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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER.

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. IX.

CONVEYANCES—CORONERS.

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROR.** The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal.....	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee.....	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall.....	Marsh.
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Brockenbrough	Marsh.	Opinions of Attorneys-Gen-	
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Call	Call (Va.).	Oregon	Oreg.
Central Law Journal.....	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
Chicago Legal News	Ch. Leg. N.	Paine	Paine.
Clifford	Cliff.	Peters	Pet.
Colorado Territory.....	Colo. T'y.	Peters' Admiralty	Pet. Adm.
Connecticut Reports.....	Conn.	Peters' Circuit Court	Pet. C. C.
Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims.....	Ct. Cl.	Pittsburgh Reports	Pittsbr. R.
Crabbe	Crabbe.	Sawyer	Saw.
Cranch	Cr.	Smith	Smith (N. H.).
Cranch's Circuit Court....	Cr. C. C.	Sprague	Spr.
Curtis	Curt.	Story	Story.
Dakota Territory.....	Dak. T'y.	Sumner.....	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis.....	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court ...	Wall. C. C.
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Hoffman.....	Hoff.	Woods.....	Woods.
Holmes.....	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes.....	Hughes.	Wyoming Territory.....	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

CONVEYANCES.*

[As to Corporate Securities, see BONDS. Mortgages of Ships, Bottomry Bonds, etc., see MARITIME LAW. See, also, *Railway Companies*, under the title CORPORATIONS; EQUITY; LIENS.]

- A. DEEDS.
- B. MORTGAGES OF REAL ESTATE.
- C. RAILROAD MORTGAGES.
- D. CHATTEL MORTGAGES.

A. DEEDS.

- | | |
|--|---|
| <ul style="list-style-type: none">I. FORM AND EXECUTION, §§ 1-20.II. DEED UNDER A DECREE OR POWER, §§ 21-38.<ul style="list-style-type: none">1. <i>Deeds Under Decrees</i>, §§ 21-32.2. <i>Deeds Under Powers</i>, §§ 33-38.III. DELIVERY AND ACCEPTANCE, §§ 39-79.IV. ACKNOWLEDGMENT, §§ 80-147.V. REGISTRATION AND NOTICE, §§ 148-191.VI. VALIDITY AND OPERATION, §§ 192-246. | <ul style="list-style-type: none">VII. CONSTRUCTION, §§ 247-372.<ul style="list-style-type: none">1. <i>General Rules</i>, §§ 247-255.2. <i>What Estate or Interest Passes</i>, §§ 256-236.3. <i>What Land Passes. Description and Boundaries</i>, §§ 287-337.4. <i>Conditions</i>, §§ 338-349.5. <i>Covenants</i>, §§ 350-372.VIII. PROOF OF DEEDS, §§ 373-379. |
|--|---|

I. FORM AND EXECUTION.

§ 1. A seal is essential to conveyance of real property, but the existence of the seal may be presumed from any expressions used in the conclusion of the instrument or in the attestation indicating that a seal was affixed. *Le Franc v. Richmond*, 5 Saw., 601, 603.

§ 2. The presumption thus indulged is more just and natural where the original instrument is lost, and resort is had to secondary evidence of its contents. *Ibid.*

§ 3. In California a scroll, if intended to be a seal, is regarded as a seal, though no reference is made to a seal, either in the body of the deed or in the witnessing clause. *Burton v. Le Roy*, 5 Saw., 510, 513.

§ 4. Seal of corporation.— Where a deed is sealed with the corporate seal, and the signatures of the proper officers appearing signed thereto, the presumption is that these officers did not exceed their authority in this respect; and the seal itself is *prima facie* evidence of their authority. *Mickey v. Stratton*, 5 Saw., 475, 478.

§ 5. A deed not under the corporate seal of a bank, but under the private seal of its president, is not the deed of the bank. *Bank of the Metropolis v. Guttschlick*, 14 Pet., 19, 29.

§ 6. Witness.— At common law, no witness to a deed was necessary. At an early day in the history of England, the names of witnesses were often found indorsed on the back of the deed, or were mentioned within it. *New York Dry Dock Co. v. Hicks*, 5 McL., 111.

§ 7. A deed attested by one witness is inoperative to convey lands in a state where the law requires for that purpose the attestation of two witnesses. *Clark v. Graham*, 6 Wheat., 579.

§ 8. Under the statute of New York, it is not necessary that it should appear that the subscribing witness became such at the request of the grantor. Nor under the Illinois statute of 1847 is it necessary. *Carpenter v. Dexter*,* 8 Wall., 513.

§ 9. Under the Oregon statutes, it seems that the attestation of a deed is no part of its execution, but only a means of preserving the evidence of it. *Goodenough v. Warren*, 5 Saw., 494, 498.

* Edited by LEONARD A. JONES, Esq., of Boston, Mass., author of treatises on Mortgages of Real Property; Mortgages of Personal Property; Railroad and other Corporate Securities; Pledges, including Collateral Securities; to be followed by a treatise on Liens.

§ 10. **Signing.**— A deed need not be signed by the grantor, but if he adopt the signature of himself affixed by another party, it takes effect as his deed just as completely as though he had executed it himself. *Riggs v. Boylan*, 4 Biss., 446.

§ 11. **Signing by corporation.**— A corporation can only make a deed by its directors acting as a board of directors. A writing is not the deed of the corporation when it appears that it was only signed by the directors in pursuance of an informal understanding among the majority of the directors, and that the subject never came before the directors as a board, or was acted upon by them at any meeting of the same. *In re St. Helen Mill Co.*, 3 Saw., 88, 92.

§ 12. The authority of the trustees of a town to execute a deed must be shown when it is relied upon in an action. *Wallace v. Dewey*,* 3 McL., 548.

§ 13. **Stamp.**— A deed duly stamped is valid although the grantor holds under an unstamped deed. *Kinney v. Con. Virginia M. Co.*, 4 Saw., 383, 429.

§ 14. **The grantee.**— It is not essential to the validity of a deed that the grantee be named. If he be so designated by other description that he can be distinguished from all others, the grant will be good without any name at all. *Friedman v. Goodwin*, 1 McAL., 142.

§ 15. A conveyance of a bare legal title to the equitable owners of land, describing the grantees as the "legatees and devisees of A. B., deceased," is a sufficient description to pass title to the persons mentioned in the will of A. B. as legatees and devisees. *Webb v. Den*,* 17 How., 576.

§ 16. A conveyance to "P. H. & Son," a copartnership, P. H. having only one son, passes a title to the son. *Hoffman v. Porter*, 2 Marsh., 153, 153.

§ 17. A title by deed implies a contract, or, at least, competent parties. A deed to a person having no existence is generally inoperative, and passes no title from the grantor. If a man grant his estate to an imaginary corporation, which exists only in his own mind, no title passes; and it is precisely the same if it is granted to a corporation, rendered incapable by its charter of taking the grant. As to that particular faculty it is not a corporation. *Russell v. Topping*, 5 McL., 194, 204.

§ 18. The identity of a grantee in a deed is a question of fact to be established, ordinarily, by evidence *dehors*. *Babcock v. Pettibone*, 12 Blatch., 354, 356.

§ 19. A grant to a deceased person, at common law, passes no estate to his heirs. *Dougherty v. Edmiston*,* Cooke, 134.

§ 20. But it is otherwise under the act of the legislature of North Carolina of 1779. *Ibid.*

II. DEED UNDER A DECREE OR POWER.

1. *Deeds Under Decrees.*

SUMMARY — *Deed under decree*, § 21. — *Proof of decrees*, § 22.

§ 21. A deed of land made pursuant to a decree of court is valid without proof of the decree. *Hanrick v. Neely*, §§ 23, 24. See § 31.

§ 22. Proof of a decree of court is not necessary to support the delivery of a deed executed in obedience to such decree. *Ibid.*

[NOTES. — See §§ 25-32.]

HANRICK v. NEELY.

(10 Wallace, 364-366. 1870.)

ERROR to U. S. Circuit Court, Western District of Texas.

STATEMENT OF FACTS. — Trespass to try title. Plaintiff proved title in one Zarsa, and a letter of attorney to one McKinney, authorizing him to sell or to substitute another in his stead. It was proved that one Williamson was substituted, and that negotiations by him for a sale of the land failed, and that he was required by decree of court, made pursuant to resulting litigation, to convey the land. The deed made pursuant to the decree was offered in evidence, but was rejected because the decree was not produced.

§ 23. *Deed made pursuant to a decree.*

Opinion by MR. JUSTICE DAVIS.

It may be true that the deed which the court below rejected was executed because of the decree made by the district court for the eastern district of

Texas, and that it would not have been made if the decree had not been rendered, but it does not follow that the decree was necessary to its validity. The fee of the lands was in Zarsa, and the power of Williamson, his attorney in fact, to sell and convey them to Hanrick, was plenary, and did not require to be employed, that a court of justice should act on it. If Williamson was stimulated by the decree to exercise the power thus vested in him by Zarsa, what right have the defendants to question his action or complain of it? They are not concerned with the reasons that induced him to act, nor with the nature or result of the litigation with Hanrick. All that they are interested to know is, that Zarsa had title to the lands, that he authorized Williamson to sell, and that the conveyance to Hanrick was in due form of law. The decision by this court in *Games v. Stiles*, 14 Pet., 322, is a direct authority against the position taken by the court below. In that case, Buchanan, the purchaser from the United States of lands in Ohio, sold them to Sterling, but recited in his deed that the conveyance was made in pursuance of a decree of the circuit court of the United States for the district of Virginia. The court held that it was not necessary to prove the decree to sustain the deed; that as Buchanan was the patentee of the land, although he made the deed under the authority of the decree, yet the deed was good without the decree, which could add nothing to its validity. If anything, the case at bar is stronger than the case just cited, because Zarsa does not recite in the body of the deed that the conveyance is made in consequence of the decree, and we only learn the fact that it was so by an indorsement on the back of the deed.

§ 24. — *proof of a decree of court to support delivery.*

One other point remains to be noticed. It seems that the court based its rejection of the deed also on the ground that it was delivered by the clerk to Hanrick in obedience to the decree of the court, and that therefore proof of the decree was necessary to support the delivery. But the deed was not complete without delivery, and the decree of the court was no more essential to give validity to the delivery than it was to any other formality necessary to the full execution of the instrument. Williamson authorized the delivery, and has acquiesced in it, and no one else can object to the mode by which the act was accomplished. All that the defendants are interested in is the fact of delivery, and about this there is no dispute. They are no more concerned with the considerations that induced Williamson to deliver the deed to Hanrick, through the clerk of the court, than they are with the motives that prompted him to affix his signature and seal to the instrument. Apart from this, Hanrick, the grantee, being in possession of the deed, which upon the face of it is regularly executed, and having had it recorded, the presumption is that it was duly delivered. *Carver v. Jackson*, 4 Pet., 84; *Ward v. Lewis*, 4 Pick., 520. It is therefore clear that the circuit court erred in rejecting the deed, and on that account its judgment is reversed and a *venire de novo* awarded.

§ 25. A deed executed under a decree is binding without a reference to the decree, if a consideration be named in it. Reference to the chancery proceeding need be considered for no other purpose, except as showing a consideration. *Tardy v. Morgan*, 3 McL., 358, 360.

§ 26. A deed signed "W., guardian of M.," and acknowledged "to be his act and deed as guardian as aforesaid, and thereby the act and deed of the said M.," is a good execution of a decree to convey. *Van Ness v. Bank of United States*, 13 Pet., 17, 20.

§ 27. A deed executed by a guardian *ad litem* of an infant, in pursuance of a decree of court, recited in the *in testimonium* clause that the infant by her guardian had set her hand and seal, and it was signed by the guardian and sealed with his seal. He acknowledged the instrument to be his deed as guardian and thereby the act and deed of the infant. The exe-

cution and acknowledgment were held good. *Bank of United States v. Van Ness*, 5 Cr. C. C., 294.

§ 28. The recital in a deed that it was executed in pursuance of a decree, where a decree was not necessary to its validity, is surplusage. *Dunn v. Games*, 1 McL., 321, 323.

§ 29. A decree ordering a conveyance operates as a conveyance in Ohio. The party to whom it is ordered to be made takes as purchaser for a valuable consideration. *Steele v. Spencer*,* 1 Pet., 552.

§ 30. Under a statute which makes a decree to operate as a conveyance, a decree of a court in another state cannot have this effect. *Watts v. Waddle*, 1 McL., 200, 204.

§ 31. If the owner of the fee in a deed recites therein the decree of a court, in pursuance of which it is made, it is unnecessary to prove the latter, as the deed is good without it. *Games v. Stiles*, 14 Pet., 322, 326. See § 21.

§ 32. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. A decree cannot operate beyond the state in which the jurisdiction is exercised. *Watts v. Waddle*, 6 Pet., 389, 399.

2. Deeds Under Powers.

[See AGENCY, XIII.]

§ 33. A valid deed cannot be executed by an attorney acting under a power not under seal. *Piatt v. McCullough*, 1 McL., 69, 82.

§ 34. A deed executed by an attorney, apparently within the scope of his power, which admits payment of the consideration, is presumptive evidence of the conveyance of the legal estate, but it is competent for the principal to show that the transaction was in appearance only, and not in fact, within the authority bestowed. *Morrill v. Cone*, 22 How., 75.

§ 35. A deed made by one person in the name of another is not good unless a power of attorney to make it is shown. *United States v. Patterson*, 15 How., 10, 12.

§ 36. A deed executed by an attorney in his own name does not bind his principal. *Barger v. Miller*, 4 Wash., 280.

§ 37. Under the Mexico-Spanish law a deed by an attorney in fact as such in his own name conveyed the title of his principal. Such an instrument is deemed the act of the principal and not of the attorney. *Hanrick v. Barton*, 16 Wall., 166, 173.

§ 38. A deed of lands belonging to a state, executed by the governor of the state in pursuance of a statute, conveys the interest of the state, although the deed is not in terms in the name of the state. *Sheets v. Selden*,* 2 Wall., 177.

III. DELIVERY AND ACCEPTANCE.

SUMMARY—*What constitutes delivery*, § 39.—*When delivery as an escrow takes effect*, § 40.—*Revocation of a deed*, § 41.

§ 39. To constitute the delivery of a deed it is not necessary that it should be in fact handed over to the grantee, or to a person in trust for him; but where there is no actual handing over of the deed, some act must be done, or word spoken, to indicate such an intent in order to make it effectual. Its mere execution, or putting it on record after execution without the knowledge of the grantee, is not sufficient. *Ruckman v. Ruckman*, § 42.

§ 40. Nothing passes by a deed until delivery. When a deed is delivered as an escrow, nothing passes until the condition is performed. The delivery, when the condition is performed, does not, as a usual thing, relate back to the former delivery and execution of the deed, but may do so under some circumstances. *Calhoun County v. American Emigrant Co.*, §§ 43-46.

§ 41. It is not a revocation of a deed to take it back from one to whom its custody has been committed when that person has become infirm and an unsuitable custodian. The possession of a deed by the grantor does not, without more, operate its revocation. *Brown v. Brown*, §§ 47-50.

[NOTES.—See §§ 51-79.]

RUCKMAN v. RUCKMAN.

(Circuit Court for New Jersey: 6 Federal Reporter, 225-227. 1881.)

Opinion by NIXON, D. J.

STATEMENT OF FACTS.—This is a suit for the foreclosure of a mortgage, originally brought in the court of chancery of New Jersey by Margaret Ruck-

man against James H. Marley, John F. Brylan, and the husband of the complainant, Elisha Ruckman, and removed into this court on the petition of the defendant Ruckman.

The bill alleges that in the month of September, 1878, the defendant Marley applied to Elisha Ruckman for the loan of \$5,000 on mortgage; that the loan was made, and in order to secure it the said Marley and wife executed a bond and mortgage to the defendant Brylan, bearing date September 28, 1878, and that shortly afterwards the said Brylan made and executed an assignment of the same to the complainant, whereby the title to the bond and mortgage became vested in complainant. It further sets forth that the bond, mortgage and assignment were not in possession of the complainant, but were in the possession of the defendants Ruckman and Brylan or one of them; that she was entitled to the same, and the money due thereon, as her separate estate, and prays that Ruckman may be decreed to pass over to the complainant the original bond and mortgage and assignment, if in his possession or under his control; that the same decree may be entered against Brylan, if they should be in his possession or under his control; and that Marley may be decreed to pay the mortgage debt and accrued interest to the complainant, and may be protected by the decree of the court from the bond and mortgage, if they should not be in the hands of the complainant to be surrendered and canceled on the payment and discharge of the same.

The defendant Elisha Ruckman, in his answer, admits the loan of \$5,000 by him to Marley, and the execution of the bond and mortgage to Brylan to secure the payment thereof; and also the execution of an assignment of the same to the complainant; but he claims that he retained the possession of the papers; that they were never delivered to the complainant; that no gift was made by him to her, nor intended to be made; and that after she deserted his bed and board, to wit, about the 10th of March, 1879, he surrendered the assignment, which had been formally made to the complainant to Brylan, to be destroyed, and also delivered to him the bond and mortgage, in consideration of which Brylan gave to him his promissory note for \$5,000, payable in one year from September 27, 1878,—the date of the mortgage,—and that he had no further interest in the same. Although hundreds of pages of testimony have been taken, the only question in the case is whether the complainant is the owner of the bond and mortgage on which the suit is founded. If she is not, her action must fail, whoever else the owner may happen to be. And this question is determined when we ascertain whether the complainant has shown a sufficient delivery to render the assignment effectual to vest in her the title to the mortgage. The complainant herself has been examined, and I have carefully read her testimony upon this point. It falls short of the legal requirements in such a case. She does not pretend that the papers were ever in her possession or delivered to her. The most that she claims is that they were promised to her. The substance of her evidence is that Ruckman, her husband, told her on several occasions that he would make such a loan for her benefit; that he afterwards informed her he had done so, and that the mortgage was hers, and that after their separation he promised to send it to her, but never did so.

§ 42. *What is necessary to constitute a delivery of a deed.*

It is not insisted that, in order to constitute the delivery of a deed, it is necessary that it should be in fact handed over to the grantee, or to a person in trust for him; but where there is no actual handing over of the deed, some act must be done, or word spoken, to indicate such an intent, in order to make

it effectual. Its mere execution, or putting it on record after execution, without the knowledge of the grantee, is not sufficient. Washburn says: "A delivery of a deed is as essential to the passing of an estate as the signing; and so long as the grantor retains the legal control of the instrument the title cannot pass any more than if he had not signed the deed. . . . So long as the deed is within the control of the grantor, and subject to his authority, it cannot be held to have been delivered." 3 Washb. R. P., 577, 580. To the same effect are the cases of *Crawford v. Berthoff*, Saxton, 467; *Folley v. Vantuyt*, 4 Hal. L., 158, and *Cannon v. Cannon*, 11 C. E. G., 319. I can find no evidence tending to show that the bond, mortgage or assignment was ever out of the possession or control of the defendant Ruckman, or that he ever performed an act indicating an intent to make a delivery of them to the complainant. A naked voluntary promise is not enough to support a gift of a chattel, unless it is followed by some performance. Failing to establish any title to the mortgage, the bill of complaint must be dismissed.

COUNTY OF CALHOUN v. AMERICAN EMIGRANT COMPANY.

(3 Otto, 124-130. 1876.)

APPEAL from U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Power is vested in the circuit court to enjoin the collection of a municipal tax, where it appears that the assessors acted without authority of law, and in violation of a special contract between the municipality imposing the tax and the tax-payer.

Swamp lands were owned by the county of Calhoun, and the record shows that the proper authorities of the county contracted to sell the same to the American Emigrant Company, the county stipulating that they would not assess any taxes against the lands until after the time the lands should be conveyed to the company. Pursuant to that contract, the supervisors of the county made a deed of the lands to the Emigrant Company; but they recited in the instrument that the deed was deposited with the clerk of their board as an escrow, and that it was not to be delivered to the grantees until they should execute a mortgage back to the county, conditioned to secure the full performance of the contract. Such a mortgage was never executed; but the evidence shows that the deed, by some means or agency not explained, was filed for record, and that it was duly recorded. Controversy ensued, and the county instituted a suit to set aside the contract and the deed. Pending the suit, the parties made a settlement; and, as a part of the terms of the same, the county, in consideration of certain moneys paid by the other party, consented to a decree, declaring the title to the swamp lands and swamp land interests of the county to be in the Emigrant Company. Sufficient also appears to show that the Emigrant Company complied with all the terms of the settlement, and that the circuit court, where the suit was pending, entered a decree, by consent of the parties, dismissing the bill of complaint, and decreed that the decree of dismissal should forever operate as a bar and estoppel upon the county to set up any right or title to the lands in controversy. Prior to that decree, which bears date the 20th of May, 1872, the lands described in the contract had not been assessed for the two preceding years, as is averred in the bill of complaint and admitted in the answer.

Public property is not subject to taxation by the law of the state, and con-

sistency forbade the county to assess the lands pending the controversy, as the deed had never been sanctioned or approved by the county or their proper officers. Instead of that, it appears that the authorities of the county uniformly maintained that the possession of the deed for registry was surreptitious and wrongful, and that the title to the lands was still in the county. They accordingly withheld the lands from taxation during those years; and the complainants charge that the treasurer, subsequent to the settlement and decree, caused the lands described in the two schedules set forth in the record to be listed and entered in the tax duplicates, and pretended to extend a computation of taxes, interest, penalties and costs thereon, according to the rates of levy of the two preceding years, amounting to the sum set forth in the record, whereas the complainants aver that the title was decreed to them at the time of the settlement, with the full understanding that no taxes were payable on the lands for those two years, and that the acts of the treasurer in listing the lands and assessing the taxes were without authority of law, and they pray that the pretended assessment and levy of the taxes may be decreed to be illegal, null and void, and that the county treasurer and his agents and successors may be forever enjoined from selling the lands, or in any manner enforcing the collection of said pretended taxes.

Process was duly issued and served, and the proper authorities of the county appeared and filed an answer, setting up the following defenses: 1. That the complainants are the legal owners of the lands described in the contract, by virtue of the deed from the county. 2. That the county had no right to exempt the lands from taxes. 3. That the agreement was unauthorized and in violation of the laws of the state, and is null and void. Certain admissions of the respondents are also contained in the answer, which it is important to notice: 1. That the deed was deposited as an escrow until a mortgage back should be executed; but the respondents aver that it was the fault of the complainants that it was not executed, and they insist that the complainants cannot claim any benefit from their own neglect. 2. That the settlement and decree were made as alleged; but the respondents aver that the settlement ratified the deed and gave complainants a legal title relating back to the date of the execution of the same. 3. That the officers of the county did not assess taxes on the lands pending the suit; but the respondents aver that the failure of the officers to do so did not waive the right of the county to assess the lands and collect the taxes. 4. That the title to the lands in the other schedule is in the United States; but the respondents aver that if that be so, then no sale of the same for taxes will be of any validity. Proofs having been duly taken and the parties fully heard, the court entered a decree in favor of the complainants, and the respondents appealed to this court.

§ 43. *Delivery of deed. Effect of delivery as an escrow.*

Enough appears in the pleadings in this case to show that the deed from the county to the complainants was never delivered to the grantees until the settlement and decree; and it is settled law, of universal application, that a deed takes effect only from the time of delivery, even though it may have been fully executed at a much earlier period. *Hopkins v. Leek*, 12 Wend., 105; *Hardenberg v. Schoonmaker*, 2 Johns., 23. Beyond doubt, the deed of the lands was delivered to the clerk of the respondents as an escrow, and subject to the condition that it should not be delivered to the grantees until they gave back a mortgage to secure the full performance of the agreement under which the deed was executed; but it is equally clear that the condition required to be ful-

filled before the delivery could be made was never performed, and the rule is established by repeated decisions, that, where a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed. *Hinman v. Booth*, 21 Wend., 267; *Green v. Putnam*, 1 Barb., 500; *Russell v. Rowland*, 6 Wend., 666; *Pendleton v. Hughes*, 65 Barb., 136; S. C., 53 N. Y., 626. Cases may be found where it is held that a deed delivered as an escrow, when the condition is performed, relates back to the time of its execution; and that proposition may be correct under certain circumstances, where the ends of justice require its application. *Beekman v. Frost*, 18 Johns., 544; S. C., 1 Johns. Ch., 288. Much would depend in such a case upon the intent of the parties, to be collected from the nature of the transaction; but it is clear that the rule cannot apply in this case for several reasons: 1. Because the condition inserted in the instrument never was performed. 2. Because the county never relinquished their title to the lands until the settlement and decree. 3. Because the county could not assess the lands while they remained public property. 4. Because the written agreement stipulated that no taxes should be levied on the lands until after the lands should be conveyed to the complainant. Responsive to that, the respondents suggest that it is the fault of the complainants that the deed was not delivered; but it must not be overlooked that it was the respondents or their agents who inserted the stipulation in the instrument that it should be deposited as an escrow with their clerk until a mortgage back should be executed to secure the full performance of the terms of the written agreement.

Nothing is contained in the written agreement to warrant the respondents in requiring a mortgage back before delivering the deed; but it is expressly stipulated therein that the respondents will not assess any taxes against the lands until after the time the lands shall be conveyed to the complainants. Nor does it affect the question that the deed was previously recorded, as it is clear that the theory of the respondents throughout was that it was wrongfully procured for registry; and nothing appears to controvert their theory in that regard. By what means it was procured does not appear; but it does appear that the complainants are unable to explain the matter, for the reason that their agent who transacted the negotiations on their part is deceased. Other suggestions failing, the respondents contend that the agreement not to tax the land before the conveyance was made is without authority of law, and is null and void; but the court here is not able to concur in that proposition, as the lands were held by the county in their proprietary right, and as such were as much subject to bargain and sale as lands held by an individual. Counties have no right to tax public property by the laws of the state; and the restriction in this case only extended to the time the conveyance should be made, in view of which the better opinion is that, as between these parties in respect to the right of taxation, the title did not pass until the settlement and decree.

§ 44. *A county cannot impose taxes on lands bargained to a vendee, while it claims the title to the lands.*

Argument is not required to prove that the respondents agreed not to tax the lands before they were conveyed, nor to prove that the deed was deposited as an escrow, nor that the taxes were levied by the treasurer subsequent to the settlement and decree, for the reason that all three of these propositions are admitted by the answer. Taxes imposed against those lands for the two years preceding the settlement and decree cannot be sustained in view of those admissions, especially as it also appears that the respondents, early in the month

of April, 1869, instituted a suit in equity, in which they set up title to the lands, and prayed for a decree to set aside the written agreement and the deed, and that they continued to prosecute that suit from the time it was commenced to the date of the settlement and decree. Throughout the whole period, the county claimed the fee-simple title in these lands, and maintained the theory that the complainants were not entitled thereto, and that the deed had been illegally recorded; and it appears that they never occupied any other position in the controversy until the settlement and the decree of the circuit court, to which the suit was removed pending the litigation. By that settlement the complainants agreed to pay to the respondents the sum of \$2,300 cash, and to pay all costs and expenses of the suit, including a described portion of the counsel fees of the respondents; and it is not controverted that the complainants fulfilled all the terms of the adjustment.

Viewed in the light of these suggestions, it is clear that the respondents are estopped to set up any such claim against the complainants. Taken as a whole, the circumstances disclosed in the record satisfy the court that the settlement was made with a full understanding between the parties that no taxes were payable on the lands for the two years next preceding the date of the decree, and that the respondents are estopped to set up any different theory in the present controversy. Where a municipal corporation sells a tract of land, and their authorized agents represent that there are no municipal taxes assessed against the same, neither the municipality nor its proper officers can collect from the grantees taxes for preceding years, if assessed subsequently to the conveyance. Omissions resulting from inadvertence or mistake of the assessors may doubtless be corrected, and such an assessment, it is not doubted, is legal, and may be collected; but good faith forbids such an assessment as the one before the court, which was made in violation of a written agreement and of an explicit understanding between the parties in the adjustment of a pending controversy.

§ 45. *An equitable estoppel.*

Decided support to the views here expressed is found in the decisions of the supreme court of the state, to which reference is made. *Iowa Land Co. v. Story County*, 36 Ia., 50. Circumstances substantially similar were disclosed in that case, and the court say: "We do not stop to inquire what would be the rule respecting liability for taxes as between vendor and purchaser, in cases where the latter, by performance of his contract, has become the owner, though the legal title is in the former; because we ground our support of the plaintiff's case upon this plain rule of fair dealing and the broad principles of equity, that a party shall not wrongfully withhold the title to property and the benefits of ownership thereof from one entitled thereto, and at the same time subject the property to burdens, for the benefit of the party thus wrongfully withholding the title." In other words, the county having during those years denied the right and title under which the plaintiff claims, is now equitably estopped from asserting that the plaintiff then had the title in order to give validity to the burden imposed. *Davidson v. Follett*, 37 Ia., 220; *Adams Co. v. Railroad*, 39 id., 511; *Lucas v. Hart*, 5 id., 419; *Swain v. Seamens*, 9 Wall., 274.

§ 46. *Municipal corporations must deal honestly.*

Corporations, quite as much as individuals, are held to a careful adherence to truth and uprightness in their dealings with other parties; nor can they be permitted, with impunity, to involve others in onerous obligations, by their misrepresentations or concealments, without being held to just responsibility for the consequences of their misconduct or bad faith.

Decree affirmed.

BROWN v. BROWN.

(Circuit Court for Rhode Island: 1 Woodbury & Minot, 325-334. 1846.)

STATEMENT OF FACTS.—Gideon Brown conveyed land to his son, Cyrus Brown, by a deed which he deposited with Whipple for safe keeping, wishing to preserve secrecy as to the gift. By the terms of the deed he retained a life interest in the land. Whipple fell into bad health and Brown took back the deed, thinking it safer in his own possession. When he died it was among his papers, and Cyrus Brown had it recorded and claims under it.

Opinion by WOODBURY, J.

I take it for granted that there is no controversy concerning the premises of which partition is asked, except as to the one hundred acres conveyed to Cyrus Brown in May, 1833, and that no objection is made to the prayer of the complainant, except by Cyrus Brown. The sole question then is, whether that deed was a valid one; or, in other words, whether it was ever duly delivered by the grantor. On that point the evidence is in some respects conflicting, but the balance of the testimony is to this effect. The general impression left by all the evidence in the case on this point is, that Gideon, the father, intended to convey the one hundred acres so as to vest the title in Cyrus, but was unwilling to quit the premises during his life, or have it appear to the community that he had divested himself of his own homestead, or to let his new wife know that he had disposed of so large a portion of his estate before their marriage.

The facts bearing on this, and which are not in controversy, are, that the father, Gideon, was about to marry a second wife, when somewhat advanced in life; that he proposed to settle some of his estate on his sons first, and accordingly executed the three deeds above mentioned in May, 1833, having made some other small conveyances before; that Cyrus had worked with him and aided him in business more than the rest, though the complainant contended and offered evidence on her part to show it had not been so beneficially as to entitle him to so liberal a share as the one hundred acres in the homestead farm; that the father had often expressed himself under great obligations to Cyrus for his assistance, and said that he should have the homestead at his death. Accordingly it is beyond controversy that the father executed the deed in question to Cyrus in May, 1833, and that Cyrus executed back to him a life-lease of the premises, and took the deed into his possession and carried it to a draughtsman to write the lease by. Had the possession of it been for any other than a specific purpose, it would be natural to infer a delivery of the deed then generally, to Cyrus, in order to perfect the grant. But it being for a particular purpose, consistent with no delivery for general objects, I think the validity of the deed as to a delivery must be inferred from other facts, if at all. The execution of the life-lease back would also be evidence that the deed had been perfected, if the lease had been delivered to the lessee. For, in that event, a previous delivery of the deed must occur, in order to have any interest for the life-lease to operate on. But that lease was likewise left in the hands of a third person, as well as the deed to Cyrus; and it cannot be regarded as delivered, unless the intention of the grantor is apparent to that effect from other circumstances.

§ 47. *Intentions and corresponding acts will constitute a delivery.*

If it be so apparent, no manual delivery is necessary, as words without acts, or acts without words, may show the intent. *Thoroughgood's Case*, 9 Coke,

136, b; *Souverbye v. Arden*, 1 John. Ch., 240, 258; 12 John., 552; *Mills v. Gore*, 20 Pick., 28, 29; *Shep. Touch.*, 57. Thus, intentions and corresponding acts may constitute a delivery, without handing the deed to the grantee or leaving it in his possession, if the grantor completed the execution of the instrument, and merely disposed of it in such a way that it should not be recorded or made public during his life. The deed may be as perfect to convey the title, without as with recording, the latter being merely notice to third persons, and not affecting the interests of the parties to the instrument. *West v. Randall*, 2 Mason, 181, 207.

§ 48. — *relations between father and son.*

It is to be remembered, also, that much more indulgence and confidence would exist between a father and son on such a subject than between strangers. The caprices or whims, or wishes of any kind, of the parent would be gratified, so far as practicable, without defeating their leading intentions and interests. Here, then, after perfecting the conveyances as to this one hundred acres — the deed and life-lease — it was natural for the father, being on the eve of another marriage, as well as being a man of substance among his townsmen, to desire to retain the appearance of property, and, if practicable, not to seem stripped of much of his real estate. How was this, then, to be effected, and still secure the land to Cyrus, the leading object in the conveyance? Not by recording both the deed and lease; for though that would secure the latter object, it would defeat the former one. The only mode, then, to accomplish both objects, was to have neither instrument recorded in the life-time of Gideon Brown. How was that to be safely effected and still pass the title? If each was left in the hands of the person entitled to each, one or the other, or both, might get them recorded, if some difficulty should happen between the parties, or might do it by mistake or forgetfulness of the arrangement, and hence it seemed safest to lodge both in the hands of third persons, not to be recorded till Gideon's death. If the design had been that the deed was not to be considered as delivered till Gideon's death, there would have been no occasion for the lease at all, as there would and could be nothing for it to operate on. But both parties took pains to have the lease prepared; and neither could have desired it, unless the title to the land, as between the parties, was understood by them, and intended to have been actually conveyed and passed to the lessor beforehand.

This view of the matter, too, does not conflict with any established precedents. The cases that may appear to operate against it are cases where no delivery of the deed was intended at the time, but it was to be dependent on some future event, or payment, or act done. *Foster v. Mansfield*, 3 Metc., 412; *Russell v. Rowland*, 6 Wend., 666; *Wheelwright v. Wheelwright*, 2 Mass., 447. Here was no such contingency, and a delivery to A. for B. is good. *Dyer*, 167; 2 Leonard, 110; *Garnons v. Knight*, 5 Barn. & Cress., 671; 12 Com. L., 351; *Souverbye v. Arden*, 1 John. Ch., 240. In this case, as in that, if the question were doubtful, whether this deed was originally delivered on the hypothesis that it might have been merely lodged with a third person so as not to be recorded till the death of the grantor, it would not be difficult to sustain it on the other ground just stated, that it was delivered to Whipple for Cyrus, and to be kept for him till the death of the grantor. 2 Mass., 447; 3 Metc., 414; *Belden v. Carter*, 4 Day, 66; *Bickford v. Daniels*, 2 N. H., 71; 1 id., 357; 4 Cranch, 219. See the cases just cited. And the grantor's taking it back, when Whipple fell sick, was by consent of Cyrus, and merely for safe

keeping. Again, this view of the subject carries out the manifest design of the father to invest Cyrus with this part of the homestead as his own, after the death of the father. Any other view would defeat that paramount design; one which, looking to the lease as well as the deed, and to the frequent statements of the father, is too clear to be misunderstood. In fact, the whole transaction may also be considered a species of settlement of Gideon Brown's estate. And in equity, such a settlement is a sort of bequest by the father, which we ought to sustain, if it has never been revoked. 4 Day, 66; Equit. Dig., 408; 1 Hilliard's Ab., 301.

§ 49. *When taking back a deed delivered to a third person does not amount to a revocation.*

Taking back the deed from Whipple, when he became infirm and unable longer to take care of it, and only for that reason, is no evidence of such a revocation; and the mutual confidence between father and son in not at once depositing it elsewhere, should hardly, in a court of conscience, be treated as the result of alienation rather than confidence, and as a change of views, when nothing appears to have existed to change their kindly relations and feelings. As a voluntary settlement, if the deed is retained, it should bind. 1 Johns. Ch., 240; Jones v. Jones, 6 Conn., 111. Again, although there is some contradiction in the testimony as to the value of the other property conveyed to Cyrus, and of his extra labor and services performed for the father, I am strongly inclined to the conclusion that the premises in this deed would but little more than indemnify Cyrus, as an equitable creditor, and that to sustain the deed would not go much beyond paying him the principal honestly due, with the interest thereon from the time the services were performed. These matters between a father and a son should not be weighed in very nice scales; and where the father, as here, was rich, and the son industrious and useful, and faithful to his interests, a liberal reward is to be encouraged rather than defeated. The expression by Gideon was, at the time the deed was made, "He wanted his son Cyrus to have the deeds to pay him for his labor." Hesitancy about a mere technical delivery, after a party has signed and sealed a deed and for good cause, it is hardly equitable to indulge in, beyond what is absolutely necessary on legal principles, and it is not to be encouraged. 19 Ves. Jr., 296.

If a bond and mortgage are executed for a debt due, though not known to the obligee, they are good, though retained by the mortgagor. Exton v. Scott, 6 Sim., 31; Buffum v. Green, 5 N. H., 71. So a deed, prepared and acknowledged, will take effect, though found in grantor's desk, if circumstances indicate an intent to consider it delivered. Scrugham v. Wood, 15 Wend., 545; Prec. in Ch., 211, 235; 1 Brown, P. C., 122; Shelton's Case, Cro. Eliz., 7; Garnons v. Knight, 8 Dowl. & R., 348; 4 Kent, Com., 455; 1 John. Ch., 240; Jacques v. Meth. Epis. Church, 17 John., 548, 577; Buffum v. Green, 5 N. H., 71. The assent of the mind of the grantor, that the grantee have the deed, is the great inquiry, and evidence of that, if existing, controls the question of delivery. Jones v. Jones, 6 Conn., 111; Devereaux, Eq., 15. So the subsequent possession of this deed by the grantor raises a presumption of delivery to him till the contrary is well proved. Flagg v. Mann, 2 Sumn., 486. A deed once executed and delivered does not become invalid by being afterwards in possession of the grantor, unless surrendered as or to be canceled. 1 Johns. Ch., 240; 6 Sim., 31; 2 H. Bl., 264; 2 Levins, 113; 4 Conn., 550; 5 id., 262; 6 Mass., 24; 2 Johns., 84. Then it prevents success under the deed, as it prevents evidence of title under it, but it does not technically reconvey the title, to cancel the deed.

Farrar v. Farrar, 4 N. H., 191, and cases there cited; *Tomson v. Ward*, 1 id., 9. Nor is there any difficulty here, as in some cases, about the time the delivery must be regarded as taking effect. For both the deed and the lease took effect at the time when they were executed, and both will thus operate consistently and in accordance with the conduct and confessions of the parties made afterwards. See statements to James Olney, that Gideon said "the land was to be Cyrus', after his death." So to Christopher Wilkinson, that Cyrus was to have the homestead. Such statements in conformity with the deed are competent evidence. 1 Greenl. Ev., 220; 1 Johns. Ch., 245. See further, 2 Mason, 207; 9 Mass., 310; *Foster's Case*, 3 Metc., 412; 13 John., 285; 2 Mass., 453.

It has not been overlooked in examining the evidence that some of it for the respondent comes from connections; and, standing alone, would not be entitled to so much credit. And that other parts relate to some surprise expressed by Cyrus at the finding of the deed, and his looking for a will, which are not thought to be consistent entirely with my views of the case. But where the relations testify to what is material, they do not stand wholly alone; and the surprise of Cyrus may have been rather to find the deed *there* than elsewhere; and the will may have been expected to refer to the residue of the estate of the father rather than to this one hundred acres.

§ 50. *Evidence of confessions of respondent, put in by complainant, may be used by either side.*

The complainant puts in confessions or statements of Cyrus that the deed was not to be made known during his father's life-time; and that Cyrus assented to his father's taking the deed from Whipple, who was old and sick. All this is competent evidence put in by the complainant. 1 Greenl. Ev., 220, 221, 222. And being properly in the case, it may be used by either side in support of its views. It tends strongly to fortify the ground that it was not an unwillingness to deliver the deed, or to have it considered as delivered, which led to the arrangements that were made, but merely an unwillingness to have it recorded, and publicity given to the transaction in any way before Gideon's death. It shows, also, that the deed being afterwards in possession of Gideon, was, by consent of Cyrus, and for its safe keeping, and not because it had been relinquished by him, or the title reclaimed or wished to be reclaimed by Gideon. Indeed, after once duly delivered, if a deed gets again into the possession of the grantor, it does not affect the title, unless, as before shown, it is expressly placed there to be canceled, and with a view to vacate the conveyance. 1 Johns. Ch., 240; *Prec. in Ch.*, 211; 1 N. H., 9, and other cases before cited. Considering all these circumstances and principles, I think the plaintiff is not entitled to any share or partition in these one hundred acres.

§ 51. The delivery of a deed is essential to its validity. The leaving of the deed in the hands of a third person amounts to nothing unless it was left with him as the agent of the grantee, or unless it was delivered as an escrow to take effect upon the fulfillment of certain conditions. *Carr v. Hoxie*,* 5 Mason, 60.

§ 52. So where a deed was made and delivered to a third party, but without any authority to him to deliver it, and it was never delivered, it was held that the title did not pass. *Ibid.*

§ 53. A delivery of a deed is essential to pass an estate. Where a deed had been made without the knowledge of the grantee, and he had subsequently, at the request of the grantor, made a reconveyance, it was held that the acts of the grantor and grantee — the one in asking a reconveyance and the other in making it — were satisfactory evidence that at that time the delivery had been made. *Gould v. Day*, 4 Otto, 405, 412.

§ 54. The delivery of a deed is as essential to its validity as the signing of it; they are both essential to the execution of the deed. *Utterbach v. Binns*, 1 McL., 242, 243.

§ 55. The delivery of a deed is essential to the transfer of the title. It is the final act,

without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery. But any such presumption is repelled where the registry was made without the assent of the grantee, he having no knowledge of the existence of the deed, and the property it purported to convey always remained in the possession and under the control of the grantor. *Young v. Guilbeau*, 3 Wall., 636, 641.

§ 56. A deed absolute on its face, executed to enable the grantee to sell and make title to the lands for the benefit of the grantor, imports a trust, and, it never having been delivered or recorded, is a nullity. *Holmes v. Trout*, 1 McL., 1, 9.

§ 57. Evidence of delivery.—It is not necessary that the acknowledgment of a deed should contain evidence of its delivery. Possession of a deed by the grantee is *prima facie* evidence of delivery. *Dunn v. Games*, 1 McL., 321, 323.

§ 58. Intentions and corresponding acts will constitute a delivery of a deed without actual manual delivery. *Brown v. Brown*, 1 Woodb. & M., 825 (§§ 47-50).

§ 59. Delivery inferred.—It is not necessary to prove the delivering of a deed by positive testimony, as it may be inferred from circumstances. *Gardner v. Collins*,* 3 Mason, 398.

§ 60. Possession of a deed by a party claiming under it is *prima facie* evidence of its delivery. *Games v. Stiles*, 14 Pet., 322, 326.

§ 61. Under some circumstances the possession of a deed is no affirmative proof of its delivery. *Crane v. Morris*,* 6 Pet., 598.

§ 62. Proof of handwriting of a deed, added to its being in possession of the grantee, is *prima facie* evidence of the sealing and delivery of the deed; and where the deed is lost, it may be proved by other evidence. *Sicard v. Davis*, 6 Pet., 124, 137.

§ 63. When a deed is found in the possession of the grantee there is a just presumption of a due delivery. A deed cannot be delivered as an escrow to the grantee himself. *Flagg v. Mann*, 2 Sumn., 487, 503.

§ 64. Recording without delivery — Ratification.—A deed, though recorded prior to a mortgage, does not take precedence of it, if not delivered until after the mortgage was recorded; and the recording of such deed without the grantee's knowledge or authority does not constitute such delivery as will give it precedence over such mortgage. And a ratification by such grantee in such deed, subsequent to the recording of such mortgage, of the grantor's and register's action in recording it, does not relate back to cut out such mortgage. *Parmelee v. Simpson*,* 5 Wall., 81.

§ 65. The recording of a deed by the grantor may, under some circumstances, be considered evidence of delivery. *Bulkley v. Buffington*, 5 McL., 457.

§ 66. Under the recording act of Ohio, a copy of a recorded deed is *prima facie* evidence of the existence of the deed, though this presumption may be rebutted by proof of the grantor's acts inconsistent with the presumption that the deed was delivered to the grantee. *Buckley v. Carlton*, 6 McL., 125.

§ 67. No man can make another a grantee without his consent; and a deed though recorded is null and void if it is not afterwards accepted by the grantee. *Longworth v. Close*, 1 McL., 282, 290.

§ 68. A deed in trust to secure certain creditors, being for their benefit, will be presumed to have been accepted by them. *Tompkins v. Wheeler*, 16 Pet., 106, 118.

§ 69. The presumption of the acceptance of a trust deed arises in favor of the beneficiary and never against him, and in face of his protest against being bound by it. *The Illinois*, 2 Flip., 383, 417.

§ 70. Though the assent of a grantee to a deed, clearly for his benefit, may be presumed, yet, if a consideration is to be paid, the assent must be proved, or nothing passes by the deed. *Hurst v. M'Neil*, 1 Wash., 70, 82.

§ 71. A deed delivered to a stranger for the use of the grantee is a delivery to him. The delivery of it to a register, to be recorded, is in law a delivery to the grantee. *Tompkins v. Wheeler*, 16 Pet., 106, 118.

§ 72. An escrow.—In the delivery of a deed as an escrow, the grantee need not be privy to it, nor is it necessary that the condition to be performed should be one to be performed by him. *Mayor, etc., v. Moore*,* 1 Cr. C. C., 193.

§ 73. Delivery back to grantor for record.—When a deed has once been delivered to the grantee, and is handed back to the grantor to be put on record, but he dies without recording it, the deed is valid and effectual in law and should be delivered by the grantor's executors to the grantee for record. *Austin v. Fendall*,* 2 MacArth., 362.

§ 74. Delivery at date.—The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day, and when a delivery on some subsequent day is shown, the deed speaks

on that subsequent day, and not on the day of its date. *United States v. Le Baron*, 19 How., 73, 75.

§ 75. The surrender and cancellation of a deed does not reinvest the title in the grantor. *Suydam v. Beals*, 4 McL., 12, 13.

§ 76. The mere canceling of a deed does not reinvest the title in the grantor under the laws of Kentucky. *Holmes v. Trout*, 7 Pet., 171, 213.

§ 77. Deeds under seal can be surrendered and canceled only by other deeds under seal. Acquiescence expressed by parol, and mutual understanding that a title should be released, cannot be made a substitute for a deed of release or surrender, executed and recorded. *Washington v. Ogden*, 1 Black, 450, 458.

§ 78. An innocent purchaser will be protected from a claim set up under a previous unrecorded deed, which, by consent of parties, had been destroyed. *Parker v. Kane*,* 22 How., 1.

§ 79. The legal title to land in Ohio can be passed only by a proper conveyance, by deed, according to the laws of that state. There cannot be a parol waiver of title by acts *in pais*, or a parol acceptance of land, in lieu of other land. *Morris v. Harmer*, 7 Pet., 554, 564.

IV. ACKNOWLEDGMENT.

SUMMARY — *Notary personally interested*, § 80. — *Involuntary acknowledgment by married woman*, § 81.

§ 80. The acknowledgment of a deed before a notary public personally interested as a beneficiary of the trust is valid. *National Bank of Fredericksburg v. Conway*, § 82.

§ 81. An acknowledgment of a deed by a married woman which was involuntary on her part, and procured by the influence of her husband, invalidates the conveyance. *Providence v. Manchester*, § 83.

[NOTES.— See §§ 84-147.]

NATIONAL BANK OF FREDERICKSBURG v. CONWAY.

(Circuit Court for Virginia: 1 Hughes, 37-47. 1876.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The supreme court of the United States decided at its last term, in *Sawyer v. Turpin*, not yet reported [1 Otto, 114], that if a mortgage to secure a pre-existing debt was executed more than four months before the filing of a petition for the adjudication of the mortgagor a bankrupt, it would be good as against the assignee in bankruptcy when appointed, if recorded before his rights attached but within the four months. This case arose before the act of June 22, 1874 (18 Stat., part 3, 180), changing the time of the prohibited preference to a period within two months next preceding the filing of the petition, instead of four, as it originally stood. Upon the principle established in that case, this deed of trust is not invalid under the provision of section 35 of the bankrupt act as amended and enforced at the time of its execution. The deed was delivered to Conway when it was executed, and held by him as security for the notes it described. The testimony is clear upon this point. The failure to record previous deeds of the same character, their surrender for cancellation without a formal reconveyance after payment of the notes, and their acknowledgment before the defendant Garnett as a notary, are all circumstances proper for consideration when determining what the real character of this transaction was; but, in our opinion, they are not sufficient to overcome the positive testimony of all the parties to the effect that the delivery was complete, that the object on both sides was to secure the debts provided for, and that Conway, the trustee, was fully authorized to cause the record to be made whenever he or his beneficiaries thought it desirable to do so. The deed was good as between the parties without record, but until recorded it was void against creditors. Code of Virginia, 1873, p. 897, ch. 114.

No deed can be admitted to record until proved or acknowledged in the manner provided for. Same Code, 905, sec. 117. A record without the requisite proof or acknowledgment does not affect creditors.

§ 82. *A notary may take the acknowledgment of a deed in which he is interested as a beneficiary.*

A deed may be acknowledged by the grantor before a notary public, and, upon the certificate of the notary to that effect in proper form, recorded. The form of the certificate in this case is correct, but it is insisted that because Garnett, the notary, was interested as one of the beneficiaries in the trust, he was incompetent in law to receive and certify the acknowledgment. This presents the principal question in the case for our consideration. The law provides only for the acknowledgment of a deed before a notary public. It does not require, in express terms, certainly, that he shall be disinterested. A notary public is an officer provided for by statute. He must give bond for the faithful performance of his duties. Code of Virginia, 1873, p. 903, ch. 116. It has been frequently decided that an acknowledgment before a grantee named in a deed was of no effect. *Beaman v. Whitney*, 29 Me., 413; *Wilson v. Trear*, 20 Ia., 233; *Stevens v. Hampton*, 46 Mo., 404; *Groesback v. Seely*, 13 Mich., 345. It has also been held that a party interested in a deed cannot take and certify the acknowledgment of a married woman requiring a privy examination. *Withers v. Baird*, 7 Watts, 228. The taking of such an acknowledgment is, in some respects, a judicial act, and not ministerial only, but in the case of an ordinary acknowledgment it is purely a ministerial act. *Freeman v. Love*, 14 Ohio St., 531; *Lynch v. Livingston*, 2 Seld., 434. Upon this principle it was decided in *Dussuame v. Burnett*, 5 Ia., 95, that an acknowledgment before one not a grantee named in the deed, but interested in the conveyance, was good. The same distinction was recognized in *Stevens v. Hampton*, before cited. In October last the judge of the Rockbridge circuit court of Virginia held, in the case of *Lady v. Lady*, pending before him, that a grantee named in a deed, though a trustee only, was incompetent to take the acknowledgment of a married woman, the grantor, which required a privy examination. An acknowledgment of that kind, it was said, was of such sanctity as to make it necessary for the officer taking it to be disinterested.

The recording acts are intended for the security of titles and the prevention of frauds. They are to be construed liberally to that end. As the record, when made, is constructive notice to all having the legal right to rely upon it for protection, public policy requires that it shall import as near absolute verity as is consistent with a due regard to the rights of the parties interested. A deed acknowledged before one named as grantee carries upon its face notice of that fact, or, what is equivalent, notice of circumstances sufficient to put a reasonable man upon inquiry. But when the name of the officer taking the acknowledgment does not appear as grantee, or as otherwise interested, no such notice or presumption accompanies the deed or its record. A certificate of acknowledgment is required to perfect a deed for record. The grantor can select such authorized officer for that purpose as he chooses. He has full power to protect himself against frauds by interested parties as certifying officers, for he may refuse to make his acknowledgment before them. The question we have now before us is not whether, as between these parties, the certificate can be impeached, but whether it is sufficient in law to authorize the record. It states only facts. The deed was actually acknowledged before a notary public. A recorder receiving it in its present form, and not knowing that the certify-

ing officer was interested in the conveyance, would certainly be justified in putting it on record. The deed itself did not carry notice to him of the supposed disqualification any more than it did to others. It was no part of his duty to detect the secret interest of the certifying officer. If the instrument was apparently sufficient in form, he had nothing to do but to receive and record it. All this the grantor knew, or ought to have known.

Every man is held responsible for the necessary consequences of his own voluntary acts. This is a familiar rule, and as old as the principles of common honesty. A grantor acknowledges a deed for the purpose of putting it in a condition for record. The object of the record is to give public notice of what had been done with the property. The public are expected to examine and act upon this evidence. Having voluntarily acknowledged and delivered his deed, the grantor is presumed to have voluntarily consented to its record. He must, therefore, be charged with all the legitimate consequences of such an act. If his deed is found on record, apparently executed according to the forms of law, and without any circumstances of suspicion against it, the plainest principles of equity would hold him estopped from setting up an undisclosed interest of the officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as the evidence of his title. But this defense would be open to him if his acknowledgment were actually void. Void acts are as no acts; they bind no one. Voidable acts are good until avoided, and they cannot be avoided as against rights actually vested under them. As against the grantee, a deed is as much voidable after record as before. So far as he is concerned, the effect of the record is only to change the burden of proof, to some extent, from him to the grantor. After a record duly made, the law presumes that all has been done which is necessary, to give the instrument validity, but this presumption may always be rebutted as against the grantee. And as against third parties, it may be shown that a deed was never signed, sealed or delivered. Clearly, therefore, it is against the policy of the recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effort should be to prevent rather than allow hidden defects in the evidence of public records. If voidable only, it is sufficient to authorize the record, if not previously avoided. So, too, as has been seen, it may be avoided at any time after record and before the rights of third parties have attached. This, as it seems to us, furnishes the grantor with all the protection he has the right to demand as against the consequences of his own acts, and at the same time leaves to the recording acts their legitimate power and effect. We conclude, therefore, that the acknowledgment in this case before Garnett was sufficient to authorize the record of the deed to Conway. The acknowledgment may, however, as between these parties, be avoided for fraud if established. But there is no proof of fraud. On the contrary, all parties agree that the acknowledgment was freely and fairly made in the belief that it was in all respects sufficient to vest the title in the trustee for the purposes specified. The decree of the district court annulling the deed is therefore reversed; but inasmuch as the trustee named in the deed is interested in the debt secured by the trust, the sale advertised by him should be enjoined, and another trustee appointed to execute the trust in that behalf. A decree may be prepared in accordance with this opinion.

PROVIDENCE v. MANCHESTER.

(Circuit Court for Rhode Island: 5 Mason, 59, 60. 1828.)

STATEMENT OF FACTS.—Proceeding instituted by a bill in equity against a *feme covert* for an injunction to a suit brought by her to recover land belonging to her, of which a deed had been executed by herself and husband in his lifetime, on a sale thereof to plaintiff. The answer denied all equity, and alleged that the defendant had received no part of the purchase money; that the sale on her part was involuntary and under the influence of her husband.

§ 83. *An acknowledgment which is involuntary invalidates a conveyance.*

Opinion by STORY, J.

The answer denies all equity. No contract was made for the sale with the defendant; she receives no part of the purchase money; and now insists that the acknowledgment, such as it is, was involuntary on her part and produced by the influence of her husband. Under these circumstances, standing wholly uncontradicted, there can be no decree for an injunction or any other relief. The bill, therefore, must be dismissed with costs.

Bill dismissed accordingly.

§ 84. **Necessity of acknowledgment.**—A deed, to be sufficient to convey the title to land, must be acknowledged and attested according to the laws of the state in which the land is situated. *Clark v. Graham*, 6 Wheat., 577, 578.

§ 85. Where the acknowledgment of a deed is defective or inoperative, its recording is not constructive notice. *Shults v. Moore*,* 1 McL., 520.

§ 86. A certificate of acknowledgment may be altered before it is recorded, but not afterwards. *Elliott v. Peirsol*, 1 Pet., 341.

§ 87. **Defective acknowledgment.**—Legislatures may remedy mere formal defects of deeds already executed, such as defective acknowledgments. *Raverty v. Fridge*, 3 McL., 230, 231; *Gillespie v. Reed*, 3 McL., 377, 378; *Doe v. Nelson*, 3 McL., 383.

§ 88. In Illinois, under the revised laws of 1845, a certificate of acknowledgment which does not state that the grantor of a deed is personally known to the officer who certifies the acknowledgment is fatally defective. *Morgan v. Curtenius*, 4 McL., 366, 368.

§ 89. By the law of Illinois, an acknowledgment of a deed of land in Illinois, taken in conformity with the law of the state where the deed was executed, is sufficient to admit it to be recorded and received in evidence. *Little v. Herndon*, 10 Wall., 32.

§ 90. Under the Illinois act of 1869, the deed of a married woman, executed jointly with her husband, is valid without acknowledgment by her. *Hawes v. Mann*,* 8 Biss., 21.

§ 91. In Illinois, under statute of January 31, 1827, the form of acknowledgment to be used when a married woman relinquishes her right of dower was different from that which she should use in transferring her estate in fee. *Lane v. Dolick*,* 6 McL., 200.

§ 92. If the certificate of acknowledgment recites only a relinquishment of dower, the wife's fee does not pass by the deed. *Ibid.*

§ 93. Proof of execution of a deed, acknowledged or proved in conformity to the laws of another state of the United States, is good by statute in Illinois. *Secrist v. Green*,* 3 Wall., 744.

§ 94. In Indiana the acknowledgment and recording of a deed operates as notice, but they are not necessary to its validity. *Doe v. Beardsley*, 2 McL., 412, 421.

§ 95. Under a statute of Kentucky requiring acknowledgments of deeds by married women to be by a privy examination, duly certified by the officer taking them, and recorded, proof of an acknowledgment cannot be made in any other way. It is immaterial whether there be an acknowledgment or privy examination in fact or not, if there be no record made of the privy examination; for it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*. *Elliott v. Peirsol*, 1 Pet., 328, 339.

§ 96. In Kentucky a deed by a *feme covert* must be acknowledged by her, when privily examined, as the statute directs. Courts cannot, by subsequent action, validate an imperfect deed of a *feme covert*. *Elliott v. Peirsol*,* 1 McL., 11.

§ 97. The act of Virginia of 1776, concerning the acknowledgment of deeds of *femes covert*, adopted by Kentucky, was not repealed by the statute of Kentucky of 1785 on the same subject, nor by the Revised Statutes of 1776. *Davies v. Fairbairn*,* 3 How., 636.

§ 98. In Maryland.—A certificate of acknowledgment by the proper officers, that a married woman was "privately examined apart from her husband," is sufficient under the statute of 1807. This is equivalent to saying that she was examined "out of the presence of" her husband. *Deery v. Cray*, 5 Wall., 795, 806.

§ 99. Under the Maryland act of 1766, section 14, when a deed of land is acknowledged before two justices of the peace, in the county where the grantor resides (not being the county in which the land lies), such deed is not properly recorded, unless there were indorsed on the deed a certificate of the clerk of the county, under the seal of the court, that the two justices were, at the time, justices of the peace of that county, and such certificate recorded with the deed. *Milligan v. Mayne*,* 2 Cr. C. C., 210.

§ 100. In Michigan, under the act of 1827, a deed acknowledged in another state, according to the laws of that state, is valid. *Farmers' Loan & Trust Co. v. McKinney*, 6 McL., 1, 3.

§ 101. A deed of land in Michigan may be executed according to the laws of any other state or territory. *Root v. Brotherson*,* 4 McL., 290.

§ 102. Under the laws of Michigan it is not necessary to the validity of a deed of lands in that state, executed in another state, that the grantors were residents in that state. *Ibid*.

§ 103. A deed by a *feme covert* in Michigan, under the statutes of 1840, must state that the wife acknowledged that she executed the deed without fear or compulsion of her husband, or any one else. If the latter words are omitted in the acknowledgment it is not good. *Bronson v. Cahill*, 4 McL., 19, 22.

§ 104. In Minnesota.—A deed insufficiently acknowledged or proved passes equitable rights, and a grantee, by a subsequent deed passing the legal title, takes the property *cum onere*. *Atwater v. Seely*,* 1 McC., 264.

§ 105. Missouri.—A deed purporting to be the deed of a married woman, made in Missouri in 1878, is invalid unless acknowledged by her according to law. *Meegan v. Boyle*,* 19 How., 180.

§ 106. Under the statutes of Nebraska, when a deed is acknowledged in another state according to the laws of that state, the officer should certify in his certificate that the deed is executed and acknowledged according to the laws of the state where the instrument is executed; and a deed recorded without a certificate in this form does not operate as constructive notice. *Morton v. Smith*, 2 Dill., 816, 818.

§ 107. North Carolina.—Under the act of North Carolina of 1715, concerning probate of deeds, the clerk should give the facts proven by the witness, and not the conclusions therefrom; but every reasonable presumption will be made in favor of an ancient probate. *Ross v. M'Lung*,* 6 Pet., 288.

§ 108. Parol testimony is not admissible to vary the official certificate of probate indorsed on the deed. *Ibid*.

§ 109. New York.—The acknowledgment of a deed in New York before a master in chancery was a good authentication from 1801 to July, 1818. *Secrist v. Green*,* 3 Wall., 744.

§ 110. Ohio.—In the absence of any decision to the contrary, this court would hold that the mayor of Cincinnati had no power to take acknowledgment of deeds. *Shults v. Moore*,* 1 McL., 520.

§ 111. The taking of an acknowledgment of a deed is not a judicial act. *Ibid*.

§ 112. But inasmuch as it has been decided by the state courts of Ohio, that the mayor of Cincinnati has power to take acknowledgments of deeds, this court will regard such decision as the law of the state. *Ibid*.

§ 113. In Oregon.—It seems that acknowledgment is an essential part of the valid execution of a deed by a married woman. *Goodenough v. Warren*, 5 Saw., 494, 499.

§ 114. In Oregon it is necessary, to constitute a valid conveyance of real estate of a married woman, that it be conveyed by joint deed of husband and wife and that she acknowledge it on a private examination. *Elliott v. Teal*,* 5 Saw., 249.

§ 115. A power of attorney by a married woman to sell land is void, for the private examination and declaration of her free execution are matters which cannot be delegated to another. *Ibid*.

§ 116. In Pennsylvania the usage of acknowledging deeds before magistrates is a common law of the state, supplying the omissions of the statutes. *Milligan v. Dickson*, Pet. C. C., 433, 439.

§ 117. Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it had long been the established practice before the year 1775 to acknowledge deeds before a justice of the supreme court of the province of Pennsylvania, and such practice will be taken as a correct exposition of the law. *M'Keen v. Delancy*,* 5 Cr., 22.

§ 118. In Pennsylvania the deed of a *feme covert*, conveying her interest in land which she owns in fee, does not pass her interest by the force of its execution and delivery, as in

the common case of a deed by a person under no legal incapacity. In such cases an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband, unless the execution be before some court or judicial officer authorized to take and certify such acknowledgment. *Hepburn v. Dubois*, 12 Pet., 345, 374.

§ 119. **Rhode Island.**— Under the statutes of Rhode Island, a deed defectively *acknowledged* does not pass a freehold estate as against a subsequent purchaser in good faith. *Richards v. Randolph*, * 5 Mason, 115.

§ 120. **Tennessee.**— A certificate of probate of land in Tennessee, which did not set out that the witness swore that the grantor acknowledged the same on the day of its date, but declared that the grantor acknowledged it for the purposes therein contained, is covered by the provisions of the act of 1846. *Lea v. Polk County Copper Co.*, 21 How., 493.

§ 121. A deed acknowledged by the makers before a proper officer, who certifies that said makers are "personally known" to him, is duly acknowledged under the statutes of Tennessee. *Kelly v. Calhoun*, * 5 Otto, 710.

§ 122. In Tennessee a deed by a corporation is properly acknowledged by the officer who affixes the seal. *Ibid.*

§ 123. **In Washington.**— An acknowledgment of a deed before a commissioner of public buildings in Washington in 1823 was valid. *Middleton v. Sinclair*, 5 Cr. C. C., 409, 411.

§ 124. **The form of the certificate of acknowledgment** is immaterial, provided the directions of the law are substantially complied with. A provision of statute, that a justice, in taking the acknowledgment of a wife, shall examine her separate from her husband, and shall make known to her the contents of the deed, is complied with where it appears from the certificate that the acknowledgment of the wife was made, her knowledge of the contents of the deed ascertained, and her free consent expressed during her examination apart from her husband. *Talbot v. Simpson*, * Pet. C. C., 189, 191.

§ 125. A certificate of acknowledgment is insufficient unless it shows with reasonable certainty that the party in fact appeared before the officer and acknowledged the deed. *Hinde v. Longworth*, 11 Wheat., 199, 206.

§ 126. It is competent to construe a deed and the certificate of acknowledgment together to ascertain whether the statutory requirements for the probate of deeds have been complied with. *Carpenter v. Dexter*, * 8 Wall., 513.

§ 127. A seal of a court upon a certificate of acknowledgment is admissible in evidence, though impressed upon paper, and not upon wax or any similar substance. *Roberts v. Pillow*, *Hemp.*, 624, 637.

§ 128. An acknowledgment of a deed authenticated by the seal of a court stamped upon paper, and not on wax, wafer or other adhesive substance, is properly authenticated and properly received in evidence. *Pillow v. Roberts*, 13 How., 472.

§ 129. **Seal of notary.**— Nothing is to be presumed in favor of the validity of a notary's *certificate of acknowledgment* to a deed; hence a certified copy of a deed must either contain a *fac simile* of the notarial seal or show that the seal which was affixed to the original deed was the official seal of the notary. *Wetmore v. Laird*, * 5 Biss., 160.

§ 130. **Certificate of official character.**— It is not necessary, in order to admit a deed to be recorded, that the certificate of acknowledgment should state upon its face that the person who took and certified the acknowledgment was a justice of the peace at the time of that acknowledgment. *Bank of United States v. Benning*, 4 Cr. C. C., 81, 82.

§ 131. Where a statute does not require the officer to state his official character in the certificate of acknowledgment, it is not necessary to do so. His official character may be proved by parol. *Van Ness v. Bank of United States*, 13 Pet., 17, 21; *Shults v. Moore*, * 1 McL., 520.

§ 132. The authority of the magistrate to take an acknowledgment of a deed must be shown when the deed is offered in evidence. *Wallace v. Dewey*, * 8 McL., 548.

§ 133. It is not necessary that the official character of the officer taking an acknowledgment should be proved unless it is denied. *Carpenter v. Dexter*, * 8 Wall., 513.

§ 134. An acknowledgment before a man who styles himself a justice of the common pleas is *prima facie* evidence that he was such; and it is not necessary for the person who offers a deed so acknowledged, to produce the commission of the justice, or to give any further evidence to prove him to be a justice of the common pleas, until some evidence is given on the other side to render that fact questionable. *Willink v. Miles*, Pet. C. C., 439.

§ 135. **An alderman a magistrate.**— Under a statute of the state of Maine, which provided that deeds might be acknowledged in another state before a justice of the peace or magistrate, it was held that an alderman of the city of Philadelphia was a magistrate, within the meaning of the statute, who can take a valid acknowledgment. The term magistrate is

not confined to persons who exercise general judicial powers. *Gordon v. Hobart*, 2 Sumn., 401, 404.

§ 136. **Justice out of his state.**—An acknowledgment of a deed, taken by a justice of the peace out of his state, is defective and void. *Cowan v. Beall*,* 1 MacArth., 270.

§ 137. **Statute prospective.**—An act providing that deeds acknowledged before clerks of courts in other states shall be held duly proved for all purposes is prospective only in its operation. *McEwen v. Den*,* 24 How., 242.

§ 138. **Evidence of what.**—The certificate of acknowledgment of a deed is not conclusive evidence of what the deed purports to be. *Holbrook v. Worcester Bank*,* 2 Curt., 244, 247.

§ 139. **According to laws of another state.**—A statute which makes a deed executed according to the laws of the state in which it is made good and effectual to convey land in another state, refers exclusively to conveyances executed by the party. It can have no application to a deed executed by a commissioner under a decree. *Watts v. Waddle*, 1 McL., 200, 204.

§ 140. **In a certificate of acknowledgment by a married woman**, where a separate examination is required, it should appear that she understood what she was doing. *Lane v. Dolick*,* 6 McL., 200.

§ 141. **Statutory regulations in regard to the acknowledgment of a deed by a married woman** must be strictly followed in order to make her deed effectual. *Manchester v. Hough*,* 5 Mason, 67.

§ 142. **If there be no statute regulating conveyances by married women**, the customary law of the land governs. *Ibid.*

§ 143. **The separate examination of a wife as required by statute is indispensable**, but the very words of the statute need not be used in the certificate. *Raverty v. Fridge*,* 8 McL., 245.

§ 144. **A certificate of a married woman's acknowledgment of a deed is good** which states that its contents were made known to her through a sworn interpreter in the officer's presence. *Norton v. Meader*, 4 Saw., 603, 621.

§ 145. **Presumption that a married woman is of age.**—The certificate of a magistrate to taking the acknowledgment of a married woman need not state that she is of age. The presumption is that she was of full age, until the contrary is proved. It is a matter of defense if she was under age, and must be proved if the defendant would avail himself of the fact to defeat the conveyance. *Battin v. Bigelow*, Pet. C. C., 452, 453.

§ 146. **An acknowledgment of relinquishment of dower need not be in the very words of the statute**; words of the same meaning and in substance the same are sufficient. *Dundas v. Hitchcock*,* 12 How., 256.

§ 147. **A re-acknowledgment of a deed which is void**, after the grantor's disability is removed, operates to give it full force and effect; as where a woman, after the death of her husband, re-acknowledged a deed executed by her while married. *Riggs v. Boylan*, 4 Biss., 445.

V. REGISTRATION AND NOTICE.

§ 148. **By the common law a deed was valid without registration**; and where registry acts require deeds to be recorded, they are valid until the time prescribed by the statute has expired, and if recorded within the time, are as effectual from the date of execution as if no registry act existed. *Clarke v. White*, 12 Pet., 178, 197.

§ 149. **As between the parties.**—A deed is valid at common law between the parties, if signed, sealed and delivered, though not witnessed, acknowledged or recorded. *Goodenough v. Warren*, 5 Saw., 494, 498.

§ 150. **A deed is complete when signed, sealed and delivered**, although by the law of the state the property will not pass until it is recorded. *Wood v. Owings*,* 1 Cr., 239.

§ 151. **Deed not acknowledged.**—The registration of a deed irregularly acknowledged or proved is of no effect to give validity to the deed. *Deun v. Reid*,* 10 Pet., 524.

§ 152. **Purchaser.**—The term "purchaser," as used in registry acts, means a purchaser clothed with the legal title. *Steele v. Spencer*,* 1 Pet., 552.

§ 153. **Of paper not required to be registered.**—The registry of a deed or paper which is not required by law to be registered is not constructive notice of its existence. *McNeil v. Magee*, 5 Mason, 244, 265.

§ 154. **Notice of the existence of deeds or papers of which the law does not require a registry should be proved by matter in pais.** *Ibid.*

§ 155. **Priority of record gives priority of title**, unless the deed is recorded with an intent to defraud the grantee in the prior unrecorded conveyance. *Moore v. Thomas*,* 1 Or., 201.

§ 156. **The recording of a copy of a deed is of no effect.** *Lewis v. Baird*, 3 McL., 56, 64.

§ 157. **Record in a book.**— A deed is duly registered and recorded, within the requirements of a statute providing for a record in some *book* of record in the office of the recorder of the county, where duplicate copies are regularly deposited in such office, not bound into volumes, though classified and indorsed. *Mumford v. Wardwall*, 6 Wall., 423.

§ 158. **Record does not relate back.**— The recording of a deed pursuant to a contract entered into by the parties to such deed, and also recorded, does not have the effect to make the deed relate back and take effect from the time the contract was recorded so as to cut off all equities that existed between the date of the execution of the contract and that of the deed. *O'Neil v. Wabash Ave. Baptist Church Society*, 4 Biss., 432, 484.

§ 159. Where a contract of sale is made, and only a small part of the purchase money paid, and a judgment is afterwards obtained against the owner of the land, that judgment binds his interest, whatever it may be, and it is subject to sale under that judgment. *Ibid.*

§ 160. Where a county is divided, recording in the old county a deed of land lying in the new county is not a sufficient registry, though the deed be made before the division. *Astor v. Wells*, 4 Wheat., 466, 486.

§ 161. Notice of a prior unrecorded deed takes the case out of the statute and supersedes the prior registry of the junior deed, because a person purchasing with knowledge of such conveyance cannot be considered as acting in good faith. *Goodenough v. Warren*, 5 Saw., 494, 501.

§ 162. Actual notice of an unrecorded deed by an attaching creditor is sufficient to defeat his lien as against the grantee. *Briggs v. French*, 2 Sumn., 251, 253.

§ 163. Notice in fact of a prior deed may be proved. *Shults v. Moore*,* 1 McL., 520.

§ 164. Implied notice of an unrecorded deed is good against a subsequent purchaser. *Weld v. Madden*,* 2 Cliff., 588.

§ 165. A recital in a recorded deed, made by one who has no record title to the property, to the effect that his grantor conveyed the property to him, does not affect third parties with constructive notice of the existence of such deed, for they have no clue by which to follow the title. *Polk v. Cosgrove*, 4 Biss., 437, 439; *Mills v. Smith*, 4 Biss., 442, 443.

§ 166. But one who had read this recital in the deed would be affected with actual notice of such recital. *Mills v. Smith*, 4 Biss., 442, 443.

§ 167. Open and visible possession of land by the grantee, under a deed not recorded, continued for many years and accompanied by the making of valuable improvements by him, is implied notice of the deed to a creditor of the grantor who has levied upon the land as the property of his debtor. *Weld v. Madden*,* 2 Cliff., 587.

§ 168. **Arkansas territory.**— Under a statute of the territory of Arkansas, providing that deeds not recorded within three months from the date thereof shall be void as against subsequent purchasers who shall record their deeds within that time, the mere filing of the deeds, without spreading them upon the record within that time, was held not to be a compliance with the statute. *Scott v. Doe*,* Hemp., 275.

§ 169. In Illinois a deed takes effect as against third parties purchasing in good faith and without notice, from the time it is filed for record, whether it be actually recorded or not. *Polk v. Cosgrove*, 4 Biss., 437; *Riggs v. Boylan*, 4 Biss., 445.

§ 170. The grantee of a deed who files it for record in the recorder's office is not affected by the latter's failure or neglect to record the same. *Ibid.*

§ 171. In Illinois, under the statute of 1833, deeds shall take effect from and after the time of filing the same for record, and not before, as to all creditors, and subsequent purchasers without notice. They are void as to all such creditors and subsequent purchasers without notice, until they shall be filed for record. *Ross v. Prentiss*, 4 McL., 106, 108.

§ 172. Under the Illinois statutes an unrecorded deed is invalid as to subsequent purchasers at judicial sales without notice. *McNitt v. Turner*, 16 Wall., 352, 361.

§ 173. In Illinois deeds filed for record, though not proven according to law, are notice to creditors and subsequent purchasers. *Carpenter v. Dexter*,* 8 Wall., 513.

§ 174. **Indiana.**— Under the statutes of Indiana the record of a deed not acknowledged, or acknowledged defectively, is not notice to third persons, though it is good as between the parties. *Doe v. Smith*,* 3 McL., 362.

§ 175. In Kentucky a deed duly recorded takes effect in preference to an older deed recorded later. *Brown v. Jackson*, 3 Wheat., 449, 451.

§ 176. But if the latter deed, which is first recorded, conveys only the grantor's right, title and interest in the land, it passes no estate which the grantor did not then possess, and consequently does not defeat the operation of the first deed. *Ibid.*

§ 177. Under the Kentucky statute of 1796, a deed in writing sealed and delivered passes the title though unrecorded, except as against creditors, or purchasers without notice. *Sicard v. Davis*, 6 Pet., 124, 135.

§ 178. In Louisiana no notarial act touching immovable property is valid unless recorded in the parish where the property is situated. *McCoy v. Rhodes*,* 11 How., 131.

§ 179. Under the statute of Minnesota, judgment creditors, as regards unrecorded conveyances, are protected as *bona fide* purchasers for value. *Lash v. Hardick*,* 5 Dill., 505.

§ 180. Possession under an unrecorded deed, to be notice to a judgment creditor, must have been open, notorious and exclusive at the time the judgment was docketed. *Ibid.*

§ 181. North Carolina and Tennessee.—Statutes for registration of deeds of lands ceded by the former to the latter state construed. *Love v. Simms*, 9 Wheat., 515, 518.

§ 182. Under the Ohio Registry Act an unrecorded deed is void as against subsequent purchasers for a valuable consideration without notice, whether their titles are recorded or not. *Steele v. Spencer*,* 1 Pet., 552.

§ 183. The record of a deed in Kentucky of lands in Ohio is no notice to a subsequent purchaser. *Lewis v. Baird*, 3 McL., 56, 63.

§ 184. In Pennsylvania, according to the true construction of the act of 1715, the deed should be recorded in the county where the land lies; but if the deed conveyed lands lying in different counties, the law does not require the deed to be recorded in each county, either by the words or intention of it, so far as this intention can be discovered. Until the act of 1775, there was no absolute necessity to record any deeds, mortgages excepted; and the provision made by the law of 1715 for recording them was merely made with a view to their preservation. *Delancey v. M'Keen*,* 1 Wash., 525, 527; S. C., id., 354.

§ 185. Under the act of Pennsylvania, a deed conveying land in two counties is sufficiently exemplified by record in one of them. *M'Keen v. Delancey*,* 5 Cr., 22.

§ 186. In Rhode Island a deed to real property must be recorded, otherwise it will not pass the title as against third parties. *West v. Randall*, 2 Mason, 181, 205.

§ 187. In Tennessee, under the act of 1807, a deed of several tracts of land lying in different counties may be recorded in any one of them. *Simm v. Read*,* Cooke, 345. See *Watson v. Dobbins*,* id., 359.

§ 188. In Tennessee, by the act of 1715, a deed was required to be registered before a legal estate could be vested in the grantee. *Patton v. Reily*,* Cooke, 119; *Patton v. Brown*,* id., 126; *Patton v. Cooper*,* id., 133.

§ 189. By the laws of Tennessee a deed for land in that state, executed in North Carolina by grantors residing there in the year 1794, and proved in 1797 by one of the subscribing witnesses before a judge in the latter state, and recorded in 1808 in the proper county in Tennessee, is valid, and may be given in evidence in ejectment. *Blackwell v. Patton*, 7 Cr., 471, 475.

§ 190. The statute of Virginia, passed in 1792, which makes unrecorded deeds and mortgages void as to all creditors and subsequent purchasers, means creditors of and purchasers from the grantor. *Pierce v. Turner*, 5 Cr., 154, 165.

§ 191. Under the statute of Virginia of 1792, a deed having a certificate of the clerk of the district court of the United States, in another state, that the grantor therein named personally appeared in the court and acknowledged the instrument to be his free act and deed, this being accompanied by a certificate of the judge that said clerk was then clerk of the district court, is entitled to record. *Shutte v. Thompson*, 15 Wall., 151.

VI. VALIDITY AND OPERATION.

SUMMARY—*Deed made in compromise to quiet title*, § 192.

§ 192. A conveyance, after repeated efforts, extending over many years, to adjust the title to certain land, having been made with a view to quiet title, and upon a fair and equitable compromise of conflicting surveys and questions of title, is valid, and cannot, under such circumstances, be set aside on the ground of duress, or on account of its inequitable character. *St. Louis v. United States*, § 193.

[NOTES.—See §§ 194-246.]

CITY OF ST. LOUIS v. UNITED STATES.

(3 Otto, 462-467. 1875.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The subject of this controversy is the title to the land known as Jefferson Barracks, consisting of about seventeen hundred acres,

five miles below the city of St. Louis. It lies within the lines of a survey of the commons of Carondelet, containing a much larger quantity,—nearly ten thousand acres. The present suit was instituted in the court of claims, in 1859, by the city of Carondelet. As the jurisdiction of that court was doubted, congress, by the act of 1873 (17 U. S. Stat., 621), specially authorized it to entertain jurisdiction of the controversy. The city of Carondelet having become merged in the city of St. Louis, by an act of the legislature of Missouri, the latter city was substituted as plaintiff. A deed conveying the land in controversy to the United States was made by the city of Carondelet on the 25th day of October, 1854; and it is not controverted that the authority under which this was done was sufficient. If this deed be held to be otherwise valid, it decides the controversy in favor of the United States. Its validity is denied, however, on part of plaintiff, on the ground that it was without consideration, and that it was improperly coerced from the authorities of Carondelet by the officers of the government who had charge of the department of public lands by an unjust and illegal exercise of authority in refusing to confirm and threatening to set aside the survey, which we have already mentioned, of the Carondelet commons, and exacting this deed as the condition of their acquiescence in that survey. On the other side, the deed is supported as a just and equitable compromise of a long-existing controversy, both as to the correctness of that survey and the right of the government to the ground known as Jefferson Barracks. The origin of the claim of Carondelet was a concession of six thousand arpents of land adjoining the village, made in 1796 by Zenon Trudeau, lieutenant-governor of Upper Louisiana. An attempt to give locality to this concession was made by Soulard (who describes himself as a surveyor commissioned by the government) in December, 1797; but the first actual survey was made in 1818 by Elias Rector, who was deputy under his father, William Rector, surveyor of public lands for the territories of Illinois and Missouri.

The court of claims finds that though the field-notes of this survey were filed in the surveyor's office, it was never approved by him. But, in the year 1834, Elias T. Langham, surveyor-general at St. Louis, caused J. C. Brown, one of his deputies, to retrace and re-establish the lines of Rector's survey; and, when the result of the work was returned to his office, he approved the survey, and the same was duly filed in the office of recorder of land titles in Missouri, who thereupon certifies that the title was by him duly confirmed of the village to their claim as commons of six thousand arpents of land, as shown by that survey. Six thousand arpents are equivalent to five thousand one hundred and four acres. The survey contained nine thousand nine hundred and five acres; and the court of claims finds, that, after deducting from that quantity the Jefferson Barracks claim and all private claims, there still remained nearly one thousand acres more than the six thousand arpents. There is no evidence that this survey was ever brought to the attention of the land department in Washington until June, 1839. In that year, the surveyor-general at St. Louis seems to have called the attention of the district attorney of the United States for Missouri to the survey in connection with the location of Jefferson Barracks; and, the letter having been transmitted to the secretary of war, an investigation of the whole matter was instituted by the commissioner of public lands. This resulted in an order made in 1841 by Commissioner Whitcomb to Surveyor-General Milburn, directing a new survey of these commons, on the principle of reserving one thousand seven hundred and two acres for military purposes at Jefferson Bar-

racks, allowing six thousand arpents to Carondelet for her commons, and restoring the balance, not covered by private claims, to sale as public lands.

It may as well be here stated that this order was never carried out. In the year 1826, the military authorities of the United States, desiring to establish at that point a military post, procured from twelve inhabitants of the village of Carondelet a deed conveying to the United States a described portion of the land which they claimed as part of the commons of the village, with a reversion to the village whenever the United States should cease to use it for military purposes. From that time the government has been in continued possession of the property. It appears by the findings of the court that certain persons who had purchased lots of the city of Carondelet, not conflicting with the barracks claim, and other citizens of Carondelet, becoming uneasy about the condition in which the title to all the commons was left by the order of Commissioner Whitcomb, employed agents to procure a confirmation of the Brown-Rector survey. They appeared at Washington, and a negotiation, remonstrance and correspondence was carried on for several years; and divers opinions and decisions were had from commissioners of the land office, and secretaries of the treasury and interior, none of which confirmed the survey as valid. Finally, without any suggestions shown to come from the United States or its officers, the parties interested in the settlement of the title of Carondelet to the remainder of the commons, and the authorities of that city, conceiving that if the title of the United States to that reservation was made good, the main difficulty in the way of this settlement would be removed, the authorities of the city made the deed we have already mentioned, of October, 1854. And accordingly, on the 8th of October, 1855, another survey on the basis of Brown's, but marking the barracks property as reserved, and giving its boundaries, was made and confirmed by the commissioner of the land office as the true survey of the Carondelet commons.

§ 193. *A deed made as a compromise and to quiet title will not be set aside, when.*

It is obvious enough from this imperfect sketch of the history of the controversy that the deed of the city to the United States and the subsequent confirmation of the survey were the result of a compromise of a long-pending contest between the parties to it. No fraud is found or suggested. The action of the city of Carondelet cannot be impeached on the ground of duress within any legal or equitable definition of that term as applied to contracts. It was a suggestion originating with Carondelet, designed to secure action which she desired. The officers of the land department were doing nothing in the matter. The order for the new survey, made in 1841, had never been executed; and in 1845 Commissioner Shields had declared that there was no intention to carry that order into effect until further action by congress, and this was repeated by Commissioner Young in 1846. If, as is now argued, Carondelet had a perfect title to the land in controversy, she had nothing to do but remain quiet, or assert her title in the courts of law which were open to her; for no officer of the government from 1841 to the date of this deed — a period of thirteen years — did anything to affect that title, or to deprive her of her rights. But the opinion of all the officers of the land department was against the validity of that survey, and of course against her title to any commons at all as being perfect. The supreme court of the state of Missouri had so decided in 1844 in the case of *Dent v. Bingham*, 8 Mo., 579. It was known that the survey included nearly twice as much land as was originally claimed under the

grant of Trudeau. The land office, while it declined to exercise it, had asserted the right to set aside that survey and order another, and was apparently only awaiting some action of congress. How can it be said, under these circumstances, after a contest of thirteen years, that Carondelet, in proposing to release her claim to the one thousand seven hundred acres of the barracks reservation in exchange for the quieting and perfecting of her title to the remainder of the commons, acted under duress? or acted unwisely? or that the compromise was, as to her, inequitable?

It is said to be inequitable, because it is now the settled law, that under the act of 1812, confirming the titles of the villages to their common lands, the title became perfect on the completion of the survey. We are not disposed to deny the doctrine, that when such a survey was made by the proper officers in 1839, and approved by the surveyor-general, that it constituted a title to the land. But this doctrine was not so completely and fully settled at the date of this compromise as to be free from doubt; and, if it were, there still remained the question of the power of the commissioner of the general land office to set aside a survey so made, and order another,—a power which undoubtedly exists as to all surveys made for many years past, however it may have been in 1841. But it is important to consider that the land department then asserted such a power, and no decision had then settled the law to the contrary. It was, therefore, a proper element of doubt in considering the question of a compromise. If, however, the commissioner had no such power, and conceding that the approval of that survey by the surveyor-general completed the *legal title* to the land it included, there can be no doubt of the right of the United States, treating the same as if it were a patent, to file a bill in chancery to set it aside as improvidently made; and, on the trial of this issue, the excessive quantity of the survey, the reservation and long possession of the barracks, and perhaps other circumstances, would have made the result doubtful enough to justify the authorities of Carondelet in compromising the matter in advance of such a suit. In short, we are of opinion that the deed of Carondelet is valid, as based upon an equitable compromise of a long-pending and doubtful question of title, and that it excludes the plaintiff in this suit from any relief.

Judgment affirmed.

§ 194. **Consideration.**—As regards the effect of a deed, the grantor is estopped from denying the consideration named in it, and which is essential to its validity. This would be to deny a fact admitted in an instrument of the highest solemnity. But such is not the rule where the payment of the consideration becomes a question collateral to the deed. *Taggart v. Stanberry*, 2 McL., 543, 545.

§ 195. **Where a deed acknowledges a consideration** it is unnecessary to prove one, and the deed is not vitiated by proof of no consideration, unless fraud, mistake, incapacity or deception be proved. *Jackson v. Ashton*, 11 Pet., 229, 248.

§ 196. **Where one sells separate parcels of land to the same person, and the vendor retains the legal title, the vendee cannot come into a court of equity to compel a conveyance of one parcel, without tendering the purchase money remaining due on both lots.** *Bank of Columbia v. Dunlop*, 8 Cr. C. C., 414.

§ 197. **Nominal consideration.**—The designation, in a deed, of a nominal consideration less than the real one paid, is not, of itself, a fraud, if a fair, valuable and *bona fide* consideration were in fact paid, or *bona fide* contracted to be paid. *Ex parte Knowles*, 2 Cr. C. C., 576, 577.

§ 198. **A past or executed consideration is a sufficient consideration for a grant, which is a contract executed in *præsenti*—not to be executed in *futuro*.** The money may have been paid a year before, or the consideration may be an old debt, and yet no objection to such a consideration of a deed can be taken. *Bank of the United States v. Lee*, 5 Cr. C. C., 319, 327.

§ 199. **A mortgage for a pre-existing debt constitutes the mortgagee a *bona fide* purchaser.** *Partridge v. Smith*, 2 Biss., 183, 187.

§ 200. The real consideration of a deed is always examinable; parties are not estopped to show what was the true consideration. *Bank of United States v. Lee*, 5 Cr. C. C., 819, 825.

§ 201. Where the operation or effect of the deed is not attempted to be impeached, the consideration, named in the deed, is treated, like the date, as formal, merely, and a different sum may be shown to have been paid, or agreed to be paid. *Doe v. Beardsley*, 2 McL., 412, 414.

§ 202. The statement of the consideration in a deed is *prima facie* only, and not binding upon either party. *Patrick v. Leach*, 1 McC., 250, 251.

§ 203. Where a deed purports to be "for value received," a money consideration may be proved. *Munro v. Robertson*,* 2 Cr. C. C., 262.

§ 204. Failure of consideration.—An agreement inseparable from a conveyance of land which is a part of the consideration of the grant will not be rescinded; and yet the grant enforced for this would be to take away from the grantor consideration of the grant after the conveyance had taken effect. *Marble Co. v. Ripley*, 10 Wall., 339, 355.

§ 205. The deed of an infant is not absolutely void, but only voidable at his election, upon arriving at the age of majority; and where, by such deed, the infant does only what the law would compel him to do, it is not even voidable. *Irvine v. Irvine*, 9 Wall., 617, 636.

§ 206. Ratification of a deed by an infant need not be of as solemn a character as the deed itself; yet mere acquiescence alone, though long continued, is not generally sufficient; but a clear and unequivocal ratification, showing a clear intention to affirm it, is sufficient. *Ibid.*

§ 207. The deed of a tenant in common for a particular part of the premises, held in common, although void as against a co-tenant, is good against himself. *Lamb v. Wakefield*, 1 Saw., 251.

§ 208. A deed procured through fear of loss of life, produced by the threats of the grantee, may be avoided for duress. *Brown v. Pierce*, 7 Wall., 205; *Baker v. Morton*, 12 Wall., 150.

§ 209. Whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. *Allore v. Jewell*, 4 Otto, 503, 511.

§ 210. An alteration in a deed, in the absence of proof, is presumed to have been made before execution, and the question may be left to the jury. *Little v. Herndon*, 10 Wall., 26, 31.

§ 211. Whether or not alterations and erasures have been made is a question of fact for the jury. Their materiality is a question of law for the court. *Steele v. Spencer*,* 1 Pet., 532.

§ 212. A deed fraudulently altered is inoperative for any purpose. *Malarin v. United States*, 1 Wall., 282, 288.

§ 213. A voluntary deed passes the title subject to rights of creditors. *Atwater v. Seely*,* 1 McC., 264.

§ 214. An erasure in a deed, not shown to have been made before execution, avoids the deed on a plea of *non est factum*; and the same presumption arises in reference to a settled account. *Prevost v. Gratz*, Pet. C. C., 364, 368.

§ 215. The deed of one disseized of his freehold is void. His freehold is out of him and is converted into a right of action or right of entry, and as such is no more the subject of legal transfer at common law than an ordinary chose in action. *Bradstreet v. Huntington*, 5 Pet., 436.

§ 216. The deed of one who has neither possession nor title confers no estate on his grantee. *Girard v. Philadelphia*, 2 Wall. Jr., 301, 307.

§ 217. A deed of bargain and sale by a person not in possession of the land at the date of the deed is void. *Bank of United States v. Benning*, 4 Cr. C. C., 81, 83.

§ 218. A deed of bargain and sale by a person not in possession is void. *Fraser v. Hunter*, 5 Cr. C. C., 470.

§ 219. One cannot convey by a quitclaim deed his title to premises of which he is disseized. *Wakefield v. Ross*, 5 Mason, 16, 27.

§ 220. A deed of land, made by one while possession is held adversely by one claiming under color of title, is void, even though the person in possession claims under a deed which is void because it is forged. The possession is adverse where the claimant is in actual personal possession; and the fact of possession and the *quo animo* of the possessor are the tests by which to determine the question whether the possession is adverse or not. *Bunce v. Gallagher*, 5 Blatch., 481, 491.

§ 221. A deed of property held adversely to the grantor at the time of its execution, made to a stranger to the possession, is in law a nullity, and conveys no title. *Longworth v. Close*, 1 McL., 293.

§ 222. Where the grantor has been disseized, or the land is held adversely, no title passes

by the deed, and there is no breach of the covenant of seizin. *Thomas v. Perry*,* *Pet. C. C.*, 49.

§ 223. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction. *Noonan v. Lee*,* 2 *Black*, 500.

§ 224. In Illinois a deed of land executed while it is held adversely to the grantor is void under the laws against champerty and maintenance. *Dubois v. McLean*, 4 *McL.*, 486.

§ 225. Under the act of Kentucky of 1798 concerning champerty and maintenance, a deed of land held adversely to the grantor passes the title. *Walden v. Gratz*, 1 *Wheat.*, 292.

§ 226. The statute of Virginia against conveying pretended titles does not make a deed of such a title void as between the parties. If a debt be settled by a deed of land with general warranty, which is accepted by the creditor, he cannot disaffirm the transaction, but must look to the warranty. *Miller v. Young*, 2 *Cr. C. C.*, 53.

§ 227. A release by a disseizee to the disseizor conveys the former's title to the latter, or to his feoffee; and an absolute conveyance in fee to such disseizor or his grantee is such a release. *Bradstreet v. Huntington*, 5 *Pet.*, 402, 431.

§ 228. Possession of undivided half.—A party in possession under a deed for an undivided half is not in adverse possession of the whole. *Noonan v. Lee*,* 2 *Black*, 500.

§ 229. A deed by a person claiming a pre-emption right under the laws of the United States, before he has obtained title, is void. *Brisbois v. Sibley*,* 1 *Minn.*, 230.

§ 230. Tax title.—One in possession claiming title is bound to pay taxes. A tax deed adds nothing to the strength of his title. *Noonan v. Lee*,* 2 *Black*, 500.

§ 231. Deed to confer jurisdiction.—A deed executed merely for the purpose of giving jurisdiction to a federal court will not be countenanced for that purpose, though as between the parties it operates to pass the legal title. *Hurst v. M'Neil*, 1 *Wash.*, 70, 83.

§ 232. May operate as an estoppel.—A deed that does not purport to convey an estate, though it contain a warranty, cannot operate as an estoppel. *Lewis v. Baird*, 3 *McL.*, 56, 78.

§ 233. A deed made previous to the issuance of a patent to its grantor takes effect from the date of the patent. *Harmer v. Morris*, 1 *McL.*, 44, 48.

§ 234. May be good as a contract.—A deed invalid as a conveyance may be good as a contract of sale. *Lyon v. Pollock*, 9 *Otto*, 674.

§ 235. Subject to lien.—A conveyance to B. and wife by K., conditioned on the payment of an annual sum during the life of K. and wife, created a joint tenancy in B. and wife during the life of K. and wife. A further clause of conveyance, in consideration of an acquittance by B. and wife of all claims against K.'s estate, conveyed all that remained after the expiration of the life estate, and B.'s assignee in bankruptcy was entitled to the land subject to the lien of K. for unpaid instalments. *Atwood v. Kittell*, 9 *Ben.*, 473, 474.

§ 236. Deed to alien.—Under the Mexican law in force in Texas in 1836, a deed to an alien was not void, but conveyed an estate subject to be divested upon a proceeding by government for that purpose. *Hammekin v. Clayton*,* 2 *Cent. L. J.*, 183. See CITIZENS AND ALIENS.

§ 237. A state has power to authorize aliens to hold lands within it. *Beard v. Rowan*, 1 *McL.*, 135, 142.

§ 238. Corporation presumed capable of taking.—Where a deed is made to a company it will be presumed, in the absence of any proof whatever on the subject, that the company is capable in law of taking a conveyance of real estate. *Myers v. Croft*, 13 *Wall.*, 291.

§ 239. By the general comity which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, corporations created in one state or territory are permitted to carry on any lawful business in another state and territory, and to acquire, hold and transfer property there equally as individuals. *Cowell v. Springs Co.*, 10 *Otto*, 55 (§§ 341-346). See CORPORATIONS, IX.

§ 240. Whether a corporation has properly a right, under state laws, to hold real estate for a particular purpose, is a question that does not concern other parties than the state. *Ibid.*

§ 241. Confirmation by statute.—Although a void grant cannot be confirmed by a subsequent act between individuals, yet it is otherwise as to confirmation by statute, and the legislature may, by statute, confirm a deed or grant which was absolutely void at the time of confirmation, provided vested rights of third persons are not interfered with. *Seabury v. Field*, *McAl.*, 1, 7.

§ 242. Unless prohibited by the state constitution, the state legislature has power to pass an act making conveyances of lands under a joint power of attorney of husband and wife, previously executed, while no law enabling a *feme covert* to convey existed, as valid and binding as if executed by the original parties. *Randall v. Kreiger*, 23 *Wall.*, 137; 2 *Dill.*, 444.

§ 243. And such act does not impair the obligation of a contract, and hence is not in conflict with the federal constitution. *Ibid.*

§ 244. And such act is curative in its operation, and operates to pass the dower of a *feme*

corert who had joined with her husband in a power of attorney for that purpose to convey lands at a time when no law was in existence in the state enabling her to so convey. *Ibid.*

§ 245. A deed made to defraud creditors cannot be set aside if there are no debts founded on a legal subsisting consideration, as where the deed is made to defeat imaginary claims. *Longworth v. Close*, 1 McL., 282, 291.

§ 246. Fraud by trustee.—A release executed by a trustee in a deed of trust of a lien on property, of which, by mesne conveyances, he has become the owner, is a fraud upon the beneficiary of the trust. Even if the power of the trustee to execute the trust, confided in him by the trust deed, was not extinguished by his acquisition of the property, it was evident that he could not release the lien, while he remained the owner of the lots, without a gross abuse of his trust. *Swift v. Smith*, 12 Otto, 442, 448.

VII. CONSTRUCTION.

1. General Rules.

§ 247. It is a rule of construction that a deed shall be taken most strongly against the grantor. But the intention of the parties, both as to the interest conveyed, and the property, is to be ascertained by the language of the instrument. It must be looked at in all its parts, as one part may explain another. If there be a latent ambiguity, it may, in most cases, be explained by parol; but if the uncertainty arise upon the face of the deed, it cannot be explained. *Lewis v. Baird*, 3 McL., 56, 67.

§ 248. The governing rule in the construction of deeds is to ascertain the intention of the parties, and this must be by a careful examination of the whole instrument. It is no doubt a just rule of construction, that restrictive words, repugnant to an absolute grant or sale of a thing, may be construed to be inoperative, because they contradict the clearly expressed terms of the deed, as to the nature and extent of the estate granted, and render it ineffectual for the purpose clearly intended by the parties. But we must first examine the whole instrument, all its parts, and each provision or covenant contained in it, to ascertain the intention of the parties, before this rule can apply. We should ascertain the nature of the thing which is the subject of the grant, and the state of knowledge of the parties. *French v. Brewer*, 3 Wall. Jr., 346, 354.

§ 249. It is a general rule in the interpretation of deeds, that what is uncertain should be construed as nearly as possible in conformity with what is certain. *Howell v. Saule*, 5 Mason, 410, 412. Sheriff's deeds upon judicial sales are to be construed as the deeds of private persons. *White v. Luning*, 3 Otto, 514 (§§ 290, 291).

§ 250. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the courts will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it. *Ewing v. Burnet*, 11 Pet., 41, 54.

§ 251. The meaning and effect of an ambiguous deed, as whether it was a grant or a license, may be ascertained by the construction put upon it by the parties to it. *Steinbach v. Stewart*, 11 Wall., 566, 576.

§ 252. The United States courts are not bound, in interpreting a deed, by decisions of the state courts, because it must everywhere be interpreted in the same manner; that is to say, according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom. *Thomas v. Hatch*, 3 Sumn., 170, 176.

§ 253. Recitals in deeds are evidence, as between the parties to those deeds, of the facts therein stated. The parties are estopped to deny the truth of those facts. *Bank of United States v. Benning*, 4 Cr. C. C., 81, 82.

§ 254. Facts admitted by recitals in a deed are evidence against the parties to that deed, and all others claiming under them, as much so as if they had been proved by the plaintiffs in support of their title. *West v. Pine*, 4 Wash., 691, 694.

§ 255. A statement in a "deed of explanation," that an annuity is to be taken as interest on a charge upon land, is operative as a release of so much of that annuity as accrues on the portion of the charge which has been paid. *Blake v. Hawkins*, 8 Otto, 315, 329.

2. What Estate or Interest Passes.

§ 256. *Habendum*.—It is the office of the *habendum* in a deed, whatever may be the words of grant, to limit and confine them, and to ascertain the commencement and duration of the estate created or conveyed by the deed. *Mitchell v. Wilson*,* 3 Cr. C. C., 242.

§ 257. Where the granting clause of a deed indicates the character of the estate conveyed, and the *habendum* clause seems to restrict or qualify the general words in the grant, it be-

comes material to look into the nature and condition of the title at the time, and the mode of enjoying the estate, and also into the evidences of the title which were turned over to the purchaser at the execution of the contract. *Van Rensselaer v. Kearney*, 11 How., 297, 327.

§ 258. Words of limitation.— In 1830 F. and wife conveyed land to D., together with personal property, upon the consideration that D. should maintain F. and wife as long as they should live, D. covenanting not to dispose of the land to any person. In 1831 D. reconveyed, without words of limitation, all the property acquired by the aforesaid deed to F. and wife, who subsequently conveyed it to the persons under whom the plaintiff claims. Defendants claim the land by descent from D. It was held that the deed of reconveyance operated to revest the title in the original grantor. *Charter Oak Life Ins. Co. v. Chatillion*,* 11 Fed. R., 818.

§ 259. There remained in F. and wife, under the first deed, a sufficient interest in the property for a release or relinquishment to operate upon. The conveyances were not between strangers, but *inter partes*, and therefore the rigid technical rules invoked do not obtain. *Ibid.*

§ 260. Livery of seizin.— The statute of 9 Will. 3, dispensing entirely with livery of seizin, looked not to the particular form of the deed, but to its substance, and the intent of the grantor, so that any deed or conveyance granting the estate by any words expressing a clear intention to transfer the same is sufficient. *Durant v. Ritchie*,* 4 Mason, 45.

§ 261. Where husband and wife conveyed the estate of the latter to K. and his heirs to the use of the grantors during their lives, and to the use of the survivor in fee simple, the deed may be construed as a feoffment, and K. became seized of the estate, so as to sever the subsequent uses out of his seizin, and they became, by the statute of uses, executed in the grantors. *Ibid.*

§ 262. A conveyance of wild or vacant lands gives a constructive seizin thereof. The grantee acquires all the legal remedies incident to the estate. *Green v. Litter*, 8 Cr., 239, 249.

§ 263. A quitclaim deed only passes such interest as the grantor possessed at the time, and has no operation whatever upon subsequently acquired interests. By its execution, the grantor does not affirm the possession of any title, nor is he precluded from subsequently acquiring a valid title, and holding it for his own benefit. *Field v. Columbet*, 4 Saw., 523, 526.

§ 264. A grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. But if the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate described, as if a formal covenant to that effect had been inserted. *Van Rensselaer v. Kearney*, 11 How., 297, 322.

§ 265. One who holds under a quitclaim deed takes subject to all the equities good against his grantor. *Dickerson v. Colgrove*, 10 Otto, 578, 584.

§ 266. The grantee under a quitclaim deed is not a *bona fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. *May v. Le Claire*, 11 Wall., 217, 232.

§ 267. A conveyance by deed of bargain and sale or release without covenant does not bind an after-acquired estate in the same land, which, as to the grantor, was then contingent. *Lownsdale v. City of Portland*, Deady, 1, 15.

§ 268. A mere quitclaim without covenants from a mere occupant will not estop the releaser from asserting an after-acquired title. *Ibid.*

§ 269. In California any words in a deed indicating an intention to transfer the estate, interest or claims of the grantor, will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the statute of uses. *Field v. Columbet*, 4 Saw., 523, 526.

§ 270. A conveyance of all the right, title and interest of the grantor in lands of a certain description passes all the lands of that description that he has at the date of the deed, but does not include lands of that description previously conveyed by him by an unrecorded deed, setting out the land by metes and bounds. *Brown v. Jackson*, 3 Wheat., 449, 452.

§ 271. Lease and release.— The freehold estate which by deed of lease and release vests in the releasee by enlargement, is an estate at common law, which did not require the aid of the statute to execute the possession. *Hurst v. M'Neil*, 1 Wash., 70, 74.

§ 272. A recital of a lease in a deed of release operates as an estoppel and binds parties and privies in blood, in estate and in law, and is primary and conclusive evidence of such

lease between them, but not as against third parties, though a long lapse of time raises a presumption of loss; and such recital of a lease is admissible as secondary evidence even against strangers. *Crane v. Morris*, * 6 Pet., 598.

§ 273. A deed of release made for a valuable consideration entitles the releasee to protection as a *bona fide* purchaser and conveys to him the title. *Flagg v. Mann*, 3 Sumn., 486, 560.

§ 274. A deed of release for a valuable consideration, and meant to convey all the party's right and title, if it cannot take effect as a release, may be construed, in furtherance of the intention of the parties, as a bargain and sale, or other appropriate conveyance. *Baker v. Whiting*, 3 Sumn., 476, 481.

§ 275. Under a deed by a trustee the legal estate passes to the bargainee, whether the terms of the trust are complied with or not. If the bargainee takes with notice of the trust, he stands as trustee in the place of the grantor; if without notice and for valuable consideration, then he takes an absolute title; so that, in either event, the legal title passes, and the *cestui que trusts* only can complain; and that in a court of equity. *Bank of United States v. Benning*, 4 Cr. C. C., 81, 88.

§ 276. Deed of equitable estate.—A legal conveyance, as a general rule, has the same operation in equity upon an equitable estate that it has at law upon the legal estate. Generally, whatever is true at law of the legal estate is true in equity of the trust estate. The rule in *Shelley's case* applies alike to equitable and legal estates; and an equitable estate tail may be barred in the same manner as an estate tail, and this end cannot be accomplished in any other way. *Croxall v. Shererd*, 5 Wall., 268, 281.

§ 277. Deed to one as trustee.—Where land has been granted by patent to one as "trustee" without mention of any trust, such description does not prevent the legal title from passing by his conveyance. *Cowell v. Springs Co.*, 10 Otto, 55 (§§ 341-349).

§ 278. Where a husband and wife execute a deed which contains no words of grant by the wife, she does not convey her estate in the land, nor her right of dower, unless it contains words of relinquishment of her dower. *Powell v. Monson & Brimfield Manuf. Co.*, 3 Mason, 347, 349.

§ 279. The title of a feme covert does not pass by an instrument in which her husband is the grantor, without words of grant on her part, though she signs, seals and acknowledges it. *Agricultural Bank of Mississippi v. Rice*, * 4 How., 225.

§ 280. The receipt by her of the purchase money, after becoming sole, would not make such a deed operative as to her interest. *Ibid.*

§ 281. Deed by deserted wife.—By the laws of Maryland, a married woman cannot dispose of real property without the consent of her husband; nor can she execute a good and valid deed, to pass real estate, unless he shall join her in the deed. She cannot, therefore, execute a valid deed of land acquired while she was abandoned by her husband. The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. *Rhea v. Rhenner*, 1 Pet., 105, 108.

§ 282. Separate property of wife.—In Texas it is not indispensable that the husband shall join in the conveyance by the wife of her separate property, or that the forms prescribed by the statute be followed. *Slaughter v. Glenn*, 8 Otto, 242, 246.

§ 283. A relinquishment of dower following the signatures to the mortgage, and on the same paper, properly signed and acknowledged, is good. *Dundas v. Hitchcock*, * 12 How., 256.

§ 284. The relative position of the signatures of the husband and wife is of little importance where the apt and proper terms of the deed clearly show the intention to be for the husband to convey the fee and the wife relinquish her dower. *Ibid.*

§ 285. Where a widow deeds as devisee of the will of her husband, and afterwards renounces the will under the statute, she cannot repudiate her deed and claim dower. She is estopped. *Ibid.*

§ 286. A conveyance without restraining words operates as a conveyance of the grantor in every character necessary to give effect to his deed. *Ibid.*

3. What Land Passes. Description and Boundaries.

SUMMARY — When courses and distances control, § 287.—Reference to recorded plat, § 288.—Plat not properly recorded, §§ 288, 289

§ 287. Courses and distances will control the construction of a conveyance rather than monuments, if the latter are inconsistent with the sense of the instrument. *White v. Luning*, §§ 290, 291.

§ 288. Where lots are conveyed and described by reference to a recorded plat, the descrip-

tion cannot be controlled by reference to the original unrecorded plat, so as to show that the one recorded is erroneous. *Jones v. Johnston*, §§ 292-294.

§ 289. A description in a conveyance referring to a recorded plat is conclusive at law, although the plat is not recorded according to statute. *Ibid.*

[NOTES.—See §§ 295-337.]

WHITE v. LUNING.

(8 Otto, 514-527. 1876.)

ERROR to U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—Ejectment to recover lands lying in Santa Cruz county, California. The lands had been mortgaged by White to the plaintiff, and were sold pursuant to foreclosure proceedings, and a sheriff's deed executed to the plaintiff as purchaser. The defendants afterwards ousted plaintiff from the land, claiming that no title passed because of a misdescription in the sheriff's deed.

Opinion by MR. JUSTICE DAVIS.

This is the case of a mortgagor unable to pay his debt, and getting it satisfied by a judicial sale of the mortgaged premises, who, on the ground that no title passed by reason of misdescription in the deed of the sheriff, seeks to prevent his creditor, who purchased them, from recovering possession. And this, too, when, if there be any misdescription, it was presumably caused by him, as they were offered for sale in parcels, by his direction and for his advantage.

§ 290. *Sheriffs' deeds are to be construed as the deeds of private persons.*

As the court does not find that the descriptive errors misled any person, or caused any sacrifice of the property, the presumption is that no one was injured, and that the property brought a full price. Obviously, therefore, there are no merits in this defense. It rests alone on the idea that sheriffs' deeds and ordinary deeds *inter partes* are subject to different rules of construction. In regard, however, to the description of the property conveyed, the rules are the same, whether the deed be made by a party in his own right, or by an officer of the court. The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish.

§ 291. *When courses and distances will control rather than monuments.*

Is this deed void for uncertainty of description, or can the property intended to be conveyed be reasonably located by means of that description? The court below located it by adopting, except in one instance, the calls for courses and distances, and rejecting as false and repugnant certain calls for known objects. It is true that, as a general rule, monuments, natural or artificial, referred to in a deed, control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance. Greenleaf, in his *Treatise on Evidence* (vol. i, sec. 301), in speaking on this subject, in effect says, that where the description in the deed is true in part, but not true in every particular, so much of it as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain

its application. Applying this rule to the subject-matter of this deed, we do not think there is any difficulty in reaching the conclusion that the description is sufficiently certain to pass the title to the land.

The court below found, among other things, that if the courses and distances, being the field-notes of the survey, are followed from the point of beginning, changing east into west in the last course, the lines would, by closing, embrace the tract of land sued for, and correspond with all the other calls and monuments mentioned in the deed, except that there would be a departure at nearly right angles from the partition fence at the beginning of the call N. $47\frac{1}{2}^{\circ}$ E. 127 chains, and the lines would not extend to, nor in any manner correspond with, the north boundary of the rancho Sal Si Puedes. There are, therefore, three descriptive errors, which, if removed from the deed, would harmonize all other particulars in it, and leave enough words of description to identify the demanded premises. These errors will be noticed in the order stated by the court. The deed closes with these words: "And thence south $41^{\circ} 37'$ E. 17.32 chains to the place of beginning." This distance was correct, and so, except in one particular, was the course. It should have been *west* instead of *east*. To follow the course as given would manifestly not close the lines of the survey; and as, other things being equal, boundaries prevail over courses, the court rejected the latter and adopted the former as the true description in this particular. This was so obviously right that further comment is unnecessary.

The next error relates to the "fence along the line of partition." There is a call for this fence as a boundary during the running of seven courses; but it is plainly a false call, after the sixth course has been run, for the seventh course departs at nearly right angles from the line of the fence, and if this course be rejected and the call for the fence retained, none of the other calls in the deed can be complied with, and the instrument is wholly unintelligible. On the contrary, if this course be accepted as the true description, and the call for the fence be discarded at the termination of the sixth course, there is no difficulty of harmonizing the other parts of the deed, with the exception of the northern boundary, and the difficulty there, we think, can be easily removed. It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for the course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant. This applies with equal if not greater force to the last and main error in this deed. Adopting the seventh course as the true description, the calls in the deed proceed as follows: "N. $47\frac{1}{2}^{\circ}$ E. 127 chains to the north boundary of the rancho Sal Si Puedes on the mountains, thence along said north boundary the following courses," etc.

The calls for these boundaries are equally false and mistaken with the call for continuing the line along the partition fence, as is clearly shown in the findings of fact by the court below. There are two ranges of mountains in the direction of the course N. $47\frac{1}{2}^{\circ}$ E. The summit of the first range is the northerly boundary line between the counties of Santa Cruz and Santa Clara, and both the summit and county line are about the distance of one hundred and twenty-seven chains from the point in the partition fence where the course N. $47\frac{1}{2}^{\circ}$ E. begins. There is another range of mountains in the same northerly

direction, in the county of Santa Clara, about three-quarters of a mile beyond the summit of the first range, and the northerly boundary of the rancho Sal Si Puedes is on this range of mountains.

The calls for courses and distances run along the summit of the first range, and do not apply to the second. Besides this, if the summit of the first be treated as the boundary intended to be called for, all other calls, monuments, courses and distances in the deed completely harmonize, except the two descriptive errors which have already been corrected, and the lines inclose a tract of the precise number of acres sued for, lying wholly within the county of Santa Cruz. But if the call for "the north boundary of the rancho" be retained as the true description, there is not only conflict with all the remaining courses and distances, but all the subsequent monuments mentioned in the deed, and the lines would not inclose the land in controversy, nor, indeed, any other. With all these facts to rest upon, is not the conclusion irresistible that the words of the call at the end of the course N. $47\frac{1}{2}^{\circ}$ E. 127 chains — to wit, "the north boundary of the rancho Sal Si Puedes on the mountains," and "along said boundary the following courses" — were mistakenly inserted, and should be rejected? Rejecting them, with the other particulars we have named, from the deed as false and inconsistent with the other parts of the description which are true, and of themselves sufficient to make a complete instrument, we are able to give effect to this judicial sale, according to the plain and manifest meaning of the officer who had it in charge.

It is rare, where so many field-notes of the survey of an irregularly shaped tract of land are incorporated in a deed, that there are so few mistakes. The courses and distances in this deed are numerous, and are all correct, except the last; and there the only error is in the course, which is easily corrected, as the call is for the post where the survey begins. And these courses and distances inclose the identical land in dispute. In such a case it would be wrong to let two false boundaries stand in order to defeat a conveyance. It is proper to remark that a map will accompany the report of this case so as to make this opinion intelligible.

Judgment affirmed.

JONES v. JOHNSTON.

(18 Howard, 150-158. 1855.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Illinois. The suit below was an action of ejectment, brought by Johnston, against Jones and Marsh, to recover a tract of alluvial land in the city of Chicago, formed in Lake Michigan, adjoining the north pier of Chicago harbor, and which is claimed as an accretion to water lot No. 34, in Kinzie's addition. The defendant, Jones, is owner of lot No. 35, in said addition, lying east, and adjoining 34, and between that and the lake. Both parties claim under Robert A. Kinzie, the patentee of the north fractional section 10, in township 30, which was situate in the bend of the Chicago river, at its mouth, and bounded southerly by that river, and easterly by the Michigan lake. Kinzie, the patentee, in February, 1833, laid out an addition to the town of Chicago upon this fractional section, and made a plat of the same, which was recorded in the recorder's office of the county, on the 18th of January, 1834, according to the requirements of the laws of the state of Illinois. On this plat, lot No. 34 is one of a series of water lots, bounded on

the south side of North Water street, sixty feet, as its northerly boundary, and is included within lines dropped from the fixed corners on that street at right angles with the same, and extended until they intersect the lake shore. Lot No. 35 is the next lot east, of the same width, on Water street, and extended in like manner to the lake, its west line being the east line of 34.

On the 25th of February, 1833, R. A. Kinzie conveyed to John H. Kinzie several lots in this addition, and, among others, lot No. 35. And on the 1st of September, 1834, John H. conveyed the same to Jones, the defendant, describing it in the deed as in Kinzie's addition, and as "being water lot No. 35," etc., "agreeably to the town plat, recorded in the office of the recorder of the said county of Cook, to which reference may be had if necessary." On the 22d of October, 1835, R. A. Kinzie conveyed to Johnston, the plaintiff, lot No. 34, describing it as lying in Kinzie's addition, and known as water lot No. 34, "as will more fully appear, reference being had to said plat as recorded in the recorder's office of the town of Chicago, in the county of Cook," etc.

In the summer of 1833, the general government commenced the construction of the harbor of the city of Chicago, which is formed by an erection of two piers across this fractional section 10, from the curve of the Chicago river, as it takes a direction southerly to the lake, and for a considerable distance into the lake, the effect of which was to turn the river from its sweep southerly across the sand-bar to the waters of the lake between the two piers, and thus opening a passage for vessels into the town. The south pier was built in 1833, and the north in 1834. The harbor thus constructed divided several of the lots in Kinzie's addition that bounded on Water street, east and west, and, among others, as is claimed by the defendant, No. 34, leaving a part of it, as originally laid out, south of the harbor. Since the construction of the harbor and extension of the piers into the waters of the lake, the shore above, or north of the piers, has greatly changed, the firm land having increased by the washing up of sand and earth, and the recession of the waters, to the extent of some twelve hundred feet in width, and for a considerable distance in length northward along the shore. The present suit is brought to recover a portion of this alluvion or new-formed land as an increment or accession to lot No. 34. The plaintiff claims that a part of its southern termination on the lake was north of the piers, and contiguous to the new-formed land, and therefore entitled to its share of the increment. The defendant contends that no part of its boundary was on the lake north of the harbor, and therefore no part connected with or adjoining this land newly formed. On the contrary, that part of his own lot, No. 35, which lies between 34 and the lake, was bounded on the lake south of the north pier, and hence cut off No. 34 from any portion of the alluvial accession.

§ 292. *Lands conveyed and described by reference to a recorded plat.*

The plaintiff insisted, on the trial, that the plat of Kinzie's addition, as recorded in the recorder's office in January, 1834, was incorrect, and produced what was claimed to be the original, but which was not recorded when the conveyances of the lots in question were executed. According to this original plat, as the side lines were laid down, lot No. 34 appeared to be partially bounded on the lake north of the harbor. In this respect it differed from the plat recorded; as, according to the side lines as there extended, its entire boundary on the lake was south of the harbor. In laying out the addition by the surveyor in 1833, the only lines of the lots run out or measured on the ground were those butting on Water street, the north lines of the lots. The

side lines depend upon their protraction on the plat of the addition, and which, as we have already said, were formed by dropping them at right angles from the corners on Water street, and extending them till they intersected the lake. And even the lake shore, as laid down on the plat—as appears from the testimony of the surveyor—was ascertained without survey or measurement, and with little more accuracy than could be obtained from the eye. The case was a good deal embarrassed on the trial, arising out of the evidence in respect to this original plat, and some consideration and effect were given to it by the court in submitting it to the jury. We think the court erred in admitting it as evidence to control, or in any way to affect, the recorded plat. Both lots in controversy were conveyed with express reference to that, and without such reference there is not a sufficient description given in the deeds of the boundaries to admit of a location of either. If there was in fact any error or mistake in this reference, by way of description of the premises conveyed, the remedy was in chancery to reform the deed. So long as that remained unreformed, the description of the lot by the reference to the recorded plat was conclusive upon the parties.

§ 298. *Effect of a description referring to a recorded plat.*

The acts of the state of Illinois regulating the laying out of town lots, and the recording of the plats of the same, were supposed by the court below to have a bearing upon the questions involved, and influenced the instructions given and refused to the jury. It seemed to be admitted that the plat recorded did not conform in all respects to the requirement of the statutes. But it is not pretended that the omission in any way operated to invalidate the deeds, or affect prejudicially the rights of the parties under them. Both parties stand upon the same footing in this respect, as each claims under the same survey of the town, and by reference to the same plat. We do not perceive that these acts of the state have any material bearing upon the case, and should not have been allowed to influence the trial. If the description in the deeds was sufficiently certain, by a reference to the plat on record, to identify and locate the lots, the title passed to the grantees, whether the plat conformed to the acts of the legislature or not. This is all that was material so far as the plat is concerned.

The court, in instructing the jury, observed that the controversy turned upon the length of the line dividing lot 34 from 35, before the north pier was constructed—that whether in point of fact it touched the shore of the lake before it reached the pier, or the place where the pier was; in other words, whether there was any water line of lot 34 north of the north pier, and if so, what was the extent of the water line. Again, the court charged, after adverting to the recorded plat, and to the question whether or not it was made in conformity to the statutes of Illinois, that if the jury should find the plat was not so made and recorded, then they should determine, under all the evidence in the case, whether or not, prior to the construction of the north pier, the dividing line between lots 34 and 35 touched the water at a point north of where the north pier was subsequently placed; if it did, then the court was of opinion that the owner of 34 had a right to follow the water as the accretions were formed on his water line.

In these instructions we think the court erred. As we have seen, this lot No. 34 was conveyed to the plaintiff the 22d October, 1835, and described as included within side lines dropped at right angles from the northwest and northeast corners on Water street, which were sixty feet apart, and fixed, and

extended in right lines till they intersected the shore of the lake below. The boundaries, therefore, including and locating the lot, were specific and complete. The north boundary was marked on the south side of Water street; the side lines extended according to the plat at right angles from Water street to the lake; the lake was the southern boundary which closed the lines of the lot.

§ 294. *Accretions to land fronting on a lake.*

Now, in order to determine what land was conveyed to the plaintiff by his deed of 22d October, 1835, all that was necessary was to locate the lot upon the ground in conformity to the description at that date. The calls in the deed having reference to the plat furnished the necessary data for the location. There was the fixed line north on the ground, the lake, a natural object, south, and the lot inclosed between two lines extending at right angles from the corners on Water street to the lake. If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. I speak not now of sudden and considerable changes, which are governed by different principles. The court below, as appears from the instructions referred to, assumed that lot No. 34 should be located on the ground as of the time of the survey and plat of February, 1833, some two years and nine months previous to the conveyance to the plaintiff, and not at the date of that conveyance; and if at that time the dividing line between 34 and 35 would strike the lake north of where the north pier of the harbor was subsequently built, so as to give a like boundary at that time above the pier, the plaintiff would be enabled to take under his deed not only lot 34, as laid down on the plat, but all subsequent accretions by alluvion or dereliction, whatever might be the extent of the new-formed land. By the like assumption and process of reasoning, if the present plaintiff should convey the lot with the same specific boundaries, the north line sixty feet on Water street, and side lines extending at right angles to the lake, the deed would carry with it the whole of the new-made land outside the lines of the deed which is now in dispute—it being a tract from one hundred and thirty to two hundred and twenty-two feet one way, and some twelve hundred the other.

Now, one answer to this assumption is that a grantee can acquire by his deed only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it, and cannot acquire lands outside of the description by way of appurtenance or accession. Lord Coke says: "A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." Coke Litt., 121, B. And this court, in *Harris v. Elliott*, 10 Pet., 54, after approving of the maxim of Coke, observed that, according to this rule, land cannot be appurtenant to land. In the case of *Jackson v. Hathaway*, 15 Johns., 454, the court say, a mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one piece of land not mentioned in the deed to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries. See, also, 7 Mass., 6.

Land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining. 2 Bl. Com., 261-2. If, therefore, the rule be as supposed by the court below, that the boundaries of lot 34 must be taken as it would have been located at the time of the plat, and the southern limit to stop at the water

line as it then existed, and the subsequent gain by alluvion or dereliction to pass as appurtenant to the land conveyed, the grantee would find it difficult upon this construction to reach the lake at all. Certainly he could not, if the water line as it then existed is to be deemed the southern limit, as described in his deed, provided alluvial accretions had taken place between the survey and plat and the date of the deed. The land thus formed belonged to the adjoining owner for the time being, and we have seen that the deed would not pass it as appurtenant or incidental to the land granted. But the true answer to the position assumed, and which governed the trial below, is, that the water boundary on the lake is to be deemed the true southern boundary of the lot at the date of the conveyance, as much so as North Water street was its northern boundary. And the plaintiff is carried by his deed to it, not because of the alluvial deposit, if any, between the water line at the time of the survey and plat and the line at the date of the deed, having passed as appurtenant to the lot, but because one of the calls given in the deed requires that the side lines should be thus extended. Any alluvial accretions since the deed belong to the plaintiff as owner of the adjoining land. Any past accretions belonged to the then owner, and whoever sets up a title to them must show a deed of the same, as in the case of any other description of land.

The case of *Lamb v. Rickets*, 11 Ohio, 311, exemplifies the principle for which we are contending. The defendant had agreed to convey a piece of land called the Hamlin lot, containing forty-two acres, more or less, and also two other small lots of ten acres, with a proviso, if the Hamlin lot and the two others contained more than fifty-two acres, the excess was reserved. The defendant conveyed the Hamlin lot, and refused to convey the other two. A bill was filed to compel a conveyance. The Hamlin lot was bounded by one of its lines on the bank of the Tuscarawas river, and had been originally conveyed to the defendant, and by him to the plaintiff, as containing forty-two acres, more or less. The defense set up to the bill was that, before the defendant conveyed the lot to the plaintiff, large accessions had been made from the river to the lot, and that these alluvial formations made up the quantity of fifty-two acres. The plaintiff claimed that the quantity should be determined according to the old boundary of the lot upon the bank of the river, which would be but some forty-two acres. But the court held that the question was not as the bank of the river was twenty-five or thirty years ago, but as it was when the Hamlin tract was conveyed to the plaintiff, and estimated the quantity of land conveyed accordingly. The case of *Giraud v. Hughes*, 1 Gill & J., 249, asserts a similar principle. There Gist's inspection, a grant as early as 1732, was bounded by one of its lines in the waters of the Patapsco river, afterwards a basin of Baltimore; the lines, however, were given in the grant by courses and distances, and did not call for the river. Hughes held under this grant by deed in 1782.

Before 1812, the waters of the Patapsco had gradually receded, and formed a body of firm land, which had been surveyed and patented by the state to the plaintiff. The question was, whether or not Hughes was entitled to this alluvial deposit as the adjoining owner to the river. It was not doubted by the counsel or court but that, if the grant of Gist's inspection had been bounded on the river, this boundary of the tract would have included the land made by the recession of the water; and the court even held that, as the original location of the tract extended into the river, it entitled those holding under it to the land, on the ground that the principle governing these alluvial accretions

gave them to the adjoining owner. In other words, the description in the original grant gave, in legal effect, to the grantee, a water boundary; and, if so, the boundary included the accretions. The jury, therefore, in this case, should have been directed to inquire whether or not, at the time of the deed to the plaintiff, lot 34 had a water line upon the lake north of the pier of the Chicago harbor; in other words, whether the line between that lot and No. 35 struck the shore of the lake before it reached this pier. If it did, then the question would properly arise in respect to its right to a share of the alluvial accretions formed since that period. If it did not, then no question of the kind could arise in the case.

We think the court also erred in the rule laid down to govern the jury in the division of the new-made land. That was, the jury should ascertain the extent of the water line of 34 between the piers and the point where the line dividing 34 and 35 touched the water. They should also ascertain the extent of the water line of the fraction of land south of North Water street and east of 35, and also of 35 to the point dividing 34 and 35; they would then have the plaintiffs' and the defendant's front on the lake. They must then ascertain the front on the lake shore, as it at present exists, and divide that into as many equal parts as there are feet on the old shore from North Water street to the piers, and give to each of the parties as many of these parts as he had feet on the old shore, and then draw a straight line from the point of division on the old lake shore to the point thus determined as the point of division on the present one.

We do not perceive why North Water street should have been adopted as the northern limit upon the old shore as the basis in making the division, as it appears from the evidence and maps that the alluvial accretions extended much further north. The northern limit on the old shore should have been carried as far as the new-made land extended, as each riparian proprietor was entitled to his proper share, and it was essential that the entire line be regarded, in order that each might obtain his proportional part. Neither do we perceive any reason for excluding the pier shore of the lake—that is, the shore along the line of the piers—from measurement, in ascertaining the extent of the newly-made shore. If we disregard the artificial construction which occasioned the accretions, the lake there is as much new shore as any other portion of it, and should have been taken into the estimate. As no question was made below whether or not the alluvial accretions in question were formed under such circumstances as gave to adjoining owners a title to them, we do not intend to express any opinion upon that question. The judgment of the court below is reversed, with directions that a *venire de novo* issue.

§ 295. Courses and distances must yield to natural and ascertained objects.—A call for a natural object, such as a river, controls both course and distance. A boundary by the bank of a river precludes the existence of any land between the river and river boundary. *County of St. Clair v. Lovington*, 28 Wall., 46.

§ 296. Where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the uniform rule as to the description of lands in deeds is that the great natural object is to govern, and courses and distances are to yield to the object. *Forsyth v. Smale*, 7 Biss., 201, 207.

§ 297. It is a general rule, in the interpretation of the descriptive words of deeds and grants, that courses, and distances, and admeasurements, and ideal lines, should yield to known and fixed monuments, natural or artificial, upon the ground itself. This rule is only the adoption of the result of the common sense of mankind, because sources of mistake

may more easily arise from the former than from the latter. *Cleaveland v. Smith*, 2 Story, 278, 288.

§ 298. If a grant be made which describes the land by course and distance only, or by natural objects not distinguishable from others of the same kind, the description by course and distance must govern. *Chinoweth v. Haskell*, 3 Pet., 92.

§ 299. The possession of one claiming under a deed which does not describe the lands by metes and bounds cannot be considered as extending beyond his actual possession proved. *Fraser v. Hunter*, 5 Cr. C. C., 470.

§ 300. A grant of land bordering on a road or river carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. *Banks v. Ogden*, 2 Wall., 57, 68.

§ 301. A person owning the bed of a stream of fresh water, and the land upon both sides of it, may convey the bed of the stream, separate from the land on either side of it. *Den v. Wright*, Pet. C. C., 64.

§ 302. Accretions.—In determining the right to accretions to land fronting a lake the claimant's boundaries are to be taken as of the date of acquiring title. *Jones v. Johnston*, 18 How., 150 (§§ 292-294).

§ 303. In taking the distance from one point to another on a large river, the measurement is to be with its meanders, not in a direct line. And in ascertaining a place to be found by its distance from another place, the vague words "about," or "nearly," and the like, are to be discarded, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively. *Johnson v. Pannel*, 2 Wheat., 206, 211.

§ 304. Plan part of deed.—A plan of a tract of land, referred to in a deed for purposes of description, will be considered as part of the deed. *Thomas v. Hatch*, 3 Sumn., 170, 180.

§ 305. Where a deed calls for a plat to show a boundary line, the existence of such line and its location can be shown by other evidence. *Deery v. Cray*, 10 Wall., 263, 272.

§ 306. When a deed refers to a plat for one boundary line of a moiety of a tract of land which is to be divided into two equal parts, and the point where the division line commences on one side is given, there is no ambiguity on the face of the deed which will vitiate it, for the line may be accurately determined from the rest of the description. *Ibid.*

§ 307. After long possession on each side of a fence which has been regarded as the boundary line by the owners on each side, the line of such fence will be regarded as the line called for by the plat, though it be not proved that this line was run by a surveyor. *Ibid.*

§ 308. Plat of streets.—A plat not executed, acknowledged and recorded according to the laws of Illinois does not operate to set apart for public purposes the streets upon it, but only as a dedication, the fee remaining in the proprietor, burdened with the public easement. *Banks v. Ogden*, 2 Wall., 57, 68.

§ 309. The designation of quantity in a description of land will not control the boundaries where they are clearly indicated. Yet where there is doubt as to the true description, it may be properly considered. *Field v. Columbet*, 4 Saw., 523, 526.

§ 310. At common law, in order to carry out the presumed intention of the parties, the court will reject quantity in favor of metes and bounds when the latter are so specific and distinct as to indicate with certainty the identity of the land intended to be conveyed. *Tobin v. Walkinshaw*, 1 McAl., 151, 167.

§ 311. It is a general rule that, where there is a specific description by natural or artificial boundary lines, distances and quantity of contents must yield, if mistaken, to such lines. The parties are presumed to contract with reference to such known lines or objects; and the insertion of distances or measure of acres is understood to be no more than a conjectural or probable estimate. *Wakefield v. Ross*, 5 Mason, 16, 26.

§ 312. Land may pass without specific description in the conveyance, as under designation of "banks," "margins," "tow-paths," "side cuts," etc., etc. *Sheets v. Selden*,* 2 Wall., 177.

§ 313. A grant of an island called Eden passes the whole island, without regard to the courses and distances. *Lodge v. Lee*, 6 Cr., 237.

§ 314. Metes and bounds given in a deed control the location, if they can be ascertained with certainty, although they give less quantity of land than the deed calls for. *Jackson v. Sprague*, 1 Paine, 494.

§ 315. More or less.—When the land sold is said to contain about so many acres, be the same more or less, both the grantor and grantee consider these words as a representation of the quantity which the grantor expects to sell, and the grantee to purchase. The words "more or less" are intended to cover a reasonable exception or deficit. If the difference between the real and the represented quantity be very great, both parties act obviously under a mistake, which it would be the duty of a court of equity to correct. *Thomas v. Perry*,* Pet. C. C., 49.

§ 316. An omission of the course of a line on one side of the premises described does not vitiate the description, when the omission can be supplied by the data afforded by the whole description. *Morton v. Root*, 2 Dill., 312.

§ 317. If a part of the disputed corners are established by the proof, the boundary must be established by running the courses and distances called for so as to include the established points. But no other deviation from the courses and distances called for can be made unless controlled by objects called for in the original survey. *Nelson v. Hall*, 1 McL., 518, 519.

§ 318. Where the different parts of a description are contradictory, such part as is repugnant may be rejected, if enough is left plainly and clearly to designate the land intended to be conveyed. *Jackson v. Sprague*, 1 Paine, 494.

§ 319. Where there is a latent ambiguity in a description of land in a deed, and yet the intention of the parties can be ascertained, the misdescription will not vitiate the instrument; but it will yield to the clearly ascertained intention. It is only when the language, with reference to the actual facts, involves such fatal errors and mistakes as leaves the court without reasonable means of ascertaining the real intention, that the instrument will be treated as a nullity. *Cleaveland v. Smith*, 2 Story, 278, 287.

§ 320. Where the description in a deed is indefinite, uncertain or ambiguous, the construction thereof by the parties, shown by their acts and admissions, is the true one, unless the contrary be clearly shown. *Reed v. Proprietors of Locks and Canals*, 8 How., 289.

§ 321. A misdescription of land in a deed of settlement upon a wife will not vitiate the deed when the description can leave no one in serious doubt that the land intended to be conveyed was that in dispute. *Wallace v. Penfield*, 16 Otto, 260, 263.

§ 322. A recorded deed, which so misdescribes the premises that it is apparent there is no such tract of land in the county, may yet put a prudent man upon inquiry and compel him to follow it up, and to affect him with notice of the conveyance of the land intended to be conveyed. *Partridge v. Smith*, 2 Biss., 183.

§ 323. Incurable uncertainty.—Where the description of property conveyed is affected by incurable uncertainty, the deed is inoperative. *Le Franc v. Richmond*, 5 Saw., 601, 602.

§ 324. Where a tract of land conveyed by deed to a vendee is wholly different in the metes and bounds set forth in the deed from the land claimed, it is not sufficient, in order to establish the identity of the land, to prove that only one warrant was issued by the colonial governor to the person under whom both parties claim. *Russel v. Transylvania University*, 1 Wheat., 432, 433.

§ 325. Description aided aliunde.—It is essential to the validity of a grant that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. Almost all grants of land call for natural objects, which must be proved by testimony consistent with the grant, but not found in it. *Blake v. Doherty*, 5 Wheat., 359, 362.

§ 326. Reputation is admissible evidence to prove boundaries. But what an individual may have said respecting lines or corners does not constitute public reputation, and is, therefore, inadmissible to prove a corner or lines. The reputation must be general in the neighborhood. *Nelson v. Hall*, 1 McL., 518.

§ 327. Reputation in the neighborhood as to a corner boundary is not admissible, unless traditional in its character, or derived from ancient sources, or from persons who had peculiar means of knowing what the reputation as to the corner was, at an early day. *Shutte v. Thompson*, 15 Wall., 151, 162.

§ 328. Upon the question whether a deed not describing land by metes and bounds passed a certain spring, hearsay evidence was not allowed. *Fraser v. Hunter*, 5 Cr. C. C., 470.

§ 329. Description by reference.—A deed which does not give the boundaries of the property conveyed, but makes reference to a location certificate of record, which contains a full and definite description of the claim, is the same as if the description had been given in the deed. It matters not that the location certificate was not shown to be regular in all respects. If it gives a correct description of the property, such description is, by reference, incorporated in the deed. *Harris v. Equator Mining & Smelting Co.*, 8 McC., 14, 18; 8 Fed. R., 863, 865.

§ 330. Although a town plat is defective and not entitled to record, still, having been recorded, it is competent to refer to it for description in a deed. *Noonan v. Lee*,* 2 Black, 500.

§ 331. It is the duty of the court to give a construction to a deed, so far as the intention of the parties can be elicited therefrom. But it is still a question of fact, to be discovered from evidence *dehors* the deed, whether the lines, monuments and boundaries called for include the premises in controversy or not; and it necessarily becomes a fact for the jury to

decide, whether the land in controversy is included therein, or, in other words, was intended by the parties so to be. *Reed v. Proprietors of Locks and Canals*, 8 How., 274, 288.

§ 832. An exception in a deed of land conveyed in another deed is not void for uncertainty if the parcel in the deed mentioned is there described by definite boundaries. *Norton v. Meader*, 4 Saw., 603, 625.

§ 833. Where an exception is made in the granting clause, the thing excepted is not granted, and never being granted, the exception is not repugnant to the grant. *Greenleaf v. Birth*,* 6 Pet., 302.

§ 834. An exception of "squares, etc., conveyed solid, etc.," without naming to whom or when, is sufficiently certain; as that which can be made certain is certain. *Ibid.*

§ 835. Where a deed conveyed all of a certain lot, except that part of it which the grantor had previously conveyed to the grantee, and there was no evidence of a prior deed to the grantee, *it was held* that the deed conveyed the whole lot. *Weld v. Madden*,* 2 Cliff., 587.

§ 836. The term "appurtenances," both in common parlance and in legal acceptation, is used to signify something appertaining to another thing as principal and which passes as an incident to the principal thing. Land cannot be appurtenant to land. The soil and freehold of a street does not pass by virtue of the term appurtenances. *Harris v. Elliott*, 10 Pet., 25, 54.

§ 837. When a house or store is conveyed by the owner thereof, everything then belonging to, and in use for, the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in use and belonged to it. *United States v. Appleton*, 1 Sumn., 492, 500.

4. Conditions.

SUMMARY — *That grantee shall not sell liquors*, § 338. — *Condition subsequent*, §§ 339, 340.

§ 338. A condition that land should revert to the grantor if liquors should be sold by the grantee on the premises is valid and not repugnant to the estate conveyed. *Cowell v. Springs Company*, §§ 341-346.

§ 339. Such a condition is a condition subsequent, and no entry by the grantor is necessary to authorize him to maintain ejectment. *Ibid.*

§ 340. A grantee holding property upon a condition subsequent cannot, in defense to such action upon a breach of the condition, set up the invalidity of the title conveyed to him by the grantor. *Ibid.*

[NOTES. — See §§ 347-349.]

COWELL v. SPRINGS COMPANY.

(10 Otto, 55-61. 1879.)

ERROR to the Supreme Court of the Territory of Colorado.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS. — In May, 1873, the plaintiff in the court below, the Colorado Springs Company, sold and conveyed to the defendant Cowell two parcels of land situated in the town of Colorado Springs in the then territory of Colorado. The deed of conveyance stated that the consideration of its execution was \$250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that, in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterwards opened a billiard saloon in a building thereon, which became a place of public resort where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in

its deed, and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession. The principal questions, therefore, for our determination are the validity of the condition, and on its breach the right of the plaintiff to maintain the action without previous entry or demand of possession.

§ 341. *A condition that land should revert to the grantor if liquors should be sold by the grantee on the premises is a valid condition.*

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character. *Shep. Touch.*, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries and machine shops, have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods. The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality. A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the court of appeals of New York in *Plumb v. Tubbs*, 41 N. Y., 442. And a similar condition was held by the supreme court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended. 14 Kan., 61. See, also, *Doe v. Keeling*, 1 Maule & S., 95, and *Gray v. Blanchard*, 8 Pick., 283.

§ 342. *Upon breach of a condition subsequent no entry of grantor is necessary to authorize ejectment.*

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there

stands in lieu of entry and demand of possession. See, also, *Austin v. Cambridgeport Parish*, 21 Pick., 215; *Cornelius v. Ivins*, 2 Dutch. (N. J.), 376; *Ruch v. Rock Island*, 97 U. S., 693.

§ 343. *Where land has been granted by patent to one as "trustee," without mention of any trust, such description does not prevent the legal title from passing by his conveyance.*

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negating the inference that the latter retained any interest in the property or advanced the purchase money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust; it did not prevent the legal title from passing by his conveyance. *Perry, Trusts*, sec. 334.

§ 344. *The corporations of one state are by comity authorized to hold real estate in another.*

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold and grant real and personal property; explore, locate and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade and traffic; colonize, organize and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or adjoining states and territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the territory of Colorado, and to hold and convey real property there. By the law of March 2, 1867, then in force, the legislatures of the several territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing and other industrial pursuits. 14 Stat., 426. His position is that congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state and territory, and to acquire, hold and transfer property there equally as individuals. If the policy

of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several states before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one state are now engaged, without question, in business in states where the creation of corporations by special enactment is forbidden.

§ 345. *Whether a corporation has properly a right under state laws to hold real estate for a particular purpose.*

The National Land and Improvement Company, the day following the receipt of the deed of Lamborn, conveyed the premises to the plaintiff, the Colorado Springs Company. This company was incorporated in 1871 for the purpose of aiding, encouraging and inviting immigration to the territory, and to purchase, hold and dispose of lands, town lots, mineral springs and other property; also to construct and operate ditches, wagon roads and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the territory, which might tend to accomplish the purposes stated. At that time the legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess and convey real property in the territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the state, succeeding that of the territory, and the corporation, and is no concern of the defendant. It would create great inconveniences and embarrassments, if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal., 552.

§ 346. *A grantee cannot hold property conveyed to him, after breach of condition subsequent, on the ground that his grantor had no title.*

But there is another and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he

received upon condition that it should be restored to his grantor on a certain contingency by denying, when the contingency has happened, that his grantor ever had any right to it. *Gill v. Fauntleroy*, 8 B. Mon. (Ky.), 185; *Miller v. Shackelford*, 4 Dana (Ky.), 287, 288; *Fitch v. Baldwin*, 17 Johns. (N. Y.), 161.

Judgment affirmed.

§ 847. Conditions in a conveyance are either precedent or subsequent; and as there are no technical words to distinguish them, it follows that whether they be the one or the other is a matter of construction, and depends upon the intention of the party creating the estate. Precedent conditions are such as must take place before the estate can vest, and must be literally performed. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated or forfeited. *Ward v. New England Screw Co.*, 1 Cliff., 565.

§ 848. Where a deed to a town recited that the land was granted "to erect a pest-house" upon, and the *habendum* was to hold "for the use aforesaid, forever," but the deed otherwise showed that the intention was to convey an unconditional estate, these words were construed as descriptive of the purpose which the town had in view in making the purchase, and not as creating a condition subsequent or a limitation of the estate. *Ibid.*

§ 849. A grant of land upon condition that an institute be permanently located upon it, between the date of the deed and the same day of the succeeding year, is a grant upon a condition subsequent. But the condition was complied with and performed when the trustees passed a resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation. *Mead v. Ballard*, 7 Wall., 290.

5. Covenants.

§ 850. Covenant of warranty.—It is not necessary to use the word "warrant" in a deed, to constitute a general warranty, if other words of like import are used. *Kirkendall v. Mitchell*, 8 McL., 144.

§ 851. Under an agreement to make "a good and general warranty deed, with the fee simple annexed," a covenant of seizin is not necessary. *Ibid.*

§ 852. A covenant to warrant and defend such *lands*, in a deed whereby the grantor conveys his right, title and interest, does not enlarge the premises. The word *lands* can have no other effect than the words in the premises of the deed, which only describe the right, title and interest of the grantor. *Lamb v. Wakefield*, 1 Saw., 251.

§ 853. Covenant by trustee.—If a trustee binds himself by a personal covenant, he is liable at law for a breach thereof, in the same manner as any other person, although he describe himself as covenanting as trustee; for, in such case, the covenant binds him personally, and the addition of the words "as trustee" is but matter of description to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party. *Duvall v. Craig*, * 2 Wheat., 45.

§ 854. A contract to convey by general warranty may be satisfied by a deed that does not contain all five of the covenants which it should contain. *Bronson v. Cahill*, 4 McL., 19, 21.

§ 855. Covenant of ownership.—Where a party makes a deed of land, covenanting therein to be owner thereof, and subsequently acquires an adverse or outstanding title, it inures to the benefit of the grantee on the principle of estoppel. *Irvine v. Irvine*, 9 Wall., 617, 625.

§ 856. Joint covenant.—A covenant in a deed of several grantors against the acts and incumbrances of all the parties, omitting the words "every of them," is construed as including several as well as joint incumbrances. *Duvall v. Craig*, * 2 Wheat., 45.

§ 857. In case of a joint covenant in a deed, a suit for specific performance may be maintained against the heir of one of the covenantors, as to the interest inherited, although such heir is not named in the covenant. *Fields v. Squires*, Deady, 366, 373.

§ 858. Covenant of seizin.—If a grantee be unable to obtain possession, in consequence of an existing possession or seizin by a person claiming and holding under an elder title, this is equivalent to an eviction and a breach of the covenant. *Duvall v. Craig*, * 2 Wheat., 45.

§ 859. Where the seizin forms no part of the description of the lands granted, a covenant of seizin applies as well to the present seizin as to the title. *Thomas v. Perry*, * Pet. C. C., 49.

§ 860. An action may be supported on a covenant of seizin although the plaintiff have never been evicted; and the declaration need not aver an eviction. *Pollard v. Dwight*, * 4 Cr., 421.

§ 861. On trial of an action of covenant in Connecticut for breach of covenant of seizin of land in Virginia, the question whether a patent for the lands from the state of Virginia is voidable is not examinable. *Ibid.*

§ 362. Parol testimony is not admissible in an action on a covenant of seizin to prove prior claim on the land. *Ibid.*

§ 363. Where an action is brought in New York upon a covenant of seizin contained in a deed executed in Wisconsin, by affixing a scroll instead of a seal of wax or wafer, the proper form of action is not covenant, but *assumpsit*, as it is an action upon an unsealed instrument. *Le Roy v. Beard*, 8 How., 451.

§ 364. Covenant in quitclaim deed.—A clause in a quitclaim deed, "and by these presents give them peaceable possession of the same, to have and to hold for their own use and benefit forever," is not a covenant for quiet enjoyment, and does not estop the grantor from asserting an after-acquired title. *Lamb v. Starr, Deady*, 350, 355.

§ 365. Exception in covenant.—A covenant against all persons except the United States government, or those deriving title from said government, does not prevent the grantor from claiming under a title subsequently acquired from a grantee of the United States. *Lamb v. Wakefield*, 1 Saw., 251.

§ 366. A covenant which runs with the land is susceptible of division into as many parts or interests as the land itself may be divided into, by subsequent successive conveyances, and suit may be maintained on such covenant by a grantee of any parcel or interest. *Fields v. Squires, Deady*, 366, 375.

§ 367. Where a grantor has taken possession under a deed, or where he has only a right of possession, he has a sufficient estate to carry the covenants in the deed to his assignee. *Ibid.*

§ 368. A covenant against incumbrances caused or permitted by the grantor is not in its nature prospective, but refers only to incumbrances existing at the date of the deed. *Lamb v. Kamm*, 1 Saw., 238.

§ 369. A covenant against the claim, right or title of any person claiming through the grantor is in effect a special covenant of non-claim. It operates only upon the estate which the grantor had in the premises, and does not bar him from claiming them under a title subsequently acquired. *Ibid.*

§ 370. Where a covenant is general, and does not specify the particular conveyance to be made, the covenantor is not in default until the covenantee has demanded such conveyance as he deems himself entitled to, but a suit in equity to enforce specific performance may be deemed a sufficient demand. *Fields v. Squires, Deady*, 366, 388.

§ 371. Implied covenant.—At common law no covenant is implied in a deed from the use of the words "bargain, sell and convey." The grantor only undertakes to dispose of the right, title and interest in the property. The addition of the words "estate, property and demand, as well in possession as in expectancy," adds nothing to the legal effect of the words right, title and interest. *Lamb v. Kamm*, 1 Saw., 238.

§ 372. As to the form of action upon a covenant, it is immaterial whether it be implied in a deed or be incorporated in it. *Wilson v. Griswold*, 9 Blatch., 267, 269.

VIII. PROOF OF DEEDS.

§ 373. Copy of recorded deed.—A copy of a deed from the land records of the county may be read in evidence, without producing the original or accounting for its non-production. *Peltz v. Clarke*, 2 Cr. C. C., 703.

§ 374. A deed duly acknowledged and recorded need not be proved by subscribing witnesses. *Edmondson v. Lovell*,* 1 Cr. C. C., 108.

§ 375. The act of the legislature of Tennessee, declaring what should thereafter be received in courts as legal evidence of the authenticity of ancient deeds, is not a retrospective law. The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law. *Webb v. Den*,* 17 How., 576.

§ 376. The probate of a deed by a witness upon oath before a magistrate, for the purpose of having it recorded, and the certificate of the magistrate of its due probate upon such testimony, are entitled to more weight as evidence than the mere unexplained proof of the handwriting of a witness after his death. *Crane v. Morris*,* 6 Pet., 598.

§ 377. A subscribing witness to a deed may be compelled to attend court to prove it, so that it may be recorded. *Irwin v. Dunlap*, 1 Cr. C. C., 552.

§ 378. Lost deed.—Where a bill for discovery and relief on the ground of the loss of a deed or other instrument is not accompanied by an affidavit of the loss, advantage must be taken of the omission at the earliest stage of the case, if at all. Answering over waives objection. *Findlay v. Hinde*, 1 Pet., 241, 244.

§ 879. While the law allows parol evidence of the contents of a lost or destroyed deed, the testimony should be of a very clear and convincing nature in order to justify a jury in acting upon it, and setting aside a valid record title upon such proof. *Sacket v. McDonnell*, 8 Biss., 894, 896.

B. MORTGAGES OF REAL ESTATE.

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| <p>I. FORM AND REQUISITES, §§ 380-402.</p> <p>II. THE PARTIES, §§ 403-425.</p> <p> 1. <i>Who May Give a Mortgage</i>, §§ 403-419.</p> <p> 2. <i>Who May Take a Mortgage</i>, §§ 420-425.</p> <p>III. WHAT MAY BE MORTGAGED, §§ 426-431.</p> <p>IV. EQUITABLE MORTGAGES, §§ 432-447.</p> <p>V. ABSOLUTE DEED AND AGREEMENT TO RECONVEY, §§ 448-466.</p> <p>VI. PAROL EVIDENCE TO PROVE AN ABSOLUTE DEED A MORTGAGE, §§ 467-532.</p> <p>VII. THE DEBT SECURED, §§ 533-568.</p> <p>VIII. INSURANCE, §§ 569-592.</p> <p>IX. FIXTURES, §§ 593, 584.</p> <p>X. REGISTRATION AS AFFECTING PRIORITY, §§ 585-619.</p> <p>XI. NOTICE AS AFFECTING, §§ 620-633.</p> <p>XII. VOID AND USURIOUS MORTGAGES, §§ 634-656.</p> <p>XIII. MORTGAGOR'S RIGHTS AND LIABILITIES, §§ 657-687.</p> <p>XIV. MORTGAGEE'S RIGHTS AND LIABILITIES, §§ 688-715.</p> <p>XV. PURCHASER'S RIGHTS AND LIABILITIES, §§ 716-727.</p> <p>XVI. ASSIGNMENT OF MORTGAGES, §§ 728-750.</p> <p>XVII. MERGER AND SUBROGATION, §§ 751-761.</p> <p>XVIII. PAYMENT AND DISCHARGE, §§ 762-786.</p> <p>XIX. REDEMPTION, §§ 787-836.</p> <p>XX. MORTGAGEE'S ACCOUNT, §§ 837-880.</p> | <p>XXI. WHEN THE RIGHT TO REDEEM IS BARRED, §§ 881-902.</p> <p>XXII. WHEN THE RIGHT TO FORECLOSE IS BARRED, §§ 903-935.</p> <p>XXIII. REMEDIES FOR ENFORCING A MORTGAGE, §§ 936-979.</p> <p>XXIV. FORECLOSURE BY ENTRY AND POSSESSION, AND BY WRIT OF ENTRY, §§ 980-986.</p> <p>XXV. PARTIES TO EQUITABLE SUITS FOR FORECLOSURE, §§ 997-1024.</p> <p>XXVI. FORECLOSURE BY EQUITABLE SUIT, §§ 1025-1033.</p> <p>XXVII. APPOINTMENT OF A RECEIVER, §§ 1039-1045.</p> <p>XXVIII. STRICT FORECLOSURE, §§ 1046-1052.</p> <p>XXIX. DECREE OF SALE, §§ 1053-1064.</p> <p>XXX. FORECLOSURE SALES UNDER DECREES OF COURT, §§ 1065-1090.</p> <p>XXXI. JUDGMENT IN EQUITABLE SUIT FOR DEFICIENCY, §§ 1091-1103.</p> <p>XXXII. POWER OF SALE IN MORTGAGES AND DEEDS OF TRUST, §§ 1104-1200.</p> <p> 1. <i>Nature and Operation of Such Instruments</i>, §§ 1104-1120.</p> <p> 2. <i>Exercise and Suspension of the Power of Sale</i>, §§ 1121-1140.</p> <p> 3. <i>Notice of Sale Under Power</i>, §§ 1141-1156.</p> <p> 4. <i>Conduct of Sale</i>, §§ 1157-1182.</p> <p> 5. <i>Who May Purchase at Sale Under Power</i>, §§ 1183-1200.</p> |
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I. FORM AND REQUISITES.

SUMMARY — *Acknowledgment of a mortgage having blanks unfilled*, § 890. — *Interlineation presumed to have been made, when*, § 891. — *Reforming a mortgage*, § 882.

§ 880. There can be no valid acknowledgment of a mortgage until all material parts of the instrument are written in, such, for instance, as the name of the grantee, and the amount of the lien. Where a wife acknowledges an instrument intended to be a mortgage of her separate lands, while there are blanks for the insertion of the mortgagee's name and the sum borrowed, she is not estopped from denying that she signed and acknowledged the mortgage. *Drury v. Foster*, §§ 883-888.

§ 881. An interlineation, if suspicious upon its face, is presumed to be unauthorized. But if it is in the same handwriting as the original instrument, and bears no evidence of having been made subsequent to the execution of the instrument, it is presumed to have been made in good faith. *Cox v. Palmer*, § 889.

§ 382. A mortgage may be reformed by inserting the name of the mortgagee when this has been omitted by mistake, and it appears upon the face of the mortgage that the consideration moved from the complainant, that it was given to secure a debt due to him, and that the omission of the name was a mere oversight. *Parlin v. Stone*, §§ 390-392.

[NOTE.— See §§ 393-402.]

DRURY v. FOSTER

(2 Wallace, 24-35. 1864.)

STATEMENT OF FACTS.— This was a bill to foreclose a mortgage given by Foster and wife on the separate property of the wife. The money was borrowed for Foster's benefit, and it did not appear that the wife ever received any benefit from the same. When the mortgage was drawn up it was left blank as to the amount and the name of the mortgagee, and in this form was acknowledged by Foster and wife. She expressed some doubt as to the speculation in which her husband was about to engage, and intimated that she did not like to mortgage the land; but she signed the mortgage, and the certificate of acknowledgment was drawn up in the form required by the statute of Minnesota, stating that the parties acknowledged the deed to be their own voluntary act, and that Mrs. Foster was examined separate and apart from her husband. Subsequently Drury loaned Foster \$12,800, and the blanks in the mortgage were filled up accordingly. On a bill to foreclose, the bill was dismissed as to the wife, on the ground that the deed was not her deed.

§ 383. *Acknowledgment of deed by married woman in Minnesota.*

Opinion by MR. JUSTICE NELSON.

By the laws of Minnesota, an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a *feme covert*, is an essential prerequisite to the conveyance of her real estate or any interest therein. And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney. These disabilities exist by statute and the common law for her protection, in consideration of her dependent condition, and to guard her against undue influence and restraint.

§ 384. *Married woman not bound by a deed which was acknowledged in blank, the deed being subsequently filled up.*

Now, it is conceded, in this case, that the instrument Mrs. Foster signed and acknowledged was not a deed or mortgage; that, on the contrary, it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. We agree — if she was competent to convey her real estate by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance — that its validity could not well be controverted.

§ 385. *Parol authority sufficient to authorize alteration of sealed instrument.*

Although it was, at one time, doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient.

§ 386. — *blank instrument not a deed.*

But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed within the requisitions of the

statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the *feme covert* and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing.

§ 387. *Married women are not bound by an estoppel in conveyance of their property.*

It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *femes covert*. Instead of the transaction being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated.

§ 388. *Conclusiveness of officer's certificate of acknowledgment.*

There is authority for saying that, where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the *feme covert*, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that acts of the officer for this purpose are judicial and conclusive. We express no opinion upon the soundness of this doctrine, as it is not material in this case. The case before us is very different. There is no defect in the form of the acknowledgment or in the private examination. No inquiry is here made into them. The defect is in the deed, which it is not made the duty of this officer to write, fill up, or examine, and for the legal validity of which he is no way responsible. The two instruments are distinct. The deed may be filled up without any official authority, and may be good or bad. The acknowledgment requires such authority. The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was, therefore, nugatory. The truth is, that the acknowledgment in this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert*. The argument in support of its validity would be equally strong.

Our opinion is that, as it respects Mrs. Foster, the mortgage is not binding on her estate. We may regret the misfortune of the complainant from the conclusion at which we have arrived; but it seems to us impossible to extend the relief prayed for by the bill of foreclosure, without abrogating the protection which the law for ages has thrown around the estates of married women. Losses of the kind may be guarded against, on the part of dealers in real estate, by care and caution; and we think that this burden should be imposed on them, rather than that a sacrifice should be made of the rights of a class who are dependent enough in the business affairs of life, even when all the privileges with which the law surrounds them are left unimpaired.

Decree affirmed. (a)

COX v. PALMER.

(Circuit Court for Minnesota: 1 McCrary, 431-434. 1890.)

Opinion by McCrary, J.

STATEMENT OF FACTS.—This cause has been argued and submitted upon the merits. It is a suit brought to foreclose a mortgage. Upon the face of the mortgage there appears an interlineation, the words "block 19" being interlined upon the face of the instrument. Without these words the property described could not be located. They are, therefore, material, and the question is whether they were inserted before the execution of the mortgage, or afterwards. This question must be decided upon the proof, and in view of the law applicable to such cases. The mortgage was twice recorded. The words in question do not appear in the *first* record, but do appear in the second. Several years intervened between the first and second recording. It is contended by the defendants that the interlineation was made after the first recording, and without authority, while the plaintiff insists that the words were in the instrument as originally executed, and were omitted by the recorder in copying the same upon the record. The only testimony offered by the defendants is that of Henry H. Finley, one of the defendants, and who is the person who drew the mortgage. He testifies that the words "block 19" were not in the instrument when originally executed and filed for record. But the strength of this testimony is greatly impaired by certain facts which are in the evidence. In the first place, Mr. Finley has, since the execution of the mortgage, become the purchaser of the premises, and has, therefore, a strong interest in defeating the lien of the mortgage. Besides, he was the lawyer who drew the mortgage for the mortgagee, and the court will not presume, in order to give additional weight to his testimony, that he purposely omitted these material words of description, or that he accidentally did so, and afterwards, with knowledge of the mistake, and without informing his client for whom he had drawn the mortgage, undertook to defeat the mortgage by purchasing the property. The court will rather presume that, if the words were omitted from the original instrument, Mr. Finley did not know it at the time. If he did not know it at the time, he has clearly had no opportunity to ascertain it since, for he shows, by his own testimony, that he has not had possession of the instrument since its execution. Again, it appears beyond question that the interlineation is in the handwriting of Finley, and since he has not seen the mortgage since the time of its execution, it follows that he must have inserted the words in question at that time.

§ 389. *The rule of law as to interlineations in deeds and other instruments.*

It further appears, from the testimony of Mr. Horn, a witness for plaintiff, that when he called the matter of the interlineation to the attention of Finley, sometime before the commencement of this suit, the latter stated that the mortgage was all right, and that he had himself made the interlineation. It is true that Finley gives an entirely different version to this conversation, but, as he is an interested witness, his testimony must give way to that of Mr. Horn, in so far as they are in conflict. The most that can be claimed, with respect to the evidence bearing upon this question, is that it is evenly balanced, and, assuming that to be the case, my decision must turn upon a question of law. What is the presumption in such a case? Upon this question there is an apparent conflict of authority. I think, however, it is apparent only, and not real. There are cases in which it has been held that an interlineation is presumably

an unauthorized alteration of the instrument after execution, and that the burden is upon the party offering the instrument in evidence to show the contrary. There are also cases in which interlineations have been held to be *prima facie bona fide*, and that the burden is upon the party attacking the instrument to show that it was altered after execution. But I think that one rule governs in all these cases, and it is this: If the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution. *Stoner v. Ellis*, 6 Ind., 152; *Huntington v. Finch*, 3 Ohio St., 445; *Nichols v. Johnson*, 10 Conn., 192; *Burnham v. Ayer*, 35 N. H., 351; *Beaman v. Russell*, 20 Vt., 205.

These considerations dispose of the case so far as defendant Finley is concerned. The other defendants cannot claim to be *bona fide* purchasers without notice, because the mortgage was recorded the second time before they purchased. Decree for plaintiff for amount of note and interest, to be assessed by the clerk.

PARLIN v. STONE.

(Circuit Court for Missouri: 1 McCrary, 443-445. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—This cause has been argued and submitted for final decree upon the merits. The plaintiffs bring their suit in equity to reform and foreclose a mortgage.

The following are the material facts established by the proof: 1. Defendant John L. Stone was indebted to plaintiffs in the sum of about sixteen hundred (1,600) dollars, part of which was his individual debt, and the balance was the debt of John L. Stone & Co. 2. This indebtedness was partially secured by collateral notes turned out by defendants. 3. Plaintiffs called upon said John L. Stone for additional security, and after some negotiation it was agreed that they were to have a mortgage on two tracts of land. 4. The defendant John L. Stone represented to the plaintiffs that one of the said tracts of land was defendant's property, and that the other tract was the property of his son, Jeremiah Stone, and of record in his name. 5. Relying upon these representations, the plaintiffs accepted two mortgages, one of which was executed by defendant John L. Stone, and the other by defendant Jeremiah Stone; the latter being the mortgage sued on in this case. 6. The representations of said John L. Stone, that the title to one of said tracts was in his son Jeremiah Stone, was not true in fact. The title to said tract was at the time in said John L. Stone, who had executed a deed to his son Jeremiah, which had never been delivered, and has never since been delivered, but has probably been destroyed. 7. In executing the mortgage sued on, the names of the plaintiffs, as mortgages, were omitted by mistake.

§ 390. *In equity a mortgage may be reformed by inserting in it the name of the mortgages omitted by mistake.*

Upon consideration of these facts and the law applicable thereto, I have reached the following conclusions: 1. That plaintiffs are entitled to decree reforming the mortgage sued on, by inserting the names of plaintiffs as mortgagees, in accordance with the intention of the parties to the instrument. It is insisted by counsel for defendants, that inasmuch as no grantee is named in the mortgage the instrument is void, and the defect cannot be cured by parol evidence. This point is not well taken, since it appears upon the face of the mortgage itself that the consideration for the mortgage moved from the plaintiffs; that it was given to secure a debt due to them; and that the omission to fill the blank left for the insertion of the names of the grantees, with the names of plaintiffs, was a mere oversight.

§ 391. *Estoppel in pais.*

2. Inasmuch as the defendant John L. Stone, by his acts and representations, induced plaintiffs to believe that the land in controversy had been conveyed to Jeremiah Stone, and inasmuch as, acting upon that belief, the plaintiffs extended the time for the payment of their debt, and took a mortgage upon said land executed by said Jeremiah Stone to secure the same, John L. Stone is estopped to claim the land as against the lien of said mortgage. This, upon the doctrine of estoppel in pais. It would be a fraud upon the plaintiffs to permit said John L. Stone now to deny what by previous declarations and conduct he asserted, when on the faith of his representations the plaintiffs have acted. A person having title to real estate, who represents another as the owner, and thereby induces a third party to accept from that other a conveyance by deed or mortgage for a valuable consideration, is in equity bound by such conveyance, and is not permitted to set up his own title against it. *Rice v. Bunce*, 49 Mo., 231; *Story's Eq. Jur.*, sec. 385; *Sweeney v. Mallory*, 62 Mo., 485; *Hart v. Giles*, 64 Mo., 175.

§ 392. *A mortgages must account for notes received as collateral and collected by him.*

3. Inasmuch as the plaintiffs have received and collected certain collateral notes assigned to them as security for this debt, an account should be taken before a master or otherwise, as the court may direct, to ascertain the sum due the plaintiffs, and decree should be rendered reforming the defective mortgage and foreclosing the same as against all the defendants, including the said John L. Stone. The other defendants named, who are subsequent purchasers, are clearly shown to have purchased with notice of plaintiffs' equities.

§ 393. A mortgage is in substance but a security for a debt or an obligation to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument or their privies, it is a grant which operates to transmit the legal title to the mortgagee and leaves the mortgagor only a right to redeem. *Brobst v. Brock*, 10 Wall., 519 (§§ 697-705).

§ 394. The equitable doctrine in regard to mortgages is that, although in the form of conditional conveyances of the legal estate, they are merely securities for debts, and create only liens upon the property. The interests of mortgagees are regarded as real estate only so far as may be necessary to give them the full benefit of their securities. *Hutchins v. King*, 1 Wall., 53 (§§ 427-429).

§ 395. In Georgia a mortgage is nothing more than a security for a debt, the title remaining in the mortgagor until foreclosure and sale; this being a rule of property, the United States courts adopt the decision of the state courts. *United States v. Athens Armory*,* 35 Ga., 344, 353.

§ 396. In Oregon the title remains in the mortgagor until a valid conveyance is made by the person appointed to make the sale. The title does not pass by the sale, but by the delivery of the deed in pursuance of the sale. *Semple v. Bank of British Columbia*, 5 Saw., 98.

§ 397. In Oregon the equitable doctrine prevails that a mortgagee has no interest in the mortgaged property and no right to the possession thereof; that the mortgage is a mere security for the debt, and the mortgagee is limited to a sale of the property and the application of the proceeds upon his debt. The mortgagee cannot enter upon the premises as such mortgagee and take the rents and profits without the consent of the mortgagor, and this must appear and be shown by the mortgagee by some matter independent of, and collateral to, the mortgage. *Semple v. Bank of British Columbia*,* 5 Saw., 394.

§ 398. Where a mortgage was made by a married woman to a foreign corporation to secure her husband's debt, and this corporation attempted to dispose of the property by a judicial sale, but failed to do so because it attempted to purchase it, when by law it was prohibited from doing business in the state, the corporation having entered into possession and taken the rents and profits of the land, it was held that such married woman might recover the rents and profits from the corporation until her title was divested by a valid sale in pursuance of the mortgage. *Ibid*.

§ 399. In such suit the corporation was allowed to deduct from the rents and profits the amount paid by it for taxes and necessary repairs upon the premises, but was not allowed to deduct insurance premiums, because these were paid in the interest of the mortgagee, and did not improve the property. *Ibid*.

§ 400. Against whom mortgage may be reformed.—A mortgage cannot be reformed as against a prior judgment creditor; but if, having notice of the proceeding, and of a decree for the sale of the property free of incumbrances, he omits to protect his rights, and the property is sold under such decree, he cannot afterwards assert his rights as against the purchaser. *Fowler v. Hart*, 13 How., 373.

§ 401. The mortgagor's assignee in bankruptcy is not in the position of a purchaser for value without notice, and therefore the mortgage may be reformed as against him. *Schulze v. Bolting*,* 8 Biss., 174.

§ 402. A court of equity may correct a mistake in the description of land conveyed by mortgage and reform the deed as between the parties, but not as against purchasers without notice. *Reeves v. Vinacke*, 1 McC., 217 (§§ 623-626).

II. THE PARTIES.

1. Who May Give a Mortgage.

SUMMARY — Mortgage by wife for benefit of her husband's firm; forgery, § 403.—Power of corporation to mortgage; to secure future advances, § 404.—Mortgage securing president's own bond, § 405.—Parol evidence to show loan was for benefit of corporation, § 406.

§ 403. Where a mortgage is given of a wife's property for the benefit of a firm of which her husband was a member, the forgery of her name to the note of her husband, secured by the mortgage, invalidates the note and the mortgage too, even in the hands of an innocent indorsee. *Mersman v. Werges*, §§ 407, 408.

§ 404. A corporation has the power to mortgage its real estate as an incident to the power to acquire and hold it, and to make contracts in regard to it, when the power is not expressly denied. A corporation having such power may mortgage its property to secure future advances as well as a present debt. *Jones v. Guaranty & Indemnity Co.*, §§ 409-412.

§ 405. Where the president of an incorporated company obtains a loan for the company and the money is expended for its purposes, although it is his bond that is secured by the mortgage of the company's property, the debt is not his but the company's. *Ibid*.

§ 406. Parol evidence is admissible to prove that the consideration of such a mortgage inured to the corporation and not to the president whose obligation is secured. *Ibid*.

[NOTES.—See §§ 413-419.]

MERSMAN v. WERGES.

(Circuit Court for Iowa: 1 McCrary, 528-534. 1890.)

Opinion by LOVE, D. J.

STATEMENT OF FACTS.—This is a bill to foreclose a mortgage upon certain lands, the property of Lucy W. Werges, situated in Clayton county, Iowa. The husband, Casper A. Werges, joined in the mortgage without any title to

the lands, or any interest, except what the law gives him. The essential facts are as follows: Casper A. Werges, with one E. H. Kreuger, now deceased, was engaged in the milling business at Clayton county, Iowa, under the firm name of Kreuger, Werges & Co. E. H. Kreuger was the managing partner. Werges seems to have committed the business to his exclusive control. Kreuger went to St. Louis and agreed with the complainant for a loan of \$6,000 to the firm of Kreuger, Werges & Co., and for their use and benefit. To secure this loan, Casper A. Werges executed his note payable to the order of Kreuger, his partner. The mortgage in question was also executed, and delivered with the note, to Kreuger. Kreuger, while the note was in his possession, and before its delivery to the complainant, forged the name of Mrs. Werges to the note. He indorsed this forged note to the complainant, placed the mortgage in the hands of the recorder for record, and received the \$6,000 for which the note and mortgage were given.

The complainant was wholly ignorant of the forgery, and in no wise implicated in it. His perfect good faith in the transaction cannot be impugned. I find the fact to be that Kreuger committed the forgery of Mrs. Werges' name. There is no direct evidence to establish the fact, but the negative and circumstantial evidence is, to my mind, conclusive. It is in evidence, and not, I think, seriously questioned, that when the note passed into the hands of Kreuger the name of Mrs. Werges was not signed to it. Her name was placed upon the note by somebody who had an interest in so doing. Neither she nor her husband signed her name to the note. Her name was put to the note without her knowledge or consent. There is no evidence that the note was ever in the possession, after its delivery to Kreuger, of any person but Kreuger and the complainant. The complainant did not commit the forgery. This is conceded. Who, then, did commit the forgery? It must have been some one who had an interest in the note, and a motive to commit the crime. No stranger to the note, without interest or motive, would have forged Mrs. Werges' name, or could have done it without possession of the note. Casper A. Werges did not sign his wife's name to the note. She did not subscribe her name to it. Mersman did not. It was never, that we know of, in the hands of any stranger to the instrument. The inevitable conclusion is that Kreuger committed the forgery.

We can easily find a motive moving Kreuger to use the name of Mrs. Werges as he did. He probably found or apprehended difficulty in negotiating the note to Mersman without the name of Mrs. Werges. It is admitted by the complainant's counsel that it was understood by both Kreuger and Mersman that the note was to be signed by Mrs. Werges. This being the case, Kreuger had reason to believe that he could not get the money from complainant without the signature of Mrs. Werges to the note. In order, therefore, to get the money Kreuger forged the name of Mrs. Werges to the note. Perhaps he assumed in his own mind that he might do this with impunity, if not propriety, since by signing her name he would not substantially increase her liability, seeing that she had agreed to pledge her land by mortgage for the debt; or it is possible that to Kreuger's mind it appeared that the name of Mrs. Werges to the note would, under the circumstances, be at most a mere matter of form.

§ 407. A mortgage by a married woman for the benefit of another is rendered void by a forgery of her name to the note.

The note and mortgage must be treated as one contract. The parties evi

dently so intended them. They were delivered together, and at the same time, as security for the debt. The complainant would not otherwise have received them, and advanced the money upon them. Considered in this light, they must be construed together, and their true character is that of accommodation paper. The paper was especially such as to Mrs. Werges, who received no consideration whatever for executing the mortgage. Casper A. Werges executed the note for the accommodation of the firm to which he belonged, and his wife joined him in the mortgage to secure the same. She was clearly a surety for the firm of Kreuger & Werges. She executed the mortgage for the accommodation of that firm. The note and mortgage were in form given to Kreuger, and made payable to his order, to enable him to indorse the note, and thus transfer both note and mortgage to the complainant as security for the money to be loaned by the plaintiff to the firm. While the note and mortgage were in the hands of Kreuger, and before the transfer, Kreuger forged Mrs. Werges' name to the note. He thus entirely changed her relation to the transaction. He made her a principal instead of a surety in the contract evidenced by the note and mortgage. Can it be doubted that the moment Kreuger changed the contract without Mrs. Werges' consent she was released? She signed the contract for the accommodation of the firm. A member of the firm so changed it, without her authority, as to make her a principal instead of an accommodation party. Surely, then, the note and mortgage ceased, as to her, to have any validity in the hands of Kreuger, and Kreuger could transfer to the complainant no better title as against Mrs. Werges than he himself had. The contract evidenced by the note and mortgage was not Mrs. Werges' contract after the forgery of her name to the note, and it could not be made her contract by its transfer to the complainant. The instrument which Mrs. Werges signed was not negotiable, and the note ceased to be so in the hands of Kreuger after he destroyed its identity, and made it a different note from that which the parties had signed, by the forgery of Mrs. Werges' name to it.

Suppose a party holding negotiable paper delivered to him for his own accommodation, for the purpose of enabling him to raise money upon it, makes a material alteration of it, and then passes the paper for value to an innocent indorsee. Can the original accommodation makers be held upon the paper? Clearly not, because the paper passed to the innocent indorser is not the deed of the accommodation makers. Nothing is better settled in the law of negotiable paper than that those defenses which go to the very inception and validity of the paper may always be set up against an innocent holder of the paper. Hence, where the name of a party has been forged to a negotiable bill or note, or where it has been executed without his authority, it is utterly void as against him in the hands of an innocent holder or indorsee. The same rule must undoubtedly hold as to any material alteration made after its execution or indorsement, when it is sought to enforce the paper against the maker or indorser. Suppose the holder of a note for one thousand dollars should change it to two thousand dollars, and then indorse it before due for value, could the maker be made liable upon it? Would such an instrument be the deed or contract of the maker? Would the holder have any authority whatever to bind the maker by indorsing it over for value? But it is insisted that, even setting aside the note as utterly null and void, this suit can be maintained upon the mortgage alone; that Mrs. Werges undeniably executed the mortgage, and her genuine signature to it; that the real consideration of the mortgage was the debt of \$6,000, due from the firm of Werges & Kreuger to the complainant; that the note was at

most but evidence of that debt; and that the real purpose and intention of Mrs. Werges in giving the mortgage was to secure the debt. Hence, it is argued that the provision of the mortgage, that it should stand as a security for the payment of the note of Casper A. Werges to E. H. Kreuger, was more a matter of form than substance, and that it can be no wrong to Mrs. Werges to compel payment by the sale of her property of the very debt that she purposely pledged it to pay.

It will be seen that this argument is exceedingly ingenious and plausible. It is, however, in my judgment, untenable. Mrs. Werges saw fit to pledge her land by mortgage to pay a note executed by her husband to Kreuger. *Non constat* that she would have mortgaged her property in any other form. If she had been asked to give a mortgage to secure the debt of the firm of Kreuger & Werges to the plaintiff, she might, for aught we know, have refused. Parties may contract in a certain form, and they have a right to do so. The law cannot change their contract, and hold them to the substance of it in a wholly different form. The debt in this case was not Mrs. Werges'. The consideration did not move to her. Her property is bound for it only by virtue of her express contract. She cannot be made liable on the ground that she received the consideration, and therefore that, irrespective of the written evidence, she is bound to pay the debt. She can be made liable for the debt only in pursuance of the terms of her written contract, and not otherwise. In order to have fixed her liability, or rather that of her property, it would have been necessary, as the contract was actually made for Mersman, to present the note to Casper Werges, the maker, and protest it for non-payment. Setting aside the note as a part of the contract, and proceeding directly upon the mortgage, no demand, notice or protest was necessary. In a word, by treating the note as a nullity, and proceeding directly on the mortgage, a collateral and conditional liability would be changed into a direct and absolute liability.

Again, as the contract was, in fact, made, Mrs. Werges was a surety for her husband. She pledged her property, without consideration to her, for his debt. If we set aside and disregard the note, and proceed upon the debt and mortgage directly, she becomes a joint debtor with her husband upon the face of the contract of mortgage. She is a joint obligor with her husband, and in order to entitle herself to any of the rights of a surety she must resort to parol evidence, showing her true relation to the debt. In a word, by setting aside the note, to which the mortgage was a mere incident, and treating the mortgage as the evidence of indebtedness, we change the position of Mrs. Werges upon the face of the written contract from that of a surety, which she was, to that of a principal debtor, which she was not. Again, the debt was, in fact, not that of her husband individually. It was the debt of the firm. By charging her directly upon the mortgage, making the debt, not the note, the basis of her liability, she becomes the surety, not of her husband, which she in fact was, but the surety of the firm of Kreuger & Werges, which she in truth was not.

§ 408. *No jurisdiction.*

Lastly, if we reject the note and count exclusively upon the mortgage, the jurisdiction here clearly fails. The mortgage was not a negotiable instrument; it was given to Kreuger in his name, and by him assigned by delivery to the complainant. Kreuger could not have sued these defendants in this court upon the mortgage, being himself a citizen of Iowa. Therefore his assignee,

the complainant, cannot maintain an action here. The complainant is clearly within the prohibition of the judicial act, and the amendatory act of 1875. See *Sheldon v. Sill*, 8 How., 441, 449.

JONES v. GUARANTY AND INDEMNITY COMPANY.

(11 Otto, 622-683. 1879.)

APPEAL from U. S. Circuit Court, Eastern District of New York.

STATEMENT OF FACTS.—Cozzens, president of the "Oil Company," a New York corporation, borrowed for it from the Guaranty Company \$100,000 in three different loans, one of \$50,000, and two others of \$25,000 each. He gave his personal bond, but the loans were secured by mortgage of the Oil Company's property. Part of the loans were made after the mortgage was executed. It was stated in the mortgage that the amount was to be paid by the Oil Company, not by Cozzens. While the debt was outstanding the Oil Company and Cozzens both failed, and this suit was brought assailing the validity of the mortgage by the unsecured creditors. It was sustained by the circuit court.

Opinion by MR. JUSTICE SWAYNE.

The analysis of this case in the preceding statement divests it of all extraneous considerations, and presents it in the nakedness and simplicity of its material facts. The central and controlling questions to be determined are: Whether the Oil Company had the power to give a mortgage for future advances; and whether the mortgage here in question is, in the view of a court of equity, for the debt of the Oil Company or for the debt of Abraham M. Cozzens.

§ 409. *A corporation, having the power to mortgage its property, can mortgage it for advances thereafter to be made.*

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the circuit court, and shall pass them by without further remark. At the common law every corporation had, as incident to its existence, the power to acquire, hold and convey real estate, except so far as it was restrained by its charter or by act of parliament. This comprehensive capacity included also personal effects of every kind. The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd, Corp., 69, 76, 78, 108; Angell & Ames, sec. 145; 2 Kent, Com., 282; *Reynolds v. Commissioners of Stark County*, 5 Ohio, 204; *White Water Valley Co. v. Vallette*, 21 How., 414. A mortgage for future advances was recognized as valid by the common law. *Gardner v. Graham*, 7 Vin. Abr., 22, pl. 3. See, also, *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.), 320; *Lawrence v. Tucker*, 23 How., 14. It is believed they are held valid throughout the United States, except where forbidden by the local law.

§ 410. — *the Oil Company by its charter had the power to mortgage its property.*

The statute under which the Oil Company came into existence made it "capable in law of purchasing, holding and conveying any real and personal

estate whenever necessary to enable" it to carry on its business; but it was forbidden to "mortgage the same or give any lien thereon." This disability was removed by the later act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is therefore to be construed liberally with reference to the ends in view. The learned counsel for the appellant insisted that a mortgage could be competently given by the Oil Company only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law. *The People v. Utica Insurance Co.*, 15 Johns. (N. Y.), 357; *United States v. Babbit*, 1 Black, 55. The view of the court in *Thompson v. New York & Hudson River R. Co.*, 3 Sandf. Ch. (N. Y.), 625, was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result, with respect to the security, would be just the same as if the mortgage were given for a pre-existing debt, in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars, would be the same, whether the transaction took one form or the other. According to our construction, the company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the state. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained. Our view is not without support from the language of the statute, that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining doubtless would not have been brought before us for consideration. When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity. *Sumner v. Hicks*, 2 Black, 532. It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the

reason insisted upon. The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the state. As to all other parties, it must be held valid, and may be enforced accordingly. *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.), 370; *National Bank v. Matthews*, 98 U. S., 621. In the latter case this subject was fully examined. A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor. No one else can raise the question. All other parties are concluded. *Gordon v. Preston*, 1 Watts (Penn.), 385. Where money had been obtained by a corporation upon its securities, which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. *In re Cork & Youghal R'y Co.*, Law Rep., 4 Ch., 748. A court of equity abhors forfeitures, and will not lend its aid to enforce them. *Marshall v. Vicksburg*, 15 Wall., 146. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Lewis v. Lyons*, 13 Ill., 117.

§ 411. *Whether a mortgage debt is the debt of the corporation making the mortgage, or of the officer whose own bond is secured.*

The second point to be considered is whether the mortgage was for the debt of Cozzens or for the debt of the Oil Company. Cozzens occupied a twofold relation to the latter. He owned all the stock but a trifle, and was the president of the company. At the same time he was largely its creditor. When he applied to the Guaranty Company he appeared in his official character, and proposed a present loan to the Oil Company of \$50,000 upon its note, and further advances thereafter to the amount of \$50,000, making in the aggregate the sum of \$100,000, the whole to be secured by a mortgage from the company upon all its real estate. This offer was accepted. The proposition as to the mortgage was in writing, and signed by Cozzens as president. It mentioned a loan of \$50,000 as already made to the Oil Company, and spoke of "any future loan you may make to our company," as the liabilities to be secured. Let us pause for a moment and consider the position of the parties at this point of time. So far, all that had been done and all that had been proposed and agreed to be done was in form and substance solely for the Oil Company. Nothing had been done or proposed for Cozzens individually. There is no ground for the allegation or suspicion that the transaction was in aught otherwise than as we have stated it. It is true the Guaranty Company held the indorsement, not of Cozzens, but of Cozzens & Co., on the note of the Oil Company, for \$50,000. But the Oil Company was primarily liable. Cozzens & Co. were responsible as indorsers and sureties, and were liable to be called upon only in the event of the default of the principal debtor. Until that occurred they could not be required to respond; and in that contingency they would have been liable as any other sureties are under the same circumstances. The Oil Company was the principal debtor.

When the agreement between the Oil Company and the Guaranty Company came to be carried out, the scrivener by whom the papers were prepared, with-

out the request or knowledge of the Guaranty Company, described in the mortgage the penal bond of Cozzens as the thing to be secured, but the mortgage recited that the president had been authorized to make the loan and to execute the mortgage to secure its payment, and that the requisite consent of the stockholders had been given, and the condition of the mortgage was that the Oil Company, and not Cozzens, should pay whatever might become due upon the bond. It is true that Cozzens covenanted personally in the mortgage to pay, while there was no such covenant on the part of the company. The first indorsement upon the bond was made upon the renewal of the company's note of \$50,000, held by the Guaranty Company. One of those of \$25,000 was for that amount advanced upon the note of the Oil Company for the like sum. The remaining indorsement was for that amount advanced upon a warehouse receipt for oil given by the company to Cozzens, and by him transferred to the Guaranty Company. All the moneys thus advanced were applied exclusively for the benefit of the Oil Company. There can be no question as to the first indorsement on the bond of \$50,000 being the debt of the mortgagor. It was the same debt which subsisted when the first note was delivered to the Guaranty Company, and the character of the debt was not changed by the renewal of the note and the indorsement on the bond then made.

If a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid. Changes in the form of the instrument are immaterial. Equity regards only the substance of things, and deals with human affairs upon that principle. The same state of things in effect occurred with respect to each of the other sums advanced by the Guaranty Company. The note and warehouse receipt given for them were the note and receipt of the Oil Company, and it was responsible accordingly. Its needs were the motive, and were at the foundation of every loan that was made; and whether Cozzens acted as its agent in making them, or transferred the securities as a creditor acting for himself, is quite immaterial. The result is inevitably the same. In either case the Oil Company became directly liable upon the securities, and, to that amount, the principal debtor to the mortgagee. The condition of the mortgage being that the company should pay and not that Cozzens should, it could not be broken without the company's default. Until that occurred, there could be no remedy upon it either by foreclosure or ejectment. If Cozzens made default, no such consequence would follow. He could be sued on his covenant, but the rights and remedies of the mortgagee with respect to the mortgaged premises would be neither more nor less on that account. The covenant of Cozzens was collateral to the liability of the company. No such covenant was needed from the Oil Company, because the mortgage pledged its entire real estate, and the mortgagee held in addition a direct liability for each advance upon which a judgment at law could be taken. As before remarked, there could be no breach of the condition of the mortgage without the default of the Oil Company; and if it had paid the amount due, that would have extinguished the collateral liability of Cozzens and of Cozzens & Co., and if the tender had been refused, it would have extinguished the mortgage, though not the debt. *Kortright v. Cady*, 21 N. Y., 343. In all that Cozzens did he acted as the agent of the Oil Company, and it would involve an utter perversion of the facts to hold that he and not that company was the principal debtor to the Guaranty Company. We are satisfied beyond a doubt that it was the debt of the Oil Company and not his debt that was intended to be secured and was secured by the mortgage.

§ 412. *Parol evidence is admissible to prove that the consideration of a mortgage inured to the mortgagor and not to the party whose obligation it secured.*

In examining this point, it was proper to consider all the evidence in the record. This was objected to by the counsel for the appellant. He insisted that the scope of our view must be limited to the face of the mortgage and the obligation secured by it. It is common learning in the law that parol evidence is admissible to show that a deed absolute on its face is a mortgage, to establish a resulting trust, to show that a written contract was without consideration, that it was void for fraud, illegality, or the disability of a party, that it was modified as to the time, place or manner of performance or otherwise, or that it was mutually agreed to be abandoned; also to show the situation of the parties and the surrounding circumstances when it was entered into, and to apply it to its subject, to show that a joint obligor or maker of a note was a surety, and that the acceptor or indorser of a bill or the maker or indorser of a note became such for the accommodation of the plaintiff. Where a party has entered into a written contract, it may be so shown that he did it as the agent of another, though the agency was concealed and the principal not disclosed, and the principal, in such case, may be held liable upon it. A mortgage or a judgment may be assigned by parol. These are but a small part of the functions which such evidence is permitted to perform. In no class of cases is it admitted with greater latitude and effect than in that to which the one here in hand belongs. In *Shirras v. Caig*, 7 Cranch, 34 (§§ 556-558, *infra*), Mr. Chief Justice Marshall said: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums due at the time to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount." After remarking that such an instrument was liable to suspicion, he proceeds: "But if, on investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured by the misrepresentation. That cannot have happened in the present case." The decree of the court was that the mortgagees were entitled to have the mortgaged premises sold, "and to apply the proceeds of said sale to the payment of what remains unsatisfied of their respective debts," etc.

In *Gordon v. Preston*, *supra*, it appeared that the mortgage was for a greater amount than was owing to the mortgagee. Chief Justice Gibson said the mortgage was good "for the sum actually due." He said further: "But the mortgage was in fact given for the benefit of other creditors, whose debts are not disputed, and though the trust is not expressed in the instrument, *evidence was proper to explain the true nature of the transaction and negative any imputation of actual fraud.*" In *Hurd v. Robinson*, 11 Ohio St., 232, the condition of the mortgage was: "Provided, always, and these presents are upon the condition, that whereas the said Robinson is indebted to said bank for money loaned, and for divers bills of exchange and promissory notes, now if the said Robinson shall discharge his said several liabilities in six months from this date, these presents shall be void, otherwise to remain in full force and virtue." The condition was held to be sufficiently definite, and the mortgage was sustained. The opinion of the court is able and elaborate. *Gill v. Pinney*, 12 Ohio St., 38, is to the same effect. Other like cases might be multiplied to an

indefinite extent. It is unnecessary to incumber this opinion with further references. The grounds upon which they proceed are, that a thing is to be regarded as certain which can be made certain; that evidence can be adduced to apply the contract to its subject; that where there is enough to put those concerned upon inquiry, the means of knowledge and knowledge itself are, in legal effect, the same thing. *A multo fortiori* was it proper to receive the evidence referred to in the present case. See in this connection, also, *Chester v. Bank of Kingston*, 16 N. Y., 336, and *Horn v. Keteltas*, 46 id., 605.

Decree affirmed.

§ 413. **Mortgage by a person drunk.**—A deed of trust, executed and acknowledged by the grantor when he was in such a condition of mind on account of drunkenness that he could not comprehend its terms and conditions, is void. *Harmon v. Johnston*,* 1 MacArth., 139.

§ 414. **A married woman can, by deed duly executed and acknowledged, bind her separate estate for the payment of a specified debt of her husband.** *Stephen v. Ball*, 23 Wall., 329 (§§ 1186-1189).

§ 415. **Under the laws of Louisiana, a wife cannot bind her property for debts contracted by the husband; but if she mortgage her property under assurances made to the mortgagee, the loan is for her exclusive use, and the money is actually paid to her and the mortgagee acted in good faith, she cannot invoke the aid of a court of chancery to relieve her of her mortgage.** *Bein v. Heath*, 6 How., 238.

§ 416. **In Missouri a married woman may mortgage her real estate.** *Parsons v. Denis*,* 2 McC., 359.

§ 417. **A gas company organized under the Illinois statute of February 18, 1857, which provides that a corporation shall be capable of purchasing and holding, conveying and disposing of such real and personal estate as may be necessary to enable said company to carry on its business, has power to mortgage its property.** *Gaytes v. Lewis*, 2 Biss., 136, 137.

§ 418. **A corporation cannot execute a mortgage deed of land otherwise than under its seal.** *In re St. Helen Mill Co.*, 3 Saw., 88, 90.

§ 419. **Power to mortgage.**—In Indiana a power to sell, conferred by will, may, under some circumstances, be held to include a power to mortgage, although in this state a mortgage does not convey the land, but only a security or lien upon it. *Downie v. Downie*, 9 Biss., 353, 356; 4 Fed. R., 57.

2. Who May Take a Mortgage.

§ 420. **An alien is entitled to hold and enforce a mortgage, this being regarded as a personal interest, the debt being the principal thing, and the land merely an incident.** *Hughes v. Edwards*, 9 Wheat., 489 (§§ 919-925).

§ 421. **Foreign insurance companies can lawfully invest their means in Illinois mortgages.** *Hards v. Conn. Mut. L. Ins. Co.*,* 8 Biss., 234.

§ 422. **Banks.**—A mortgage taken in violation of the prohibition in the national banking act of a loan made upon real estate security is valid and may be enforced by a sale of the lands. The remedy for the violation is a forfeiture of the bank's charter, and this remedy can be enforced only by the United States. *National Bank v. Matthews*, 8 Otto, 621, 625; *National Bank v. Whitney*, 13 Otto, 99, 103.

§ 423. **United States.**—A deed of trust to secure a debt to the United States is not prohibited by an act of congress, providing that no land shall be purchased on account of the United States except under a law authorizing such purchase. *Neilson v. Lagow*, 12 How., 98.

§ 424. **Tenants in common.**—In Rhode Island, by statute of 1793, all grants to two or more persons create tenancies in common, unless words in the instrument of conveyance clearly and manifestly show an intention to create a joint tenancy. Though the conveyance be in mortgage, it is held that there is no implication controlling the statute that the mortgagees are joint tenants. *Randall v. Phillips*,* 8 Mason, 378.

§ 425. **Compromise creditors.**—Where a deed of trust was given by a debtor to secure his creditors under a compromise, which contained a proviso that if they should fail within ninety days from its date to signify in writing their acceptance of the terms of settlement, they should be considered as refusing the same, their acceptance in writing was held to be not a condition precedent to the vesting of the property in the trustee for their benefit, nor was it a condition upon which the trust was to be executed. It was at best only a condition subsequent, in

the nature of a penalty against creditors not assenting in the prescribed way, and could be waived by the grantors. Where a party has complied in substance with such a proviso in a deed of trust, he is not liable for a failure to comply to the letter. *Bank v. Partee*, 9 Otto, 328.

III. WHAT MAY BE MORTGAGED.

SUMMARY — *Mortgage covers timber wrongfully cut from the mortgaged land*, § 426.

§ 426. A mortgage of land covers the timber growing upon it. It covers the timber after it is wrongfully cut and removed from the land by the mortgagor; even the sale of it by the mortgagor does not divest the mortgage lien, but the purchaser takes it subject to such lien. The mortgagee can follow the timber, and take possession of it, and hold it as security for the payment of the mortgage debt. *Hutchins v. King*, §§ 427-429.

[NOTES.— See §§ 430, 431.]

HUTCHINS v. KING.

(1 Wallace, 59-60. 1863.)

ERROR to U. S. Circuit Court for New Hampshire.

STATEMENT OF FACTS.— Goodall sold land and took a mortgage to secure the purchase money, the notes maturing in one, two and three years. Certain timber cut on the land by the mortgagors, under the circumstances stated in the opinion, was sold by them to King. Hutchins and Woods succeeded to the rights of the mortgagee, and took possession of the timber and sold it, and King brought this action against them to recover the value of the timber. The finding below was in favor of King.

Opinion by MR. JUSTICE FIELD.

The stipulations in the mortgage to Goodall provided, as we construe them, that the mortgagors should have the right to enter upon the mortgaged premises and cut timber, at first to the value of \$1,000, and subsequently as they made the several payments designated, to the value of the sums paid; but that in case they failed to make any one of the payments designated, they were to cease cutting and to surrender possession until the amount due was paid. The timber, for the conversion of which the present action is brought, was cut after the interest on some of the notes secured had become due, and whilst it remained unpaid, and the greater portion of it was cut after the principal of one of the notes had matured and was also unpaid. In June, 1856, after the note which had matured was paid, but whilst a suit for the interest on the other notes was pending, the mortgagors sold the timber cut to King, the plaintiff below, the defendant in error in this court. The defendants below, Hutchins and Woods, who had succeeded, by assignment of the notes and delivery of the mortgage, to the rights of the mortgagee, in September, 1856, took possession of the timber cut, and subsequently disposed of it, and appropriated the proceeds. In November following, the interest due on the unpaid notes was collected. It does not appear from the record at what precise period the defendants disposed of the timber, but we assume from the argument of counsel that this was done after their collection of the interest. In 1859 the present action was brought to recover the value of the timber alleged to have been thus converted.

The defense rested mainly upon a claim of ownership in the property by the defendants. The position taken by their counsel in the court below, and urged in this court, was substantially this: that, between the parties to the mortgage, the mortgagee was the owner of the land, and as such was clothed with all the rights and privileges of ownership; that the license to cut timber contained in the stipulations of the mortgage ceased upon the first failure to meet one of the

payments designated; and that after default, the defendants succeeding to the interests of the mortgagee, had the absolute right to all the timber cut from the land, without liability to account to any one. We do not state the position of the defendants in the precise language of their counsel, but we state it substantially.

§ 427. *A mortgage, although in form a conveyance of a conditional estate, is a mere security for a debt.*

A mortgage is in form a conveyance, vesting in the mortgagee upon its execution a conditional estate, which becomes absolute upon breach of the condition. At law it was originally held to carry with it all the rights and incidents of ownership. The right of the mortgagee to be treated as owner of the mortgaged premises could only be defeated upon the performance of the conditions annexed by the day designated. Subsequent performance only gave a right to the mortgagor to resort to a court of equity for relief from the forfeiture arising upon breach of the conditions. Such is the law at this day in some of the states of the Union. But in a majority of the states the law in this respect has been greatly modified by considerations drawn from the object and intention of the parties in executing and receiving instruments of this character. The doctrine established by courts of equity, looking through the form to the real character of the transaction, that a mortgage is a mere security for a debt, and creates only a lien or incumbrance, and that the equity of redemption is the real and beneficial estate in the land, and may be sold and conveyed in any of the ordinary modes of transfer, subject only to the lien of the mortgage, has to a great extent, "by a gradual and almost insensible progress," as Kent observes, been adopted by the courts of law. 4 Kent, 160. To such a degree has this equitable view prevailed that the interest of the mortgagee is now generally treated by the courts of law as real estate, only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security. Although, in the absence of stipulations as to the possession, he may enter upon the premises, his interest is widely different from that of owner. He cannot by conveyance transfer any interest in the premises without a transfer of the debt secured. *Jackson v. Bronson*, 19 Johns., 325. His interest is not subject to attachment or seizure on execution. *Jackson v. Willard*, 4 Johns., 41. He cannot remove the buildings on the premises, nor the fixtures attached; nor can he subject the premises to any uses but such as may furnish the means for the payment of the debt secured without impairing the value of the estate.

In few states is the equitable doctrine respecting mortgages more clearly asserted than in New Hampshire, where the mortgage was executed upon which the rights of the parties to the present action arise. Thus, in *Southerin v. Mendum*, 5 N. H., 429, the supreme court of that state, in considering the nature of the interest which a mortgagee possesses, said: "In order to give him the full benefit of the security, and appropriate remedies for any violation of his rights, he is treated as the owner of the land. But for other purposes the law looks beyond the mere form of the conveyance to the real nature of his interest, and treats his estate in the land as a thing widely different from an estate in fee simple." In that case it was held that the interest of the mortgagee in the land was a mere chattel, and passed by a simple delivery of the note secured as an incident of the debt. And in *Ellison v. Daniels*, 11 N. H., 274, the same court said: "The right of the mortgagee to have his interest treated as real estate extends to and ceases at the point where it ceases to be necessary to enable him to avail himself of his just rights, intended to

be secured to him by the mortgage." In that case the demandant in a writ of entry was mortgagor, and the tenant claimed under the mortgagee through various mesne conveyances executed after the law day, and it was held that nothing passed to the tenant, the court observing that to enable the mortgagee to sell and convey his estate was not one of the purposes for which his interest is to be thus treated; that there was no necessity that it should be so treated, as the sale could be equally well effected by the transfer of the note secured by the mortgage.

§ 428. *Mortgagee cannot sell timber wrongfully cut by mortgagor.*

With these views of the nature of the interest of the mortgagee, under the law of New Hampshire, the question presented in the case at bar becomes one of easy solution. The timber growing upon the land mortgaged constituted a portion of the realty. It was embraced in the pledge of the land as security. As the assignees of the mortgage held the land, so they held the timber upon it, both before and after it was cut, as a portion of their security. They could not sell it any more than they could pass, by their conveyance, the fee of the land. The mortgagors had, it is true, no right to cut the timber after default made in any of the payments designated in the mortgage. They could do nothing to diminish the value of the estate. The right to cut the timber rested upon the license contained in the stipulations of the mortgage. Their cutting, except in pursuance of such license, might have been restrained, upon proper application, by a court of equity. *Brady v. Waldron*, 2 Johns. Ch., 148. The sale by them after it was cut did not divest the lien of the assignees of the mortgage; the purchaser took the timber subject to their paramount rights. The assignees could follow it and take possession of it, and hold it until the designated amounts due at the time were paid. When these were paid, their rights over it ceased, and the vendee of the mortgagors became invested with a complete title. The subsequent detention of the timber by the assignees was wrongful, and the sale of it a conversion, for which they were liable to the purchaser.

§ 429. *A bill of exceptions must show that exception to ruling of court was taken at the time.*

Some other positions were pressed by the plaintiffs in error upon the attention of the court on the argument, but we do not notice them; because what is termed in the transcript "a bill of exceptions," does not show that any exception was taken to the rulings of the court. The bill simply shows that certain positions were urged by the parties, and that certain rulings were made. We have, however, considered the material question argued, because no objection was taken to the record on the argument, and because the associate justice of this court, who presided at the circuit where the cause was tried, informs us that an exception was in truth taken, and that the omission of the bill to state the fact is a mere clerical error. We do not intend, however, to allow this case to be drawn into a precedent. To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon. *Judgment affirmed.*

§ 430. A pre-emption right may be the subject of a mortgage by the pre-emptor although the legal title be in the United States. *Bush v. Marshall*, 6 How., 234 (§§ 673-375). See § 432.

§ 431. A mortgage of a crop, though made before the seed is sown, attaches as a lien from the time the crop comes into existence. *Butt v. Ellett*,* 19 Wall., 544.

IV. EQUITABLE MORTGAGES.

SUMMARY — *Pre-emption claim*, § 432. — *Agreement to mortgage*, § 433. — *Deposit of title deeds*, § 434.

§ 432. A pre-emption claim after entry may be mortgaged, though it is not perfected. *Wright v. Shumway*, §§ 435-439. See § 430.

§ 433. An equitable mortgage arises from an agreement to purchase and mortgage certain land. *Ibid.*

§ 434. An equitable mortgage may arise from the deposit of a title deed, where an equity is shown beyond the mere deposit of such deed; as where a creditor held as security coupons convertible into lands, and these were replaced by the delivery of an unrecorded deed of the lands running to the debtor. This equitable lien was held to be superior to the lien of a general judgment against the debtor. *First National Bank v. Caldwell*, § 440.

[NOTES.— See §§ 441-447.]

WRIGHT v. SHUMWAY.

(District Court for Wisconsin: 1 Bissell, 23-28. 1853.)

STATEMENT OF FACTS.— Proceeding in equity to foreclose a mortgage given by the defendants upon certain unsurveyed public lands upon which they had settled, to secure the payment of their promissory notes in the sum of \$1,200 to complainants. In the deed the defendants agreed to purchase the said land from the government whenever it was surveyed and put up for sale, and then to re-mortgage it to complainants or their heirs. In 1852 the lands were surveyed and offered for sale. John Shumway, one of the defendants, proved up a pre-emption right and entered one quarter section; the certificate of location was assigned by him to Fitzgerald, a co-defendant, and the latter entered another quarter section in his own name for Charles Shumway, a defendant herein, giving to each a bond for \$500, conditioned that he should give to each of them a deed for a quarter section, for a consideration of \$200, interest and annual taxes, within two years thereafter.

§ 435. *Private sales or mortgages of pre-emption claims, though the latter are not yet perfected, are valid.*

Opinion by MILLER, J.

It is contended on the part of the defendants that the deed of the Shumways to complainants is a contract in violation of the act of congress, approved March 31, 1830 (4 Stats. at Large, 392), entitled "An act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," and is therefore void. I do not think that this position is tenable. There is nothing in the deed tending to the formation of a combination of purchasers, or to prevent biddings for the land at a government public sale. But the improved portion of the land was not intended by the Shumways to be the subject of a public sale. As settlers and improvers, at the date of the deed, they considered that their right to pre-emption would be secured, which was afterwards perfected through Fitzgerald. The deed is not within the prohibition of the act. Private sales of pre-emption claims of settlers are recognized as valid by the federal courts. *Bush v. Marshall*, 6 How., 284 (§§ 673-675, *infra*); *Thredgill v. Pintard*, 12 How., 24.

§ 436. *A mortgage founded upon a past consideration is valid.*

At the date of the deed, the Shumways had peaceable and undisturbed possession of the land, with the tacit or implied assent of the United States, and had erected thereon a saw-mill, dwellings, a tavern stand and other buildings;

and they had an inchoate right of pre-emption. In consideration of their indebtedness to the complainants, they made the deed as a security. The debt was then payable. A conveyance, covenant or mortgage founded on a past consideration is valid.

§ 437. *Where the money is due and payable, and no time of payment is fixed, a foreclosure will be decreed at any time.*

When the money is due and payable, and no time is mentioned in the mortgage for its payment or redemption, a foreclosure will be decreed at any time. And a mortgage intended to secure a certain debt is valid in equity, for that purpose, whatever form the debt may assume. The consideration expressed in the deed is valuable, and is sufficient to authorize the court to enforce performance of its covenants.

§ 438. *Where the mortgagor acquires a perfect title to the property after the mortgage, it inures to the benefit of the mortgagee.*

It is further contended that the deed is of no validity, the premises not being legally vested in the Shumways. The deed does not purport to be a mortgage of the fee, but nevertheless it may be valid. In equity, whatever property, real or personal, is capable of an absolute sale may be the subject of a mortgage. Therefore, rights in remainder and reversions, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged. 2 Story's Eq. Jurisprudence, § 1021. And courts of equity support assignments of, or contracts pledging property, or contingent interests therein, and also things which have no present, actual, potential existence, but rest in mere possibility. *Mitchell v. Winslow*, 2 Story, 630. If a mortgage be made of an estate, to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, a good title, the mortgagee will be entitled in equity to the benefit of it, for it will be considered as a graft into the old stock, and as arising in consideration of the former title. *Seabourne v. Powell*, 2 Vern., 10; *Best v. Meddlenurst*, 3 Atk., 276; *Goodright v. Meade*, 3 Burr., 1703; *McGinnis v. Noble*, 7 Watts & Serg., 454.

§ 439. *An agreement to purchase and mortgage certain land is a specific lien, which will be enforced in equity.*

The deed purports to be a mortgage of all the property or interest of the Shumways then existing, with express covenants "that they will purchase the land and mortgage it to the complainants to secure their indebtedness." By this express written agreement to make a mortgage, a lien is created on the land, in equity, on the principle that what has been agreed to be performed shall be performed. *Houhey v. Vernon*, 2 Cox, 12; 3 *Powell on Mortgages*, 1049, a, b. An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. The agreement in this case to purchase the land, and then to mortgage it, is express, and is a specific lien, which will be enforced in equity. *Finch v. Winchelsea*, 1 P. Wms., 277; *Freemoult v. Dedire*, id., 429; *Devlin v. Smith*, 3 Atk., 323; *Tooke v. Hastings*, 2 Vern., 97; *Loyde v. Mynn*, 4 Leonard, 505; *Laundell v. Beerry*, id., 481; *Metcalf v. The Archbishop of York*, 6 Sim., 224; *Burn v. Burn*, 3 Ves. Jr., 573; *Legard v. Hodges*, 1 id., 352. The same principle also seems to be well settled in the courts of this country. *In re Howe*, 1 Paige, 131; *Delaire v. Keenan*, 3 Desaus. Eq., 74; *Menude v. Delaire*, 2 id., 564; *Dow v. Kerr*, Speers, 413; *Campbell v. Moseby*, 6 Litt., 358; *Fleming v. Harrison*, 2 Bibb, 171; *Richter v. Selin*, 8 Serg. & R., 425; *Fysor v. Possman*, 2 Barr, 122; *Longworth v. Taylor*, 1 McL., 395. I do

not deem it necessary to enter into a minute statement of these cases, and also of many others, as I consider the principle to be settled beyond all controversy. The deed is an equitable mortgage, to be enforced by a bill in equity. The legal title to half the land is in Fitzgerald, subject to the equity of the Shumways, to redeem on or before the day of payment specified in the bonds of Fitzgerald for conveyance. On or before the day of payment, Fitzgerald is obligated to convey to the Shumways, or to their assigns, or to the purchaser under a decree in this case, upon the payment to him of the amount he advanced for the land to the government, with interest, according to the conditions of the bonds. The Shumways continue to hold actual possession of the land. The bonds of Fitzgerald for deeds are not conveyances of the land, but obligations, whereupon the Shumways, or their representatives or assigns, may compel, by bills in equity, conveyances of the fee, upon the payment of the purchase money, according to the conditions. The purchase of the land by Fitzgerald, at the instance of the Shumways, the settlers and improvers in possession, and their acceptance of bonds for conveyances, are the same in equity as if they had made the purchases in their own names, with money borrowed of Fitzgerald, secured by mortgage of the land.

It is not necessary to determine the question of priority of lien, as the complainants consent to a decree of sale of the two quarter sections entered by Fitzgerald, subject to his lien, according to the conditions of his bonds to the Shumways, the lands being considered quite valuable, and abundant for the payment of both liens. A decree of sale is ordered, according to the prayer of the bill.

FIRST NATIONAL BANK v. CALDWELL.

(Circuit Court for Nebraska: 4 Dillon, 314-316. 1876.)

STATEMENT OF FACTS.—Plaintiff held notes of Gise, and as collateral security coupons convertible into land. With the consent of plaintiff Gise withdrew the coupons and secured lands, and replaced in the hands of the plaintiff the unrecorded deeds for the lands which vested the title in him, Gise. Caldwell, Hamilton & Co. were judgment creditors of Gise, and recorded their judgment in the county in which the lands were situated. The bill sets up the possession of the deeds as an equitable mortgage.

Opinion by DILLON, J.

Counsel have largely argued this cause as if it involved the question whether the English doctrine of equitable mortgages, arising from the *mere* deposit of title deeds, prevails in the state of Nebraska. It may be admitted, for the purposes of this case, that the deposit of recorded title deeds, without more, will not create an equitable lien against the debtor, or a general judgment creditor of his, and yet the equity of the present cause is with the plaintiff.

§ 440. *The possession of deeds as a collateral security in lieu of coupons previously held as such creates an equitable mortgage, superior to the lien of a general judgment creditor.*

The plaintiff corporation held coupons, convertible into lands, as a *specific* security for its debt. Without the debtor's consent it could have converted these coupons into lands, and taken the deed in its own name. Both the plaintiff and Gise, however, thought it advantageous to exercise the option of exchanging the coupons for lands. Gise made the selection of the lands, and the deed was taken in his name, *but not recorded*, and was delivered at once to the plaintiffs, and is now held by them in virtue of an agreement with Gise,

made at the time, that the deed should be a substituted security in lieu of the coupons. Gise does not controvert the plaintiff's rights. The defendants Caldwell, Hamilton & Co. do not dispute the above facts, but contend that their rights, as a general judgment creditor of Gise, without levy or sale, are superior to the plaintiff's. There is no statute of Nebraska which, in terms, gives such effect to a general judgment lien, nor any decision of the supreme court of the state that a judgment lien overrides existing specific equities in lands in favor of others. The plaintiff's rights, as the equitable mortgagee of the lands, or having an equitable lien upon them, are superior to the rights of a general judgment creditor, who has not become a purchaser under the judgment, in good faith, and without notice of the rights of the equitable mortgagee. *Brown v. Pierce*, 7 Wall., 205, 217.

Decree for the plaintiff.

§ 441. An agreement for a mortgage will be treated by a court of equity as a mortgage if it be the intent of the parties. *White Water Valley Co. v. Vallette*, 21 How., 414, 422.

§ 442. Agreement to mortgage.— Where land is sold partly for cash, and the remainder of the purchase money is to be paid in instalments, the purchaser agreeing to execute a mortgage to secure such instalments, but the vendor neglects to make a deed, a court of equity will consider the parties as holding the relation of mortgagor and mortgagee. *Longworth v. Taylor*, 1 McL., 395, 407.

§ 443. When by a contract of sale a deed is to be made, and a mortgage given to secure deferred payments, the vendor is considered in equity as a mortgagee, on the principle that equity will, for the purposes of justice, treat that to have been done which ought to have been done. *Taylor v. Longworth*, 14 Pet., 172, 177.

§ 444. After-acquired property.— Courts of equity in certain cases give effect to a mortgage of property to be acquired subsequently, when it appears that no rule of law is infringed and the rights of third persons are not prejudiced. *Beall v. White*, 4 Otto, 836.

§ 445. A deposit of title papers does not constitute an equitable mortgage unless there is an intent to give security thereby. *Mandeville v. Welch*, 5 Wheat., 277, 284.

§ 446. A customer of a bank, having deposited with it as collateral security for discounts a note of a third person secured by mortgage, was allowed to withdraw them for the purpose of foreclosure upon his agreement to return the proceeds, or to replace them by other securities. At the foreclosure sale, the customer purchased the property and deposited the deed with the bank. He afterwards discharged the indebtedness to secure which the deposit was made, and thereafter incurred new debts to the bank while the bank held the deed, but it did not appear that these debts were created on the faith of the deposit. Upon his subsequent bankruptcy it was held that the bank could not claim an equitable mortgage by such deposit of the deed. *Biebinger v. Continental Bank*, 9 Otto, 148.

§ 447. While the mere deposit of recorded title deeds will not create an equitable lien against the debtor, yet, under some circumstances, a deposit of an unrecorded deed may be held to create an equitable mortgage. Thus, where railroad coupons, which were convertible into lands, were held as security, and the debtor so converted them, and took a deed in his own name, and delivered it to his creditor without record as a substituted security in lieu of the coupons, it was held to be an equitable mortgage, superior to the lien of a general judgment creditor. *First National Bank v. Caldwell*, 4 Dill., 314 (§ 440).

V. ABSOLUTE DEED AND AGREEMENT TO RECONVEY.

SUMMARY — Deed with separate defeasance, § 448.— Right to redeem not renounced except upon a good consideration, § 449.— A conditional sale valid, § 450.— Absolute sale instead of mortgage, § 451.— Assignment of a mortgage with agreement to reassign, § 452.

§ 448. At law an absolute deed and separate defeasance or agreement to reconvey, executed at the same time, amount to a mortgage; although within the time limited for the reconveyance the grantee is empowered to sell the whole or any part of the land at a fixed price, in payment of the debt. *Dow v. Chamberlin*, §§ 453, 454.

§ 449. The mortgagor is not held to have renounced the right to redeem unless the creditor shows that the right was given up deliberately, and for an adequate consideration. An abso-

lute deed made by nephews and nieces joining with their mother to their uncle, who held a mortgage on the premises conveyed, executed by only a part of the grantors, those not parties to said mortgage receiving no consideration for such deed, which was executed upon the representation that the grantee would try to sell the premises, and give the grantors the surplus in excess of his debt, and which deed the grantors understood to be as security for such debt, was held to be a mortgage, even as against a lessee of the grantee with a right to purchase the premises. *Villa v. Rodriguez*, §§ 455, 456.

§ 450. A conditional sale, if intended by the parties to be such, is valid. The inquiry in every case is whether the contract is a security or an actual sale. Where land was conveyed to trustees to be by them reconveyed to the grantor, if he should repay the purchase money before a day named, and if not, then to convey to his creditor, and the debt not being paid the trustees conveyed the land to the creditor, it was held that the grantor had no right to redeem. *Conway v. Alexander*, § 457.

§ 451. A conveyance by deed absolute on its face, with an agreement that the grantee should hold the land until he could sell it at a profit, and should then sell it and pay himself the purchase price and a debt owed him by the grantor, and divide the surplus, if any, the grantee at the same time giving his notes secured by mortgage of the same land for the purchase price, is an absolute sale and not a mortgage. *Cadman v. Peter*, § 458.

§ 452. An assignment of a mortgage as security, accompanied by an agreement to reassign upon payment of the debt secured, does not amount to a legal mortgage, but to an assignment in trust. There can be no legal mortgage without a condition or clause of defeasance. *Warren v. Emerson*, §§ 459-461.

[NOTES.— See §§ 462-466.]

DOW v. CHAMBERLIN.

(Circuit Court for Michigan: 5 McLean, 281-285. 1851.)

Opinion by the COURT.

STATEMENT OF FACTS.— This is a bill to foreclose a mortgage, and the question is whether the property was given in payment or as a security. The plaintiff recovered against the defendant, Samuel Chamberlin, and one David M. Hinsdale, a judgment for the sum of \$756.93 and costs, on which an execution was issued on the 16th of January, 1847, which was levied upon certain real estate as the property of Chamberlin, and was advertised for sale. The counsel for the plaintiffs attended on the day of sale, and on examination found the property levied on much incumbered, so as to be insufficient to satisfy the judgment. And it was agreed that the levy should be released on the defendant's executing a deed of general warranty to Dow, one of the plaintiffs, for certain lots in the village of Pontiac, which deed was duly executed. After the delivery of the deed, the following instrument was drawn up by the attorney of the plaintiffs, and delivered to the defendant:

"Whereas, Samuel Chamberlin has this day executed to Marcus F. Dow a warranty deed for lots 95, 96, 97, 107, 112 and 113, of the eastern addition of the village of Pontiac, to apply on an execution issued from the United States court in favor of Dow and others against said Chamberlin and D. M. Hinsdale: Now, this witnesseth that the said Chamberlin or D. M. Hinsdale shall, at any time within the ensuing twelve months, be entitled to the privilege of redeeming said lots, on payment of the said judgment so rendered against them by the said United States court in favor of said D. K. and S.; and the said plaintiffs hereby agree to reconvey said premises to said Chamberlin on payment of said sum of money as aforesaid; plaintiffs reserving, however, the right to sell any part of said premises when opportunity offers, provided they do not sell them at a less rate than \$155 per lot, as this day appraised by persons named; and shall apply the proceeds thereof in liquidation of said judgment *pro tanto*."

Parol evidence has been heard, not to explain any matter upon the face of

the above instrument, or of the deed, but to show, beyond the instruments, the nature of the transaction. The parol testimony casts very little light on the transaction. The statements of the witnesses were made from general impressions, the words spoken not being recollected. Buddington's impressions were that Chamberlin refused to give the lots as collateral security, as that would take away his control over them, and leave the debt still unpaid. And Duffield says that twelve months were given to Chamberlin to sell the property. This placed the property within his control, unless each lot should sell for \$155. This may have removed Chamberlin's objection to giving a lien on the lots. At least it is as reasonable a conclusion as any which can be drawn from the very vague parol testimony in the case. We must look to the two instruments chiefly, to ascertain the character of the transaction. The deed was absolute upon its face, and conveyed the fee, with warranty, to the grantee. And this being done in payment of the judgment, it is contended, the transaction was closed. That this was not the understanding of the parties appears from the fact that the plaintiffs had the right to sell the lots at the price fixed, the proceeds to be paid *pro tanto* on the judgment. Now, if the judgment had been considered as discharged by the conveyance of the lots, why should the price of the lots be limited, and, particularly, why should the proceeds be applied in part discharge of the judgment? It is no satisfactory answer to this that Chamberlin was desirous to have a reconveyance of the lots, or, at least, a part of them, and therefore a limitation on the price was fixed. This limitation might have been agreed upon without providing that the money received should be paid on the judgment. If that judgment had been discharged by the conveyance, of what importance could it be that the money received on the sale of the lots should be paid on it? Could the parties have supposed that a double discharge of the judgment was necessary?

It is true the defeasance was written by the plaintiffs' attorney, to secure a right to Chamberlin which he deemed of some importance, and which he received, and it is, therefore, evidence showing, to some extent, the nature of the agreement. It does not appear that any evidence of the payment of the judgment was required. It would be an extraordinary transaction if an individual should pay a judgment in land or money, and take no evidence of the fact. The plaintiffs were not required to enter upon the record, nor on the execution, satisfaction; and nothing seems to have been said of the propriety of giving a receipt. The written instruments show nothing in relation to the judgment, except that the proceeds of the lots sold were to be applied *pro tanto* to its payment.

§ 453. *An absolute deed and separate defeasance are to be treated as a mortgage.*

The deed and the defeasance are to be construed as though they were but one instrument. The deed is absolute on its face, but to be defeated, and a reconveyance made, if, within twelve months, Chamberlin should pay the judgment. The privilege of selling the lots, at a fixed price, by the grantee, was not exercised. If it had been, the judgment would have been discharged, in whole or in part, by a sale of a part or the whole of the property, with the consent of Chamberlin. The effect of the arrangement was to give Chamberlin twelve months to pay the money, which, if paid, brought back to him the land conveyed. We are satisfied that the deed was given as a security, and that it must be treated as a mortgage. It is clear that no personal liability is imposed by this transaction on Chamberlin, except by the general warranty of

the title to the lots. But the liability under the judgment remains, it not having been paid by the conveyance of the lots. The suggestion that it was discharged by the levy on the unincumbered property, which levy was afterwards released, is not maintainable. The defendant insists that as the mortgage was given to secure, collaterally, the judgment; and, as the bill states, an execution had been issued on the judgment since the mortgage was executed, on which nothing has been done or return made, that the complainants cannot proceed until they have attempted to collect the judgment.

The one hundred and ninth section of the general chancery act of this state provides, "if it shall appear that any judgment has been obtained in a suit at law, for the moneys demanded by such bill (of foreclosure), or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff shall have returned that the execution is unsatisfied, in whole or in part, and that the defendant has no property whereof to satisfy such execution, except the mortgaged premises." Under this statute, it has been held (1 Walker's Ch., 387) that a bill filed to foreclose a mortgage given to secure a judgment is demurrable, unless it appear in the bill that an execution has been issued on the judgment, which has been returned unsatisfied, in whole or in part, and that the defendant has no property, except the mortgaged premises, to satisfy the judgment.

§ 454. *Jurisdiction and practice of federal courts in chancery are not derived from nor governed by state laws.*

The complainants, in their bill, allege that on the 9th of October, 1848, they caused an *alias* writ of *feri facias* to be issued on the judgment, yet no proceedings were had on said execution, and that the life of the same has long since expired, to wit, on the first Monday of December, 1848. That said execution is in their possession, ready to be produced to the court. It is too late to make this objection, it is contended, at the final hearing. The statute is peremptory, but the court are not bound to take notice of it unless it shall be set up in the answer, or by demurrer where the facts appear upon the face of the bill. In the state courts the objection would be fatal to a further procedure in the case. But this provision of the statute being a rule of practice, belonging to the remedy, does not apply to the circuit court of the United States; neither its jurisdiction nor practice in chancery is derived from or governed by the state laws. In several of the states which have no courts of chancery, such a jurisdiction is exercised by the courts of the United States. The court will direct a sale of the mortgaged property, and enjoin the plaintiffs from issuing an execution on the judgment, until the order of this court.

VILLA v. RODRIGUEZ.

(12 Wallace, 323-342. 1870.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an appeal in equity from the decree of the circuit court of the United States for the district of California. The appellant was the complainant in the court below. The decree was against him. He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant Rodriguez claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the

complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor, and of those who conveyed to him, denied. But the defendants insist that the title of all those parties was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties. The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That portion is his if his title be valid.

The widow is the sister of the defendant Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez, for money then borrowed, a note for \$4,000, payable a year from date, and bearing interest at the rate of two per cent. a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal, and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision, that, in default of the payment of the interest as stipulated, the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt, and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent. upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and incumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent. per month. Rodriguez subsequently paid \$1,172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about \$10,000. On the 17th of February, 1865, one of the children, who was a minor when this deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865, the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was \$100. On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant George Steele subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term, or within five days thereafter, the lessees might purchase by paying him \$25,000 in gold, and upon such payment being so made he covenanted that he would, by a sufficient deed, release and quitclaim to the lessees or their heirs and assigns, free from all incumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavicencia.

§ 455. *A purchaser of lands, whose right lies in an executory contract, or in a contract under which he has a right only to a quitclaim deed, is not an innocent purchaser without notice, as against an unrecorded mortgage.*

The lessees and their assignees insist that they are *bona fide* purchasers without notice. This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase money fully paid. *Nace v. Boyer*, 30 Penn. St., 110; *Boone v. Chiles*, 10 Pet., 177, 211. The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor. *Croxall v. Shererd*, 5 Wall., 289. This contract calls for a quitclaim deed. The result would be the same if such a deed had been executed and full payment made, without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection. *May v. Le Claire*, 11 Wall., 232; *Oliver v. Piatt*, 3 How., 363. This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

§ 456. *Right of redemption where the mortgagor has conveyed the premises to the mortgagee.*

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law. *Morris v. Nixon*, 1 How., 118 (§ 483, *infra*); *Russell v. Southard*, 12 id., 139 (§§ 491–509, *infra*); *Wakeman v. Hazleton*, 3 Barb. Ch., 148; 4 Kent's Comm., 143; *Holmes v. Grant*, 8 Paige, 245; 3 Lead. Cas. in Eq., 625. The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent. a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment.

The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow—the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez insisted that they were in the deed, and added “that they ought not to distrust him, as he was taking all these steps for their interest.” The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez, on the same day, “which was altogether unsolicited,” says: “he stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money, money which he had loaned or advanced to them, and save the property for the benefit of his sister and her family, while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister.” Rodriguez was examined as a witness. Referring to a period shortly preceding the execution of this deed, he says: “Afterwards I had with them further conversation, and told them, I don’t wish to speculate upon you, because you are my relations, and you have treated me well. If I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I will return you the surplus money, if any; and, also, if I can sell a portion of the ranch, or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch, but if I have bad luck and cannot sell it, I will lose my money.” Elsewhere, in the same deposition, he says: “I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time.”

He made the same admissions to other persons who are in no wise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that repre-

sented by the note, and the latter be settled by the terms of the contract and the law of California. The rents, issues and profits, and improvements made upon the premises must also be taken into the account.

The decree is reversed, and the cause will be remanded to the circuit court with directions to enter a decree and proceed in conformity to this opinion.

CONWAY v. ALEXANDER.

(7 Cranch, 218-241. 1812.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error. The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison, of the third part. Robert Alexander, after reciting that he was seized of one undivided moiety of four hundred acres of land, except forty acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of 800*l.* paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the 1st day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of 700*l.* with interest from the said 20th of March, 1788. And if the said Robert Alexander shall pay the said William Lyles, on or before that day, the said sum of 700*l.* with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants, that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles on the non-payment of the said sum of 700*l.*, and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurances as to the one hundred and forty acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of 700*l.*, convey the said land in fee to William Lyles. On the 23d of August, 1790, William Lyles, in consideration of 900*l.*, conveyed the said twenty acres of land and one hundred and forty acres of land to Richard Conway, with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed, Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value, and at considerable expense. In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in

which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

§ 457. *A conveyance to trustees of land, to be by them conveyed to a creditor upon the non-payment of a debt due by the grantor, is valid.*

The question to be decided is, whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed, by that deed, to trustees, which sale became absolute by the non-payment of 700*l.*, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed. To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of the money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him. That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the 700*l.*, on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no

influence on the case, if the instrument was really a security for money advanced and to be repaid. It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as at least possible that a division might be useless.

Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage. It is certain that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a syllable in the cause intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander, before or after the transaction, respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource.

To this circumstance the court attaches much importance. Had there been any treaty — any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage. It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete, that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a court of chancery will invariably defeat. His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point. The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage, he would naturally have resisted the conveyance, and it is probable that the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander

could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his. This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale on the part of Alexander was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional implies an expectation to redeem. A conditional sale made in such a situation, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at 5% per acre, conditionally, which, in fact, were worth 15% or 20% or 50% per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause. But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for 5% per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court that the decree of the circuit court is erroneous and ought to be reversed, and that the cause be remanded that to court with directions to dismiss the bill.

Decree reversed.

CADMAN v. PETER.

(Circuit Court for Michigan: 12 Federal Reporter, 838-867. 1893.)

Opinion by WITHEY, D. J.

STATEMENT OF FACTS.—The bill of complaint seeks to give to a deed the effect of a mortgage. In 1872 complainant borrowed of defendant his two promissory notes, payable to the order of Cadman at ninety days, for \$5,000 each. They were renewed by defendant from time to time for the accommodation of complainant. The last renewal was between the 15th and 20th of October, 1875, for the same time.

On the 25th of October, the bill states, defendant agreed to loan to complainant the additional sum of \$20,000, by the notes of defendant payable at four and six months, and take a deed of five thousand four hundred acres of land in Newaygo county, owned by complainant, of the estimated value of upwards of \$40,000, as security for the payment of both sums, \$10,000 and \$20,000. The deed, absolute in form, was executed by complainant and wife, and delivered to defendant on the day last named, and at the same time defendant gave his notes to complainant for \$20,000, the consideration named in the deed. The bill of complaint states the balance of the agreement as follows: "Peter was to hold said land until such time as it might be sold at a profit, or for a greater sum than could be then realized, and when such time should come was to sell said land in the most advantageous manner possible, and out of the proceeds pay himself the said sums of \$10,000 and \$20,000, and interest and the taxes, and divide the surplus, if any."

The prayer is for an accounting, that the deed may be found to be an equitable mortgage, and that complainant may redeem. The answer denies the agreement to loan \$20,000; denies that the deed was given as security; and states that defendant purchased the land from complainant for the consideration of \$20,000, for which sum he gave his notes, and long since paid them. The answer denies that complainant has any interest whatever in the land, legal or equitable, and says that complainant has not stated in his bill of complaint a cause of action. Complainant was, at the time of the alleged agreement, cashier in a bank in Detroit, and Peter was a lumber dealer in Toledo.

§ 458. *Circumstances under which a deed absolute on its face was held not to be an equitable mortgage.*

The case is an important one to the parties, and has been carefully considered as to the legal questions and the facts presented by the record. The first consideration relates to the nature of the transaction — whether the bill states a case which turns the deed into a mortgage, or mere security. Wherever there is a mortgage there is a right in the mortgagor or grantor to redeem the thing mortgaged. It need not be expressed, for the right to redeem will be implied wherever it is shown that property is transferred or pledged as security, unless the nature of the agreement forbids such implication. The agreement, set out in the bill of complaint and testified to by complainant, is, in effect, that Peter should take a deed of the land, effect a sale, and pay to Cadman one-half of the proceeds after deducting the purchase price or consideration, \$30,000, and the taxes and interest. Such an agreement is inconsistent with the right to redeem. Peter, by the agreement, was entitled to hold the land until sold by him, and then share in any profit he might obtain; rights wholly inconsistent with the idea that Cadman could redeem. This being the agreement of the parties, allowing it to be valid, the deed cannot be turned into a

mortgage. Defendant's counsel cited *Baker v. Thrasher*, 4 Denio, 493; *Macauley v. Porter*, 71 N. Y., 173. The appropriate remedy would seem to be to compel the grantee to execute his agreement whenever a sale of the land can be made at a considerable profit. If, on the other hand, such agreement is obnoxious to the section of the statute of frauds declaring that no trust concerning or in any manner relating to land shall be created by parol, then the agreement cannot be enforced specifically nor employed to turn this deed into a mortgage security. Comp. Laws 1871, § 4692. See *Saunderson v. Groves*, 13 Rep., 364 (Law Rep., Com. Pl., 234).

Emerson v. Atwater, 7 Mich., 12, cited by complainant's counsel, is distinguishable from this case. The agreement there was that the grantee might sell the land to pay the indebtedness of the grantor to the grantee, but the latter was to reconvey whatever land remained unsold; and if the grantor should pay the debt all the land was to be reconveyed. There an express right to redeem was reserved. In my judgment the agreement, if valid, would make Cadman a beneficiary under the deed, and created a trust in Peter concerning or relating to land, and not being in writing and properly signed is void under the statute of frauds. But, under the evidence, complainant is not, in my opinion, entitled to relief, conceding his bill to state a good case. It is insisted for complainant, and proved, that Cadman and Peter held and had for years intimate and confidential relations; that Cadman was in great need of money, a fact known to Peter; that Cadman endeavored to effect a loan upon the land as security, and was unsuccessful, of which Peter was informed; and that Cadman had estimates of the value of the land which led him to regard it worth largely in excess of \$30,000, though in July previous he had purchased the land for about \$20,000. Neither Cadman nor Peter had seen the land, and pine lands were not much in demand at that time, October, 1875. It must be said that Mr. Cadman's testimony supports the material allegations of the bill of complaint, and there is an item of testimony strongly corroborating the case of the complainant. Mr. Russell testifies that when the parties came to him to have the deed drafted, Peter said, in substance, that he was going to take the land as security and let Cadman have \$20,000 in addition to \$10,000 he already had, but wanted a deed so that he, Peter, could control the land.

On the theory that the bill states a good case, I should regard the proof sufficient, in the absence of other and controlling testimony, to overcome the *prima facie* effect due to the absolute form of the deed, although the testimony of a witness who speaks from recollection of a conversation after five or six years have elapsed is often not the safest evidence on which to form opinions. We are all conscious of the imperfection of our memory, and that our recollection of what we have heard said is apt to get mixed and misplaced, especially if we have heard statements on the same subject from different persons. It is familiar that mere recollection, unaided by written memorandum, is entitled to very much less weight than written declarations made at or about the time. And the written declarations of the parties, to which I shall refer, are to my mind wholly inconsistent with any such statement having been made by Peter as that he took the deed as security. I shall briefly call attention now to the facts which control my judgment.

1. The conveyance of the land was by a deed, absolute on its face, for the expressed consideration of \$20,000, to overcome the effect of which deed, and turn it into a mortgage, the evidence must be clear and convincing beyond reasonable controversy. 2. Peter gave back a mortgage to Cadman of the

same date as the deed to secure payment of the notes given for the purchase price named, \$20,000. This mortgage was given by one party and accepted by the other; it therefore speaks for both of them. It may not be conclusive, but in the absence of fraud a mortgage back at the time of a conveyance ought to be nearly so, as a contemporaneous writing expressive of the intention of the parties. It adds to the effect of the deed as evidence that there was an absolute sale. 3. January 21st Cadman wrote to Peter in substance that he had drawn on the latter at one day's sight to take up one of two \$5,000 notes due that day, which Cadman could not get extended by renewal. The two \$5,000 notes alluded to are continuations of the accommodation paper loaned in 1872 by Peter for Cadman's benefit, and according to Cadman's testimony were secured, together with the \$20,000, by the deed to Peter. Peter had forwarded new notes to enable Cadman to retire the previous ones then about to fall due, and Cadman says in his letter that he had lodged one of the new notes as collateral to his draft. The draft directed the amount to be charged to Cadman's account. Peter replied January 22d, in which he says: "I accepted your draft this morning. What do you think of making a draft on me at one day for \$5,000? This shows for itself how my notes are peddled in Detroit. Let me know if I must raise the money to pay this draft. I want you to send me something to *show that the two notes and this draft are for your benefit and for you to pay.*"

Cadman testified that it was part of the arrangement, when the deed was executed, that Peter was to pay the said two notes. Would Peter have written in the manner he did if those notes were for him to pay and Cadman had secured him for the amount? And why should Cadman be asked to give something to show what Peter had no right to ask? Cadman replied, January 24th: "I am sorely mortified and grieved that this should be the case, but I am entirely powerless to act. I will do anything in my power. I will send you my notes or anything I have." We do not understand why Cadman should acquiesce in Peter's demand for something to show that Cadman was to pay the paper and that it was all for his benefit, unless Cadman so understood the fact. This occurred only three months after the date of the deed and alleged agreement. Again, January 30th, Cadman's pecuniary affairs had reached a climax, and he wrote Peter: "I return your note for \$5,000 herein. I cannot use it except to discredit you still more. I owe so much money outside I cannot stand the pressure. I am ruined and penniless. I console myself in your case that the *great bargain you made in the Newaygo lands* will in some great measure compensate you for the loss you must incur, for I cannot take care of the acceptance due early in February."

This acceptance was by Cadman of a draft drawn on him by Peter to pay the amount of the previous draft of Cadman on Peter at one day's sight, and was for \$5,000. Cadman returned one of the \$5,000 notes which he did not use, and this left outstanding of the accommodation paper the acceptance and one note, aggregating \$10,000, besides the notes for \$20,000 given to Cadman at the date of the deed, and which had not yet matured. I am unable to reconcile the statements of this letter with Cadman's version of the understanding as to the purpose of the deed. He recognizes the fact that Peter had made "a great bargain" in the land in question — a bargain likely to compensate in a great measure the loss Peter must incur on account of Cadman. How had Peter made "a great bargain" in this land, unless by a purchase of it and selling it for more than it cost? If Cadman had a beneficial interest, a right

to redeem, or any sort of interest in the land, or in the proceeds of any sale, would he have made the statements of the letter? In his testimony he claimed the land to be worth at that time a large sum in excess of the amount he had received Peter's paper for. If the deed was understood to be security, there was no reasonable ground for loss to Peter. No man of common prudence and understanding would have written such a letter while he regarded himself as the owner in equity of, or as having a valuable beneficiary interest in, the land. A decree will be entered dismissing the bill of complaint for want of merits.

WARREN v. EMERSON.

(Circuit Court for Maine: 1 Curtis, 239-243. 1853.)

STATEMENT OF FACTS.—The payee of a note indorsed the same to the plaintiff in this case, receiving from the latter the following memorandum in writing:

Boston, December 22, 1848.

Whereas, Nathaniel Hatch, of Porter township, state of Pennsylvania, has this day indorsed and delivered over to me the note of Albert Emerson, of Bangor, dated September 14, 1847, for the sum of \$1,200, payable in two years from the date thereof, with interest; which note is secured by mortgage of land in Bangor, Maine, named in the mortgage deed of September 10, 1847, and this day assigned to me by said Hatch; all of which is done to hold me harmless against the payment of my two acceptances this day to said Hatch's order, payable at the Bank of Commerce in Philadelphia, for the sum of \$500 each, at six months from date; and on the payment of said acceptances, on the day on which the same are payable, and the sum of \$50, I agree to deliver said note, and reassign said mortgage to said Hatch.

HENRY WARREN.

Of plaintiff's acceptances, but one was negotiated by Hatch, who failed to take it up at maturity, and plaintiff was forced to pay it. In November, 1850, Hatch gave to Emerson an order, directed to plaintiff, and setting forth that he had settled with Emerson the amount due on the mortgage, which he had assigned to plaintiff, and that the latter should assign the same to Emerson or discharge it, as he might think fit, upon the satisfaction of his claim by Emerson. In a suit against the maker, the question was whether the plaintiff could recover more than would satisfy his indemnity, and the sum of \$50, as mentioned in the memorandum?

§ 459. *Effect of assignment of a security to indemnify the assignee, the same to be retransferred, if indemnified.*

Opinion by CURTIS, J.

The memorandum, given by the plaintiff to Hatch, declares the trust upon which the note and mortgage were held by him. The legal effect of the arrangement was that the plaintiff became the holder of the legal title to the note and mortgage, clothed with an equitable right to apply their proceeds to his own indemnification; and that, subject to this right of the plaintiff, the equitable interest and ownership remained in Hatch. In other terms, the plaintiff held the note and mortgage in trust, to apply so much of their proceeds as might be needful to indemnify himself and pay the sum of \$50, and the residue to pay to Hatch.

§ 460. *To constitute a legal mortgage there must be a clause of defeasance, the mere force of which reverts the title, without a formal transfer.*

It has been argued that the transaction amounted to a legal mortgage of a chattel, which became absolute in sixty days after the breach of the condition,

according to the local law of Maine. But to constitute a technical legal mortgage, there must be a condition in the conveyance, or in some defeasance making part of the same transaction, by the mere force of which the title is revested in the mortgagor, if the condition is performed. This memorandum does not contain such a condition; it provides for a retransfer of the title from the plaintiff to Hatch, if the acceptances shall be paid by Hatch at their maturity; and if it did set out such a condition, still it would not amount to a defeasance, so as to constitute a technical mortgage, because an interest in the realty was conveyed by deed, and the instrument of defeasance must be under seal. It is true, the note is a chattel; but it can hardly be that the interest in the realty was intended to be held by one species of title, and the note by another. Both were transferred to the plaintiff for the same purpose and as one transaction; both were agreed to be retransferred by him at the same time and in the same event; and the note and mortgage together made one security. To suppose that the parties intended to mortgage the note and convey the interest in the realty in trust is quite inadmissible. This renders it unnecessary to examine the cases in 2 Barb. Supr. C. R., 538; 3 Hill, 593; and 2 Comstock, 443, which, being either pledges or mortgages of stocks, are distinguishable from this case. I am of opinion this was not a legal mortgage, but a taking of security by way of an absolute transfer of the whole legal title, leaving the equitable title to the proceeds in Hatch, subject to the plaintiff's rights above stated. This being so, Hatch could certainly transfer his equitable title to Emerson, and by his order on the plaintiff has done so. In *Mandeville v. Welch*, 5 Wheat., 286, the supreme court say: "In cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and, after notice to the drawee, it binds the fund in his hands."

§ 461. *The maker of a note, who has acquired the equitable title of an assignor thereof, may use the same in his defense to the note.*

The question is, whether Emerson can avail himself of this equitable title in his defense. There are certain equitable titles which courts of law, in modern times, take notice of and give effect to. Among them are assignments of *choses in action*, which are protected by courts of law from all adverse proceedings by the holder of the legal title; and I can perceive no reason why this equitable title, gained by Emerson through the assignment from Hatch, should not be protected. It is true that, ordinarily, it is only the assignee of the whole *chose in action* who is protected; and the doctrine is not extended to partial assignments. *Mandeville v. Welch*, 5 Wheat., 277. But here the whole *chose in action*, arising out of the written promise of the plaintiff to Hatch, is assigned to Emerson; and the reason of the limitation of the doctrine can have no application to this case; that reason is, that a debtor cannot, by having a demand split up by partial assignments, be made accountable to different persons without his own consent. But here the debtor does consent; he is himself the assignee. It is true, the person here seeking protection for an equitable title is the debtor; he desires to avail himself of it in his defense, *valeat quantum*.

But why should he not be allowed to do so, as well as a plaintiff be allowed to make a similar title the ground of a valid claim? There is one reason for allowing this defense, which often determines courts of law to give effect to defenses. It prevents circuity of action. If the plaintiff should recover the whole sum of Emerson he could sustain a suit in equity, or an action for money

had and received, in the name of Hatch, to recover from the plaintiff, under his written memorandum, whatever may remain after his claims are satisfied. I do not perceive that there is anything inconsistent with established modes of proceeding at the common law, in doing complete justice between the parties in this action, by giving effect to the equitable title of the defendant. It is a new case, in its facts, but I think not in its principles. *Neponset Bank v. Leland*, 5 Metc., 259. A judgment will, therefore, be entered for the amount paid by the plaintiff, and interest and cost of protest of the bill; and to this is to be added the sum of \$50 and interest from the 22d June, 1849, the time when that sum was agreed to be paid.

§ 462. A defeasance must be between the same parties as the conveyance. It is of the very essence of a defeasance that it defeats the principal deed and makes it void *ab initio*, if the condition is performed. *Flagg v. Mann*, 2 Sumn., 486, 541.

§ 463. An absolute deed and a separate defeasance constitute a mortgage. *Lanahan v. Sears*, 12 Otto, 318 (§§ 707, 708).

§ 464. To constitute a conditional purchase, there must be a sale for a valuable consideration between the parties, with a right of repurchase. A mere gift would not raise the question. *Flagg v. Mann*, 2 Sumn., 486, 531.

§ 465. Whether the delivery of a deed is intended to be absolute or conditional depends upon the intention of the parties, and is a question of fact for the jury. *Henry v. Henry*, 4 Biss., 354, 355.

§ 466. Where there is a doubt whether a transaction be a mortgage or a conditional sale, courts of equity more readily treat it as a mortgage than a conditional sale. *Flagg v. Maun*, 2 Sumn., 486, 535.

VI. PAROL EVIDENCE TO PROVE AN ABSOLUTE DEED A MORTGAGE.

SUMMARY — *Parol evidence admissible*, § 467. — *Absolute deed to secure a loan*, § 468. — *The real transaction may be shown*, §§ 469, 470, 472. — *Whether redemption has been waived*, § 471. — *Inadequacy of consideration*, § 473. — *When transaction is doubtful*, § 474. — *Strict proof to be made*, §§ 475, 476. — *Evidence to show the transaction a mortgage*, § 477.

§ 467. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design upon mutual confidence between the parties. *Babcock v. Wyman*, §§ 478-482.

§ 468. Where an application is made for a loan of money, and the money lent, a bond taken for the amount, and simultaneously an absolute deed executed conveying to the lender valuable real estate, such deed will be held a mortgage and redemption permitted. *Morris v. Nixon*, § 483.

§ 469. The rule which excludes parol testimony to contradict or vary a written instrument does not forbid an inquiry into the object of the parties in executing a conveyance. The court will look to the real transaction. *Peugh v. Davis*, §§ 484-490.

§ 470. If the conveyance was made as a security, a right of redemption attaches to it, and this right cannot be waived by the parties by any stipulation made at the time. *Ibid.*

§ 471. In determining whether redemption has been subsequently waived by a release of uncertain import, the fact that the value of the property is at the time greatly in excess of the amount paid by the grantee, and the fact that the grantor retains possession of the land, are circumstances which strongly tend to show that such a waiver was not intended. *Ibid.*

§ 472. An absolute conveyance, given as a security, is a mortgage. The true character of the transaction will always be inquired into. *Russell v. Southard*, §§ 491-509.

§ 473. Inadequacy of consideration is a circumstance of importance in determining whether the transaction is a sale or a mortgage. *Ibid.*

§ 474. When it is doubtful whether the transaction was a sale or a mortgage, the courts lean to the conclusion that it was a mortgage. *Ibid.*

§ 475. One who alleges that his deed in absolute form was intended as a mortgage only is required to make strict proof of the fact. *Andrews v. Hyde*, §§ 510-514.

§ 476. The testimony of the grantor, that he understood the transaction to be a mortgage, is not alone sufficient to prove it to be so. The proof must be clear, satisfactory and convincing. *Ibid.*

§ 477. A deed absolute on its face may be shown to have been a mortgage, by confessions of the grantee that it was such; by receipts of money as interest for the debt; by length of possession. after the mortgage, by the mortgagor; by the relation of debtor and creditor admitted to have existed long before between the alleged mortgagor and mortgagee, and finally by the fact that the property was much more valuable than the consideration advanced. Any and all such facts are admissible as evidence for this purpose and are not forbidden by the statute of frauds. *Bentley v. Phelps*, §§ 515, 516.

[NOTES.— See §§ 517-532.]

BABCOCK v. WYMAN.

(19 Howard, 289-303. 1856.)

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.— This is an appeal from the decree of the circuit court for Massachusetts. The bill states the following facts: Nehemiah Wyman was seized in fee of about eleven and a half acres of land in Charleston, purchased by him of Tuft's administrator, one acre of which he sold to Foster, who gave a mortgage to secure the payment of the consideration of \$600, which sum was not paid when due, and he entered to foreclose. The entire tract, on the 1st of December, 1820, had been mortgaged by him to Francis Wyman, his brother, to secure three notes of that date, one for \$676, payable in one month; another for \$650, payable in six months; the third for \$704.39, payable in one year; interest to be paid on each note semi-annually. Shortly after this, Francis Wyman, by his will, dated 14th June, 1822, devised to defendant Babcock all his estate, including said notes and mortgage, in trust for testator's wife and children, and made Babcock his executor. The testator died in August, 1822. On the 1st of December, 1824, Nehemiah paid Babcock, as trustee and executor, the note for \$704 and interest; and from time to time paid the interest on the other notes, up to December, 1826.

In 1825 or 1826, Nehemiah became embarrassed, and having entire confidence in his brother-in-law, Babcock, he, by deed, 26th April, 1826, mortgaged the eleven acres of land as security of a note to Babcock of that date, for \$1,200, payable in one year, with interest. At this time, little, if anything, was due to Babcock, but it was understood between them that Babcock would become security for him, or advance money to him, the mortgage to stand as a security. Before the 20th of November, 1828, Babcock did become bound for and advanced to him upwards of \$400. In addition to this, there was due to Babcock as executor, for rent, \$136.71. On a settlement, Nehemiah executed to Babcock three notes, one dated 7th November, 1828, for \$486.79, of which \$400.08 were due Babcock individually, and \$86.71 to the heirs of Nehemiah Wyman, Sr.; another note for \$8.10, and third for \$50, due to the heirs of the same, were given. Nehemiah being thus indebted to Babcock, as trustee and executor, and not being able to pay the interest, Babcock and William Wyman, brother of Nehemiah, urged him to make a clear deed in fee for the land aforesaid, to Babcock, that he might manage and improve the same, and apply the rents and profits to pay interest on the incumbrances, and to the gradual liquidation of the principal. And finding that this conveyance to Babcock was made a condition of further advances, he eventually conveyed the estate to Babcock, it being expressly agreed by Babcock, that, notwithstanding the form of the conveyance, it should stand as security only for the sums due to him. That on the 20th of November, 1828, a memorandum was made out of the sums thus due, and handed to Nehemiah, as evidence of the amount for which the land was held. At the time this deed was executed, no one of the

notes held by Babcock was surrendered, nor the mortgage to Francis Wyman, deceased. All the evidences of indebtedness remained in the hands of Babcock, Nehemiah holding only the memorandum of the sums. The total amount of the notes in said memorandum, with interest to the 20th November, 1828, amounted to the sum of \$2,033.87. Upon receiving the above deed, Babcock took possession under it, not only of the eleven acres, but of the adjoining acre. Babcock, it is alleged, received annually from sales of clay, grass and ledge stone, from the land, more than enough to pay interest and taxes. Nehemiah having removed to the west, regardless of his trust, Babcock sold the land at private sale, without notice to the said Nehemiah, and in fraud of his rights, for \$8,000.

In the sale, Babcock represented himself to be the sole owner of the premises. On the 4th of February, 1853, Nehemiah conveyed his right to redeem to Edward Wyman, the complainant, etc. Within two years, Babcock has promised William Wyman, acting for his brother, that he would come to an account with Nehemiah for the price of the land, and pay him the proceeds of the sales, deducting the debts aforesaid, if he would take his notes on time; and would refer the question of amount of rents and profits to the arbitrament of neighbors. Babcock has frequently, recently, admitted that it was originally intended that said deed should stand as security for the amount set forth in the memorandum; and that he always intended to do right in the matter, but that he had been advised by counsel that the agreement, not being in writing, could not be enforced, and this was the reason he refused to perform it.

The bill prays for an account, and the defendant in his answer admits the conveyance stated in the bill, and that the land was subject to the mortgages. He avers the consideration named in the deed was the amount then due defendant in his own right, and as executor and trustee; and the further sum of \$8.10 due the defendant, and \$50 due as agent. He admits no additional consideration was paid; but he states the land was not worth more than \$1,900; that he consented to receive the deed in payment of the sums due him personally, and upon an agreement that if he should be able to obtain therefrom, in addition, enough to pay the sums due to him as executor and trustee, he would pay these sums, and upon no other trust or confidence whatever. That, upon the delivery of the deed, he canceled the notes of Nehemiah held in his own right, and either surrendered them to him or destroyed them. That he did not cancel the notes held by him as executor or trustee, because he was not satisfied that he should receive enough from the land to pay the same; and in order to prevent the presumption that he had so agreed absolutely, he made a minute thereon to the effect that he did not guaranty the payment thereof, it being the understanding between him and Nehemiah, that Nehemiah should be personally liable therefor. That he made no other agreement, and he denies that it was understood or agreed that the land was conveyed to him on the trust set forth in the bill; but insists that the conveyance was absolute, in payment of the sums due him, and liabilities incurred; and the only understanding was, that if the defendant should realize therefrom more than enough to pay his own claims, he would pay the debts due him as executor and trustee. Defendant took possession of the land, and for eight years occupied it, Nehemiah never claiming any interest in it. He denies the allegations of the bill, as to the trust; sets up the defense that the agreement, not being in writing, cannot be enforced. He denies that he proposed a compromise, if his notes would be taken on time, as alleged, and he pleads the statute of twenty years'

limitation, etc., and avers the profits of the land did not exceed the taxes, etc.

Three points may be considered as embracing the merits of this case: 1. Was the deed executed by Nehemiah Wyman to Babcock, for the eleven and one-half acres of ground, given in trust? 2. Can this trust be established by parol evidence? 3. Does the statute of limitation or lapse of time affect the complainant's rights?

§ 478. *A deed absolute on its face will be held a mortgage where such was the intention.*

No one can read the history of this case, as stated in the bill, without being impressed with the confidential relations of the parties. The grantor and the grantee were brothers-in-law, and the advisers bore the same relation to the grantee. It was a family concern, designed, as it would seem from the bill, to aid an embarrassed member of it, without a probability of loss by the other members. The bill charges, when the deed in question was executed, the sums which it was intended to secure were stated, and handed to Nehemiah. This is not denied in the answer, and William Wyman, the brother, being present, swears, as a witness, to the sums so stated, amounting in the whole to the sum of \$2,033.87, the consideration named in the deed. This list was in the handwriting of the son of Babcock, and the paper was delivered to Nehemiah in the presence of the witness. The deed was drawn by the witness, and he knows that the sums named included all the debts which Nehemiah owed to Babcock individually, or as trustee. The witness remembers Babcock said, after the statement was made, add sixty-two cents for recording the deed, which made the sum inserted as the consideration in the deed. Nehemiah hesitated to sign the deed, when Babcock said, he can have the land again, at any time he shall pay the debts secured by it. The answer avers, when the deed was executed, the defendant gave up the notes of Nehemiah held in his own right, and either surrendered them to him or destroyed them. But it is proved by the same witness that he did neither. These notes were given to the witness without explaining to whom they belonged. Witness supposed they belonged to the estate of Nehemiah Wyman, Sr. The witness says the property, at the time it was sold, was worth thirteen or fourteen thousand dollars, and that it was sold greatly below its value.

The bill charges that the defendant promised William Wyman, acting for his brother, that he would come to an account with Nehemiah for the price of the land, and pay him the proceeds of sales. This is denied in the answer. William Wyman swears that on the 8th of November, 1851, he showed to Babcock the memorandum of the sums named, to secure the payment of which the deed was executed. He was much embarrassed, and admitted the handwriting was his son's, then deceased. He then expressed a willingness to settle it up, and asked the witness, how shall this be done? Witness replied that he should first charge Nehemiah with all his notes and interest, and then credit him with the proceeds of the land, and what he received from the land, with interest, and be allowed a fair compensation for his trouble. He then said, I can't tell how much I have received from the land, but we will leave it to two good men; and that he would give his note for what should be due. A short time after this, Babcock told witness that he had consulted counsel, who advised him to pay the amount due the estate of Nehemiah, Sr., and no more; and this he offered to do, if the witness would execute a bond of indemnity against any farther claim. He said that he had been advised, as the deed was absolute on

its face, and no writing showed that the land was conveyed in security of a debt, the obligation could not be enforced. The witness signified to Babcock, some time before the sale of the land, that he would redeem it for his brother. Nehemiah Wyman, having transferred all his interest to the complainant, was examined as a witness, who stated, at the time he executed the deed to Babcock, he owed him, as an individual, as executor and agent, the sum of \$2,033.87, which included sixty-two cents for recording the deed; and that sum was stated as the consideration in the deed. Of this sum, only \$408.18 and interest were due to Babcock in his individual capacity.

In his answer, the defendant states that the conveyance was made in payment of the sums due him personally; that he did not cancel the notes held by him as executor or trustee, because he was not satisfied that he should receive enough from the land to pay those debts. But the proof shows that the debt due him as executor and agent, and also his individual debt, were all included in the consideration named in the deed. The defendant made no advance to the witness on the note and mortgage for \$1,200; but, at the date of the subsequent conveyance, the defendant had advanced to him \$400.08, and \$8.10, which, as above stated, constituted the debt due to the defendant on his personal account. The conveyance was made to the defendant, the witness swears, with the express understanding that Babcock was to have the entire management of the land, so as to apply the proceeds in payment of the interest, and witness was to have the land again on paying the sums specified. He was induced to make the conveyance by the urgent request of his brother William, and Babcock; his brother told him, if he did not make it, he would not assist him in his pecuniary matters. On the execution of the deed none of the notes held by Babcock were canceled or surrendered to the witness; but they are still held against him. The witness says that Babcock promised to keep an account of the receipts of the land conveyed to him; but in his answer he says he kept no account, "because the land and rents and profits were his own, without any liability to account to any one."

Such a transaction as set out in the bill, between brothers-in-law, in the nature of things might be supposed to have taken place in the mutual confidence of the parties; and in the final adjustment there should be no evasions or subterfuges to gain an advantage. So far as regards the deed under consideration, all the material allegations of the bill are proved, and all the material averments of the answer seem to be unfounded. In coming to this conclusion, we do not rest alone on the witnesses Nehemiah and William Wyman. There are strong circumstances which corroborate the witnesses, and satisfy the mind beyond a reasonable doubt. In his answer, the defendant avers that the land was conveyed to him in payment of the sums due him personally. It appears from the oaths of both the Wymans that this is not correct; and, in addition, it is shown by the memorandum made out at the time, stating the sums for which the land was conveyed, in the handwriting of the son of the defendant. Taking the statement of the defendant as true, that he did not intend to make himself responsible for the debt due to him as executor and agent at the time the deed was executed, presents him in an unfavorable light. The land for which he received a deed from Nehemiah Wyman, he was aware, had been previously mortgaged to secure the debt in his hands as executor of Francis Wyman. Could he have carried out this declared intention, he would have been unfaithful to the trust committed to him. William Wyman seems to be a man of business. He drew the conveyance from his brother Nehemiah to

his brother-in-law Babcock, and he took, in other respects, an active agency in the transaction; and he states the facts as alleged in the bill, and his statement is in every respect corroborated by his brother Nehemiah; and, although the trust is denied in the answer, there are circumstances in the case which go strongly to establish it. The defendant admitted all the facts to William Wyman, and promised to settle the account, and spoke of the principles on which it should be adjusted, but eventually he took refuge under the statutes of frauds, of limitations, and the lapse of time. We think there can be no reasonable doubt that the deed in controversy was intended to be a mortgage.

§ 479. *Parol evidence is admissible to show that an absolute deed was intended as a mortgage.*

And this brings us to the second point of inquiry: Can the trust be established by parol testimony? If the doctrine of this court is to be adhered to, as laid down in the case of *Russell v. Southard*, 12 How., 154 (§§ 491-509, *infra*), this is not an open question. In that case the court say: "To insist on what was really a mortgage, as a sale, is in equity a fraud." And in *Conway v. Alexander*, 7 Cranch, 238 (§ 457, *supra*), Chief Justice Marshall says: "Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it was a sale or a mortgage." In *Morris v. Nixon*, 1 How., 126 (§ 483, *infra*), the court say: "The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face." In *Edrington v. Harper*, 3 J. J. Marsh., 353, the court say: "The fact that the real transaction between the parties was a borrowing and lending will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised."

In *Jenkins v. Eldredge*, 3 Story, 293, Mr. Justice Story said: In 4 Kent, 143 (5th ed.), it is declared, "a deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted by fraud or mistake." In 2 Sumn., 228, 232-33, Judge Story said: "It is the same if it be omitted by design upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice." In *Foy v. Foy*, 2 Hayw., 141: "In North Carolina, it is said the law on this subject is the same as the English law was before the statute of frauds, and parol declarations of trust are valid." "Where a testator gave by will all his estate to his wife, having confidence that she would dispose of it according to his views communicated to her, and it being alleged that the testator, at the time of making the will, desired his wife to give the whole of the property to B, and that she promised to do it, it was held that, the allegation being proved, a trust would be created as to the whole of the property in favor of B." *Podmore v. Gunning*, 7 Sim., 644.

Parol proof is admissible to show fraud, and consequently a resulting trust in a deed absolute on its face, notwithstanding any denial by the answer.

Lloyd v. Spillet, 2 Atk., 150; Ross v. Newall, 1 Wash. (Va.), 14; Watkins v. Stockett, 6 Har. & J., 435; Strong v. Stewart, 4 John. Ch., 167; English v. Lane, 1 Port. (Ala.), 328. In Boyd v. McLean, 1 John. Ch., 582, it was held, after an examination of the cases, "that a resulting trust might be established by parol proof, not only against the face of the deed itself, but in opposition to the answer of the nominal purchaser denying the trust, and even after the death of such purchaser." The statute of frauds in Rhode Island contains no exception in favor of resulting trusts, but Mr. Justice Story considered the exception immaterial, for it has been deemed merely affirmative by the general law. 1 Sumn., 187.

Where a trustee misapplies the fund, it may be followed, however it may have been invested, by parol, as between the parties, or a purchaser with notice. So, where an estate was purchased in the name of one person and the consideration came from another, a resulting trust may be established by parol; and in all cases where there is a resulting trust. In Hayworth v. Worthington, 5 Blackf., 361, it was held that parol evidence is admissible to prove that a bill of sale of goods, absolute on its face, was intended by the parties to be only a mortgage. The court say these decisions are founded upon the assumption that the admission of such evidence is necessary for the prevention of fraud. Cas. Temp. Talbot, 62; King v. Newman, 2 Munf., 40; Strong v. Stewart, 4 John. Ch., 167; Dunham v. Dey, 15 John., 555; Walton v. Cronly, 14 Wend., 63; Van Buren v. Olmstead, 5 Paige, 9. In the case of Overton v. Bigelow, 3 Yerg., 513, it was held "that an absolute bill of sale of negroes may be converted into a mortgage by a parol agreement to allow the conveyer to redeem; and this agreement may be inferred from the price given, and the mode of dealing between the parties." The case of Walker v. Locke, 5 Cush., 90, is considered as having no application to the case before us. It is well known that, until within a few years, the courts of Massachusetts had no chancery jurisdiction. The jurisdiction, when first conferred by statute, was limited to cases of specific execution of contracts and trusts, not including fraud, as a ground of relief. Within some one or two years past, the jurisdiction has been extended to frauds, but this has been done since the decision in the case above cited.

If the decision had been made since the extension of the jurisdiction beyond the construction of the local statutes, we should consider it only as the decision of a highly respectable and learned court, and not as a rule of decision for this court. It is admitted that the authorities on the question before us are conflicting in this country and in England; but as this court in several cases have decided the point, and it is now, and has been for several years past, a rule of decision, we are not prepared to balance the state authorities with the view of ascertaining on which side the scale preponderates.

§ 480. *Statute of limitations will not run in favor of grantee in deed intended as mortgage. His possession is not adverse.*

The third point regards the lapse of time and the statute of limitations. In his answer the defendant avers that the pleadings show a possession by him of more than twenty years before the institution of this suit, and that that possession has never been disturbed; and also that the proceeds of sale were received more than six years before the bill was filed, and these facts are relied on to bar the right of the complainant. It is clear that the statute cannot constitute a bar in the present case. Courts of equity apply the statute by analogy to cases at law; but in this case, the trust being established, there was no

adverse possession in favor of which the statute could run. The possession was consistent with the intentions of the parties until the fraud was discovered in 1851. Nor can the statute bar the right of the complainant to the proceeds of the land, as Babcock was bound to apply these to the payment of interest on the debt and in discharge of the principal. The decree of the circuit court is affirmed, with costs. (a)

§ 481. *Parol evidence not admissible to show deed a mortgage.*

Dissenting opinion by MR. JUSTICE CATRON.

The opinion just pronounced maintains that a deed in fee, without conditions, and made in that form, according to an agreement of the parties at the time, may be proved to have been a mortgage by parol evidence, establishing that a defeasance was part of the agreement when the absolute deed was executed, but that it was left out by design. And that this parol proof may be made, after the lapse of more than twenty years from the date of the deed before the grantee was sued, he having been in possession of the land conveyed, holding it under the deed from its date up to the time when the suit was brought. The defendant, among other things, relied on the statute of frauds as a defense to the suit. Lord Hardwicke lays down the rule in *Montacute v. Maxwell*, 1 P. Wms., 618, to be, that where there was no fraud or mistake in the original transaction, and the word or promise of the defendant was relied on, the statute of frauds declares such promise void, and equity will not interfere. And in this doctrine I understand the supreme judicial court of Massachusetts to concur. *Walker v. Locke*, 5 Cush., 90. The effect of the defeasance here set up, by parol evidence, is, that it defeats the absolute deed and makes it void on payment of a sum of money. On general principles the rule is, that where there is a *written contract*, all antecedent propositions, negotiations, and parol interlocutions, on the same subject, are deemed to be merged in such contract. 1 Story Com., p. 173, sec. 160; 2 Story, p. 286, sec. 1018. There must be fraud or mistake in making the agreement, if it can be reformed. *Id.*, sec. 157, p. 169. I think the parol proof was inadmissible both by the statute of frauds of Massachusetts, and according to the general rule referred to; and that the decree should be reversed and the bill dismissed.

§ 482. — *especially when not sanctioned by the state law.*

Dissenting opinion by MR. JUSTICE CAMPBELL.

The defendant, in the year 1828, entered upon the land conveyed to him by Nehemiah Wyman, and retained it until 1844. He then sold it as his own property, and appropriated the price to his own use. During this whole period, there was no act on the part of Wyman from which the relation of a mortgagor or debtor can be inferred, and no account was rendered by the defendant, nor was any *act* performed by him inconsistent with his deed. The evidence relied on to engraft a trust on this deed consists of conversations reported by Nehemiah Wyman, the debtor, and his brother William, as contemporaneous with the deed, and other conversations reported by William Wyman as occurring in 1844 and 1851; and also the statements of the answer. No intercourse between Nehemiah Wyman and the defendant took place between 1828 and 1851, directly or mediately, relative to this subject. The witness Nehemiah Wyman is not, in my opinion, a competent witness. This suit is brought by his son upon an assignment made after the controversy had com-

menced, and with the acknowledged purpose of using his father as a witness. It was found that sufficient evidence did not exist to support the claim, and machinery was resorted to, calculated to introduce the evils of champerty and maintenance. The witness sold his claim, with a concession to the assignee to employ him as a witness to establish it. Such a practice holds out to parties a strong temptation to commit perjury. *Bell v. Smith*, 5 Barn. & Cress., 188, J. Bayley's Opinion; *Maury v. Mason*, 8 Part., 212; *Clifton v. Sharpe*, 15 Ala., 618; 1 Penn., 214; 12 Pet., 140. The testimony of Edward Wyman is open to much observation; and I feel entirely indisposed to rest a decree upon his evidence. Nor do I see intrinsic difficulties in the inconsistencies of the answer. I cannot shut my eyes to the fact that nothing has been done between these parties for above twenty-three years inconsistent with the relations of vendor and vendee, or consistent with the relations of a creditor and debtor, except the detention of the evidence of the original debt by the defendant, and the most important part of that evidence was canceled in 1830 by him.

I dissent from the opinion of the court in reference to the jurisdiction of the circuit court of the United States in Massachusetts. It is admitted that, in the courts of Massachusetts, this trust could not be incorporated into the deed. The statute of frauds prevents it. *Walker v. Locke*, 5 Cush., 90. This statute constitutes a rule of property for the state. In the present case, the subject of the suit is a contract made in Massachusetts, by citizens of that state, and affecting the title to real property there. In my opinion, the statute law of Massachusetts furnishes a rule of decision to the courts of the United States.

MORRIS v. NIXON.

(1 Howard, 118-134. 1843.)

APPEAL to U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—The complainant, besides other relief prayed for, asks the aid of this court to decree a deed made by him to Henry Nixon, and which is absolute on the face of it, to be a security for money advanced upon loan, and that he may be at liberty to redeem the premises conveyed, by paying to Nixon, or by allowing to him, on account of the transactions between them, the moneys loaned to him by Nixon, and such as he may have advanced on account of the real estate purchased by the complainant and the late General Jonathan Williams from the Bank of North America; for the resale and improvement of which the defendants, Henry Nixon and Thomas Biddle, were the attorneys and agents of the purchasers. The surviving family, however, of General Williams, are in no way interested in this suit. The controversy is between Thomas Morris and the representatives of Henry Nixon, whose death has occurred since the bill was filed.

The deed from complainant to Henry Nixon bears date the 28th May, 1822. It recites the purchase made by Williams and Morris; that certain portions of it had been sold and conveyed to other persons, and that parts had been let on ground-rents, so that the quantity remaining was about seventy acres. That the sales and income of the property had nearly reimbursed the purchasers the first payment which they had made, of \$20,000; that there had been paid upon the purchase, out of the income and proceeds of sale, from time to time, enough to reduce the sum due by the purchasers to about \$29,000, which was a charge upon the premises, to be borne by the owners thereof in proportion to their

respective interests. It then recites that at the time of the execution of the indenture to Williams and Morris, Henry Nixon was, and had continued to be, interested with Morris to the extent of three eighth parts of the moiety, so as to entitle him to the benefits, and subject him to the obligations, of the purchase in that proportion. The consideration of the deed is then recited to be one-half part, "or thereabouts," of a debt due by the complainant to Thomas Biddle and John Wharton, which was originally \$4,000, for the security of which the complainant had, with the assent of Henry Nixon, mortgaged a part of the moiety of the original purchase; then a debt, claimed by Nixon to be due to him by the complainant, of \$1,625, \$1,000 of which it is said the complainant received on account of Nixon's agency for the moiety of the purchase belonging to Williams, and \$625 being the proportion justly chargeable to complainant for Nixon's agency for the other moiety. There was a further consideration, amounting to \$4,600, being the amount of two notes which had been discounted at the Bank of North America for the accommodation of the complainant, with Nixon's indorsement. The circumstances attending the execution of the deed are disclosed in the pleadings, and by other proofs in the cause.

The complainant resided in New York, and Nixon lived in Philadelphia. The former being in great pecuniary distress, and fearing greater within a few days unless he could make a loan, sent his brother, Henry Morris, to Philadelphia to obtain from their brother-in-law, Henry Nixon, an advance of \$5,000, offering as security his interest in the property bought by himself and General Williams. Nixon says, in his answer, that his feelings being wrought upon by the representation made by Henry Morris of the urgent nature of his brother's wants, and the destructive consequences to be apprehended if he could not meet a demand there was upon him, he concluded to provide the money; that, however, before he finally agreed to do so, he told Henry Morris that he must consult his counsel upon the subject. After consulting counsel, he informed Henry Morris that he had determined to deal with the complainant upon no other terms than an absolute sale and conveyance of all his interest, legal and equitable, in the premises bought by him and Williams; and as there would be a full consideration without it, that the loan would create a new debt, for which he would take a separate evidence or security; that he was advised by his counsel to write out in the deed at large the real consideration, so that the truth of the transaction might at all times appear upon the papers, and to take a bond for the loan, so that, if the purchase should turn out well, he would not be bound to enforce the bond, but, in case of misfortune to the complainant, he would have evidence of his right as a creditor, and, if he should think fit, might use it for the benefit of the complainant or his family. In connection, however, with the foregoing statement, Nixon declares that, in the course of his conversation with his counsel, he was asked whether the interest of the complainant in the property was worth the incumbrances upon it, and what was already due by him to Nixon. To which he replied, as he truly believed, that it would not bring more; that nothing but the peculiarity of the circumstances would induce him to increase his interest, or become a purchaser of it; and that he determined, as he had been advised by his counsel, to buy out the complainant's interest entirely and absolutely, without any trust, direct or indirect, express or implied; nor any understanding whatever, that the complainant or any other person was to have a claim or benefit therefrom, and that he would deal with him on no other terms. Henry Morris arrived in Philadelphia on

the 23d of May. His first conversation with Nixon concerning his errand was on that day; on the 24th, Nixon consulted counsel, informed Henry Morris of the result, and on the same day the same counsel made a draft of the deed. On the same day, too, Nixon wrote to the complainant the following letter:

DEAR MORRIS: Henry arrived here early yesterday morning. Having had a conversation with him on the subject of a loan, I have only to say my best exertions will be to obtain this object, and to enable me to do which, Henry will immediately call on you to advise the only mode that he or I can suggest to achieve it. You, I am sure, will have confidence in me as to the mode proposed, which Henry will communicate; and be assured my sincere prayers will be, and best exertions to promote this all-important point.

In haste, truly yours,

H. NIXON.

This letter was written after Nixon had consulted counsel, for he says in his answer, after he had done so, he thereupon returned to Henry Morris, and informed him of the determination he had come to, of dealing upon no other terms than an absolute conveyance, without any trust, and taking a bond for the loan. And in the letter it is stated that "Henry will immediately call on you to advise you of the only mode that he or I can suggest to achieve it." The draft of the deed being made on the 24th May, it was afterwards engrossed by the witness Cash, and he was sent with it to New York. He arrived there on the 28th, the deed was signed by Morris and his wife, Cash and Henry Morris being witnesses. On the same day, Cash left New York on his return to Philadelphia. On the following morning, the 29th May, as it appears by a letter of that date from Nixon to the complainant, Henry Morris arrived again in Philadelphia. He says in his answer that he found Nixon resolved to do nothing in the business unless the conveyance was absolute and *bona fide*, and he was therefore obliged to deliver the deed without any promises of trust. And Nixon declares that Henry Morris delivered to him the deed, and at the same time a bond, in the handwriting of the complainant, for \$5,000.

It is in proof, also, that when the deed was delivered, there were unadjusted accounts growing out of Nixon's and Biddle's agency for the property. That no account had been furnished to the complainant since 1816, except an abstract of one Innes' account of the excavation and sales of stone and gravel, sent to him by the defendant Henry J. Williams in May, 1819. The recital in the deed shows that the accounts were unascertained, for it speaks of the \$20,000 which was first paid by Williams and Morris on their purchase as being nearly reimbursed, and that there remained due on the purchase about \$29,000. Two years before the deed was executed, the complainant made an agreement with David Walker and Henry Morris, to convey to them, in trust for his sister Maria Nixon, a fourth part of her moiety, upon the terms stated in the agreement, in pursuance of his original intention when Williams and himself made the purchase. It was urged in the argument that the recitals in the deed relating to the sum then due upon the purchase of Morris and Williams, that of Nixon's interest in it, and the debt claimed by Nixon to be due to him on account of his agency, were incorrect. We shall not, however, consider these objections, or those which were made against the validity of the deed on account of inadequacy of price, undue influence and surprise. Our object is to dispose of this case for the present, by assigning to the deed its true character in equity, under all the circumstances attending its execution.

§ 483. *When an absolute conveyance is made upon an application for a loan.*

The charge against Nixon is, substantially, a fraudulent attempt to convert

that into an absolute sale which was originally meant, by himself and the complainant, to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face. The transaction was begun by Morris, with the request of a loan from Nixon, for which he offered a security upon the property, for the management of which Nixon was his agent. It ended by Morris giving to Nixon a deed for the property, absolute on its face, and also a bond for a loan of \$5,000. Unless, then, some proof has been given to show that they truly bargained upon another footing, and that the loan did not form the chief inducement for the execution of the deed, and had not been treated by both parties as a substantial part of the consideration, though not expressed in the recital, equity will interpret it to be a security for money loaned.

Is there any such proof in this case? None that we can see, even if the defendants are allowed to use as evidence, as they contend they have a right to do, the answer of their co-defendant, Henry Morris. His account of the transaction is, that in an interview with Nixon succeeding that when he made the application for a loan, and when Nixon declined lending, stating that his own embarrassments required all the funds he could command, that Nixon said, it was very doubtful if the "Hills property" would more than pay the claims upon it, and he could not consent to make the loan unless Morris would convey the property to him; and he added, if the property should eventually turn out well, he would account to Thomas Morris for it, and share it with him. And in the third interview Nixon told him that his counsel had advised him upon no account to let the complainant have the money unless an absolute and *bona fide* conveyance of the whole premises was made; that, upon receiving his answer, he returned to New York, and communicated the determination of Nixon to his brother; and that, upon his return to Philadelphia, he was obliged to deliver the deed without any promises of trust, as he found Nixon resolved to do nothing in the business unless the conveyance was absolute and *bona fide*. He says, however, he was satisfied in his own mind that, if the property turned out well, Nixon would give a handsome share of it to the complainant; and that, in consequence of this impression, he always wrote to him as if he was still interested in the successful result of the purchase. We are in no way, though, influenced by the answer of Henry Morris in coming to our conclusion as to the character of the deed. It has been introduced because it was strongly urged to be good evidence in behalf of the defendants, by their counsel; and with the view of showing, even though the facts stated had been proved, that they would not take the case out of the principle, that a deed absolute on the face of it, for property, offered to secure a loan in a case in which the parties originally met upon the footing of borrowing and lending, will be considered a deed in the nature of a mortgage to secure a loan, though another consideration shall be in the recital of the deed than the loan, unless it shall be proved that the parties afterwards bargained for the property independently of the loan; or if it shall appear that the chief inducement of the grantor in making the deed was to procure the loan; or that the grantee, after the execution of the conveyance, treated the money which he had advanced as a substantial part of the consideration, and not as a loan. There is no proof in this case that the parties bargained without a reference to an advance by Nixon of \$5,000, and it does appear that Morris was only induced to make the deed from the offer of Nixon to make the advance of that sum, and that Nixon treated it substantially as a part of the consideration to be given for the property, as he took a

bond from Morris for the amount, and says it was only to be contingently enforced, for the benefit of Morris or his family, in the event of Morris falling into misfortune.

Courts of equity will not permit so uncertain a benefit as is here expressed to weigh at all in their consideration of cases like this; for, if they did, it might become a contrivance to give plausible coloring to an originally meditated fraud, or to one induced by the temptation of subsequent gain. But besides the transaction itself, as it appears in the pleadings, there were relations of interest and of agency, between Thomas Morris and Henry Nixon, in respect to the property; and such as grew out of the embarrassments of the former, and also out of his particular condition to the recitals of consideration in the deed, which combine to raise a violent presumption of a secret trust, and that the deed was meant to secure Nixon's advances, loans and indorsements for Morris. Nixon claimed an interest in the property, besides the one-fourth of the moiety which Morris had agreed to convey to Walker and Henry Morris in trust for Mrs. Nixon. For the former, Nixon had not such satisfactory evidence as he could rely upon. This appears from his correspondence. Morris was much embarrassed; no one knew his pecuniary difficulties better than Nixon did. He remembered, too, that Morris, without consulting him, had offered to mortgage the property to the United States. He feared, from the disclosures made by Henry Morris of the pressing necessity of his brother, that he might mortgage the property to raise the sum he then stood in need of, to some other person if Nixon did not advance it; so that, at some other time, urged by want of money or the demands of creditors, he might be induced to convey to others an interest in the concern. That new parties might interfere with the management of it, to the injury of all who were originally interested; that the bank, by any change in the ownership, and the course which might be pursued in respect to the property, might not continue to be so indulgent as it had been, in postponing the payment of the purchase money still due. Besides, sales of this property to individuals and purchases from the city were then anticipated—the latter a slow, but sure speculation; almost at the price of the owners, from the contiguity of public works, which could not be abandoned; nor could they be carried on without more of the property than the city had already bought. Add the embarrassed condition of Morris; the connection and close intimacy between the parties; their excited expectations, extended by exaggerated representations to the females of the family, that all concerned would realize great pecuniary advantages from the property; the certain interest, also, of Mrs. Nixon in it, and the certainty that, by keeping it under their own control, it would be managed in their own way,—all these considerations were cogent inducements with Nixon to get a legal title from Morris, and the moment when Henry Morris presented himself to solicit a loan for his brother was the occasion upon which it could certainly be obtained.

But, further, Morris' condition, in respect to the consideration recited in the deed, was not such as to induce him to wish to part with the property. Nor does Nixon's assumption of the particular debts of Morris, recited in it, bear the aspect of a genuine purchase. It was not a present payment of anything, and, if genuine, was the purchase of Morris' speculation by an advance of \$5,000, which, according to the face of the transaction, was to be repaid. And may we not say, when in the same transaction we have it admitted that one of the documents was not meant by the parties to be what it purports, that another of them by this fact is subjected to suspicion? But we have said, though

Morris was embarrassed, that he was not pressed by any of the particulars recited in the deed as a consideration. The purchase money remaining due to the bank on the property, the bank had permitted to remain unpaid, finding no doubt its advantage in the interest. Both principal and interest were ultimately paid, not by Nixon, but by sales of the property. The debt due to Biddle and Wharton was secured by a mortgage upon a part of the property, given by Morris with Nixon's consent. The notes discounted at the bank for the accommodation of Morris with Nixon's indorsement had been renewed, and were running as an accommodation, to be renewed again and again, as they were, in fact, without any change of names to the paper, after the deed was executed. Nixon could not press for the commissions claimed as agent of the property, or did not intend to do so; for we find him writing to Morris on the 21st May, two days before Henry Morris arrived in Philadelphia on his errand for the loan, and seven before the deed was executed, to make himself easy as to commissions, as it had not been his intention to ask for them, or acknowledging he had no right to do so, until "the final closing of the accounts, agreeably to the first agreement when the Hills were bought."

Such was the situation of Morris in respect to the debts named in the deed as the consideration for which an absolute title was to pass. He was an embarrassed man, and hard pressed at that moment for \$5,000; and, though destructive consequences were to assail him if he could not get it, is it likely that Nixon then could have been insensible to the ties which had united them, and could have made his distress the means of coercing from him an absolute conveyance, without a secret trust of all that he had left, upon which he could rest a hope to raise himself a little above his ruined fortune? We cannot think so. If we did, it would be our duty to give another aspect to this transaction, from which the defendants would derive no benefit. If a doubt remained upon our minds in respect to the character which should be given to the deed, the letter from Nixon to Morris, of the 24th May, would remove it. It may be considered either as having been intended by the writer to put Morris at ease in respect to the conveyance and bond which were required, or as a letter calculated to mislead Morris in respect to the use which Nixon would make of the conveyance. The letter might be either the artifice of the writer to accomplish an unjust intent, or the language of the letter and manner of using it might innocently mislead. In either event, if the letter is such as is likely to mislead, and from which it can be fairly implied that it induced a confidence that the receiver of it would have any benefit from or interest in the property, he was required to convey contrary to the terms of the deed, it would be fatal to it as an absolute deed.

Nixon and Morris were brothers-in-law. There seems to have been between them fraternal intimacy and confidence. It appears to have been unlimited in all the relations of social life and of business. The confidence of Morris was unwavering and dependent, from the superior business ability of Nixon. Nor can it be denied that it was met by him in Morris' difficulties by acts of timely assistance and kindness. Nixon had been his agent in the management of the property from 1812. He claimed an equitable interest in it, besides the proportion of Mrs. Nixon. There were unascertained accounts of Nixon's agency when the deed was made. Morris had received no account since 1816, except an abstract of sales of some stone and gravel, furnished to him by one of the defendants in 1819. He did not know particularly what had been the proceeds of the sales and income of the property, or how they had been applied. No

examination or estimate of the value of the residue of the property, as it then stood, was made. No communication had been given by the agent of the effect of public and private improvements upon it, in respect to its then or prospective value. Nothing was said between Morris and Nixon as to the price that the taker was to give. In this situation, being greatly embarrassed, Morris asked a loan from his agent. The agent says: "I am aware of your embarrassment. There are certain claims upon this property, which you will have to pay, and other responsibilities of yours, for which I am also answerable. I will provide the money of which you stand in need, will take a bond from you for it, which I am not to enforce against you unless you should fall into misfortune, and then only, should I see fit to do so, for the benefit of yourself or your family, if you will give me an absolute conveyance of the property." The conveyance is given, the bond is taken, and now it is said the transaction was intended to be an absolute sale, and not a security for a loan. We do not think that the connection between the bond and the deed can be dismembered. Nor can we reconcile it with what we believe would have been the ordinary conduct of men in like circumstances, to suppose that an agent so situated to a principal and friend in distress, could have intended, by asking for an absolute conveyance, to use it for any other purpose than to secure himself in the sum he was about to advance, and his other responsibilities for his principal. Morris was a ruined man. Nixon knew it, and treated with him in this instance as if the crisis had come when creditors would no longer be satisfied with postponed promises. It was natural for Nixon, nor was it wrong in the then state of real property, and as he was about to advance to his brother-in-law \$5,000, to take the most efficient way to secure himself from loss, and to put it out of the power of Morris to interfere with his security, by subsequently giving to others an interest in the property. We find upon a preceding occasion, when Morris was pressed, and had offered to mortgage this property, that Nixon suggested that it should be put into his hands, with the trust expressed of what was intended. His object, then, was that the original intention of the purchase might be carried out for the benefit of all concerned. Nixon's inducement to do so was greater than it had been at that time. Mrs. Nixon's interest of one-fourth in the moiety of the property had been in the mean time secured to her by her brother.

We will now turn to the letter of the 24th May, from Nixon to Morris, to confirm the view we have of this transaction. It begins: "Dear Morris: Henry arrived here early yesterday morning. Having had a conversation with him on the subject of a loan, I have only to say, my best exertions will be to obtain this object, and to enable me to do which, Henry will immediately call upon you to advise you of the only mode that he or I can suggest to achieve it."

It must be remembered that the letter was written on the day that Nixon consulted his counsel, after the consultation had been had. The answer of Nixon shows this. He says that he had concluded to provide the money, but that he must consult counsel before he finally agreed. And then, that he thereupon returned to Henry Morris, and informed him of the determination he had come to, of dealing upon no other terms than an absolute sale and conveyance, and taking a bond for the loan. When, then, Nixon says in the letter, "Henry will immediately call upon you, to advise you of the only mode that he or I can suggest to achieve it," it is manifest that the mode had been a subject of conversation between them; and as he mentions in the letter the loan, in connection with the mode, which Henry was to communicate to his brother,

this contemporary letter must be called on to ascertain what Nixon intended by the mode; and more especially so, as it seems the contents of the letter had not been told to Henry Morris.

The mode was an absolute conveyance of the property, and a bond. But there is, in connection with the mode, the declaration of an intention, coupled with an ability, in consequence of the mode, to achieve a loan. It would then be a very strained inference, from the words of the letter, to say that Nixon did not mean that Morris, to whom he was writing, should understand that he meant a loan, to be secured by a conveyance of the property as well as by a bond; or that he meant that the loan, which he could achieve by the mode, was to depend upon Morris making to him an absolute sale of the property for the considerations expressed in the deed. If such had been his meaning, it could have been plainly said. But we think there can be no doubt concerning what the writer of this letter meant, or the construction which, in a court of equity, should be put upon it, when we find him saying: "You, I am sure, will have confidence in me as to the mode proposed, which Henry will communicate; and be assured, my sincere prayers will be and best exertions to promote this all-important point." This language indicates a sincere desire in Nixon, at that time, to relieve the distress of his brother-in-law. That he intended to solicit his confidence as to the mode proposed, to secure himself from loss, without depriving Morris of a participation in the prospective advantages which they had mutually indulged for ten years, in respect to the property, and which, it cannot be denied, had in a great degree been excited by the representations of Nixon. In Morris' situation, it was a great point gained for the benefit of all concerned in the property, that the legal control of it should be taken from him and vested in Nixon. This letter we think a part of the entire transaction, and stamps its character in a court of equity. It could only have been intended to put Morris at ease in respect to the absolute conveyance which Nixon required; or it was designed to mislead and deceive Morris by expressions of sympathy which were not felt, and a solicitation of confidence not deserved. If the latter, we should feel bound to pronounce the transaction a meditated fraud, successfully accomplished. We adopt the first as most probable, and in that view of the case decree the conveyance of the 24th of May, 1822, to be a deed with a secret trust, for the security of moneys loaned and advanced by Nixon to the grantor. This conclusion makes it unnecessary for us to consider the effect of time upon the rights in controversy.

We order the decree of the circuit court to be reversed, and that the cause be remanded, with instructions to the court to have an account taken, and that the complainant be allowed his proportion at the rate of an interest of five-eighths in a moiety of the original purchase of Morris and Williams, and that the court shall take such other proceedings in the cause as equity may require.

PEUGH v. DAVIS.

(6 Otto, 332-339. 1877.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Peugh conveyed to Davis certain lots by deed, in form absolute, but which it was insisted was but a mortgage to secure a loan of money. There was later an instrument executed by him which added to the former conveyance a general warranty of title, and a covenant to indemnify Davis against all loss by reason of litigation concerning the title to the prop-

erty, and also a receipt for \$2,000, "the same being in full" of the purchase money of the lots. The covenant of warranty and the last mentioned receipt bear the same date, February 9, 1858. This suit was brought June 28, 1869, to redeem the property, and in the court below it was dismissed. Complainant appealed.

Opinion by MR. JUSTICE FIELD.

This is a suit in equity to redeem certain property, consisting of two squares of land in the city of Washington, from an alleged mortgage of the complainant. The facts out of which it arises are briefly these: In March, 1857, the complainant, Samuel A. Peugh, borrowed from the defendant, Henry S. Davis, the sum of \$2,000, payable in sixty days, with interest at the rate of three and three-fourths per cent. a month, and executed as security for its payment a deed of the two squares. This deed was absolute in form, purporting to be made upon a sale of the property for the consideration of the \$2,000, and contained a special covenant against the acts of the grantor and parties claiming under him. This loan was paid at its maturity and the deed returned to the grantor. In May following the complainant borrowed another sum from the defendant, amounting to \$1,500, payable in sixty days, with the same rate of interest, and as security for its payment redelivered to him the same deed. Upon this sum the interest was paid up to the 6th of September following. The principal not being paid, the defendant placed the deed on record on the 7th of that month. In January, 1858, a party claiming the squares under a tax title brought two suits in ejectment for their recovery. The defendant thereupon demanded payment of his loan, as he had previously done, but without success.

On the 9th of February following the complainant obtained from the defendant the further sum of \$500, and thereupon executed to him an instrument under seal which recited that he had previously sold and conveyed to the defendant the squares in question; that the sale and conveyance were made with the assurance and promise of a good and indefeasible title in fee simple; and that the title was now disputed. It contained a general covenant warranting the title against all parties, and a special covenant to pay and refund to the defendant the costs and expenses, including the consideration of the deed, to which he might be subjected by reason of any claim or litigation on account of the premises. Accompanying this instrument, and bearing the same date, the complainant gave the defendant a receipt for \$2,000, purporting to be in full for the purchase of the land.

§ 484. *When a deed absolute in form will be treated as a mortgage.*

The question presented for determination is whether these instruments, taken in connection with the testimony of the parties, had the effect of releasing the complainant's equity of redemption. It is insisted by him that the \$500 advanced at the time was an additional loan, and that the redelivered deed was security for the \$2,000, as it had previously been for the \$1,500. It is claimed by the defendant that this money was paid for a release of the equity of redemption which the complainant offered to sell for that sum, and at the same time to warrant the title of the property and indemnify the defendant against loss from the then pending litigation.

§ 485. — *doctrine in equity.*

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction,

and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice. *Hughes v. Edwards*, 9 Wheat., 489 (§§ 919-925, *infra*); *Russell v. Southard*, 12 How., 139 (§§ 491-509, *infra*); *Taylor v. Luther*, 2 Sumn., 228; *Pierce v. Robinson*, 13 Cal., 116.

§ 486. *As long as a deed is an instrument of security the equity of redemption cannot be waived.*

It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

§ 487. *How a subsequent release of an equity of redemption must be made to appear.*

A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skilful to take advantage of the necessities of the borrower. *Russell v. Southard*, *supra*. Without citing the authorities, it may be stated as conclusive from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding. If, now, we apply these views to the question before us, it will not be difficult of solution. It is admitted that the deed of the complainant was executed as security for the loan obtained by him from the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan. There is no satisfactory evidence that the equity

of redemption was ever released. The testimony of the parties is directly in conflict, both being equally positive,—the one, that the advance of \$500 in February, 1858, was an additional loan; and the other, that it was made in purchase of the mortgagor's interest in the property. The testimony of the defendant with reference to other matters connected with the loan is, in several essential particulars, successfully contradicted. His denial of having received the instalments of interest prior to September, 1857, and his hesitation when paid checks for the amounts with his indorsement were produced, show that his recollection cannot always be trusted.

§ 488. *What class of facts tend to show that an equity of redemption has not been released.*

Aside from the defective recollection of the creditor, there are several circumstances tending to support the statement of the mortgagor. One of them is that the value of the property at the time of the alleged release was greatly in excess of the amount previously secured with the additional \$500. Several witnesses resident at the time in Washington, dealers in real property, and familiar with that in controversy and similar property in its vicinity, place its value at treble that amount. Some of them place a still higher estimate upon it. It is not in accordance with the usual course of parties, when no fraud is practiced upon them, and they are free in their action, to surrender their interest in property at a price so manifestly inadequate. The tax title existed when the deed was executed, and it was not then considered of any validity. The experienced searcher who examined the records pronounced it worthless, and so it subsequently proved.

§ 489. — *possession and cultivation by mortgagor.*

Another circumstance corroborative of the statement of the mortgagor is, that he retained possession of the property after the time of the alleged release, inclosed it, and either cultivated it or let it for cultivation, until the inclosure was destroyed by soldiers at the commencement of the war in 1861. Subsequently he leased one of the squares, and the tenant erected a building upon it. The defendant did not enter into possession until 1865. These acts of the mortgagor justify the conclusion that he never supposed that his interest in the property was gone, whatever the mortgagee may have thought. Parties do not usually inclose and cultivate property in which they have no interest.

§ 490. *Subsequent papers ancillary to a deed are to be construed with reference to it.*

The instrument executed on the 9th of February, 1858, and the accompanying receipt, upon which the defendant chiefly relies, do not change the original character of the transaction. That instrument contains only a general warranty of the title conveyed by the original deed, with a special covenant to indemnify the grantee against loss from the then pending litigation. It recites that the deed was executed upon a contract of sale, contrary to the admitted fact that it was given as security for a loan. The receipt of the \$2,000, purporting to be the purchase money for the premises, is to be construed with the instrument, and taken as having reference to the consideration upon which the deed had been executed. That being absolute in terms, purporting on its face to be made upon a sale of the property, the other papers referring to it were drawn so as to conform with those terms. They are no more conclusive of any actual sale of the mortgagor's interest than the original deed. The absence in the instrument of a formal transfer of that interest leads to the conclusion

that no such transfer was intended. We are of opinion that the complainant never conveyed his interest in the property in controversy except as security for the loan, and that his deed is a subsisting security. He has, therefore, a right to redeem the property from the mortgage. In estimating the amount due upon the loan, interest only at the rate of six per cent. per annum will be allowed. The extortionate interest stipulated was forbidden by statute, and would, in a short period, have devoured the whole estate. The defendant should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him.

The decree of the supreme court of the District must be reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

RUSSELL v. SOUTHARD.

(12 Howard, 189-159. 1851.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This is a suit in equity to redeem a mortgage, brought here by appeal from the circuit court of the United States for the district of Kentucky. On the 24th day of September, 1827, Russell, the complainant, conveyed, by an absolute deed in fee simple, to James Southard, deceased, whose brother and devisee, Daniel R. Southard, is the principal party defendant in this bill, a farm, containing two hundred and sixteen acres, situated about two miles from the city of Louisville. At the time the deed was delivered, and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows:

“Gilbert C. Russell has sold and this day absolutely conveyed to James Southard, said Russell’s farm near Louisville, and the tract of land belonging to said farm, containing two hundred and sixteen acres, and the possession thereof actually delivered on the following terms, for the sum of \$4,929.81½ cents, which has been paid and fully discharged by the said Southard as follows, namely: first \$2,000, money of the United States, paid in hand; secondly, the transfer of a certain claim in suit in the Jefferson circuit court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of \$1,558.87½; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of \$1,270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown, etc., and James C. Johnston, etc., as aforesaid, without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston, etc., or either, and to take all risk of collection upon himself, and make the best of said claim he can.

“The said James Southard agrees to resell and convey to the said Russell, the said farm and two hundred and sixteen acres of land, for the sum of \$4,929.81½, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs, etc., that if the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that

then this agreement shall be at an end, and null and void; and the wife of said Russell shall relinquish her dower within a reasonable time, as per agreement of this date. This agreement of resale by the said James Southard to the said Russell is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of \$4,929.81½, and interest thereon from this date as aforesaid. And this agreement is to be valid and obligatory only upon the said James Southard, upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell.

"In witness whereof the parties aforesaid have hereunto set their hands and seals, at Louisville, Kentucky, on this 24th day of September, 1827.

"GILBERT C. RUSSELL, [SEAL.]

"JAMES SOUTHARD. [SEAL.]

"Witness present, signed in duplicate —

"J. C. JOHNSTON."

§ 491. *In construing a deed or written contract, a court of chancery will admit extraneous oral or written evidence of every material fact known to the parties when the contract was executed.*

The first question is whether this transaction was a mortgage or a sale. It is insisted, on behalf of the defendants, that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary or add to their contents. But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear, both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practiced, under the shelter of any written papers, however precise and complete they may appear to be. In *Conway v. Alexander*, 7 Cranch, 238 (§ 457, *supra*), C. J. Marshall says: "Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it was a sale or a mortgage;" and in *Morris v. Nixon*, 1 How., 126 (§ 483, *supra*), it is stated: "The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face." These views are supported by many authorities. *Maxwell v. Montacute*, Prec. in Ch., 526; *Dixon v. Parker*, 2 Ves. Sr., 225; *Prince v. Bearden*, 1 A. K. Marsh., 170; *Oldham v. Halley*, 2 J. J. Marsh., 114; *Whittick v. Kane*, 1 Paige, 202; *Taylor v. Luther*, 2 Sumn., 232; *Flagg v. Mann*, id., 538; *Overton v. Bigelow*, 3 Yerg., 513; *Brainerd v. Brainerd*, 15 Conn., 575; *Wright v. Bates*, 13 Vt., 341; *McIntyre v. Humphries*, 1 Hoff. Ch., 331; 4 Kent, 143, note A, and 2 Greenl. Cruise, 86, note.

§ 492. *The supreme court is not bound by the decisions or practice of state courts in admitting or excluding evidence.*

It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles. *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 id., 108; *Boyle v. Zacharie*, 6 Pet., 658; *Swift v.*

Tyson, 16 id., 1; Foxcroft v. Mallett, 4 How., 379. But we do not perceive that the rule held in Kentucky differs from that above laid down. That rule, as stated in Thomas v. McCormick, 9 Dana, 109, is that oral evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance, or some vice in the consideration.

§ 493. *Where an absolute conveyance is given as security for a loan, it is a mortgage in equity.*

But the inquiry still remains, what amounts to an allegation of fraud, or of some vice in the consideration; and it is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and we know of no court which has stated this doctrine with more distinctness than the court of appeals of the state of Kentucky. In Edrington v. Harper, 3 J. J. Marsh., 355, that court declared: "The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised." We proceed, then, to examine this case by the light of all the evidence, oral and written, contained in the record.

§ 494. *Inadequacy of consideration.*

The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed? In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. Conway v. Alexander, 7 Cranch, 241 (§ 457, *supra*); Morris v. Nixon, 1 How., 126 (§ 483, *supra*); Vernon v. Bethell, 2 Eden, 110; Oldham v. Halley, 2 J. J. Marsh., 114; Edrington v. Harper, 3 id., 354.

§ 495. *What evidence of value is admissible.*

Upon this important fact the evidence leaves the court in no doubt. The farm, containing two hundred and sixteen acres, was about two miles from Louisville, and abutted on one of the principal highways leading to that city. A dwelling-house, estimated to have cost from \$10,000 to \$12,000, was on the land. In May, 1826, about sixteen months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of \$12,960. Some attempt is made to show, by the testimony of Mr. Thurston, that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural condition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted; and considering the price paid by Rus-

sell, and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property.

§ 496. *Case of an inadequate price.*

The consideration for the alleged sale was \$2,000 in cash, and the assignment of two claims then in suit, amounting, with the interest computed thereon, to \$2,829.81, not finally reduced to money by Russell till October, 1830, upwards of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate; and therefore we must take along with us, in our investigations, the fact that there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court, compared with the facts above indicated; but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price. It appears that Russell had intrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there, except this farm, and in immediate and pressing want of about \$2,000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies: "Russell was anxious to sell; indeed, he was importunate that I should purchase." And a letter is produced by the defendant, D. R. Southard, written to James Southard, by Wing, containing a proposal for a sale. The letter is as follows:

"SUNDAY, NOON.

"SIR — Having had some conversation in relation to Col. Russell's plantation, I will take the liberty of submitting for your consideration, first, how much you will give for the place, crops, stock, utensils and implements, or how much without the same, to be paid as follows: in one-sixth cash in hand, the balance in one, two, three, four and five equal annual instalments, which may be extinguished at any time, with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation.

"Respectfully, yours, J. W. WING.

"MR. SOUTHARD.

"N. B. Please leave an answer for me at Allan's, say this evening.

"Yours, etc., J. W. W."

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase; nor is any sum of money mentioned in this letter of Wing; but, bearing in mind Russell's necessity to have \$2,000 in cash, the offer to take one-sixth cash and the balance in one, two, three, four and five annual instalments, indicates that Russell then expected about \$12,000 for the property, and had that sum in view as the price when these terms were proposed. This offer to sell differs so widely from the

terms of the written memorandum, that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, \$13,000 or \$14,000, and that he should consider it a sacrifice at \$10,000; but no proposal was made to give, or take any price for the farm. That some time after Southard told him he had advanced Russell between \$4,000 and \$5,000 on the place, but that, in case he owned the place, it would cost him \$10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that "James Southard and Gilbert C. Russell, I think on the same day, presented the agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is that Russell was to pay the money in four months and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendants' counsel as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defense a conditional sale; but it cannot be doubted that the least effect justly attributable to such a departure from the facts is to deprive his answer of all weight, as evidence, on this part of the case.

§ 497. *In doubtful cases a court of equity leans to the conclusion that an absolute deed is a mortgage.*

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten that the same language which truly describes a real sale may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that,

in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. *Conway v. Alexander*, 7 Cranch, 218 (§ 457, *supra*); *Flagg v. Mann*, 2 Sumn., 533; *Secrest v. Turner*, 2 J. J. Marsh., 471; *Edrington v. Harper*, 3 J. J. Marsh., 354; *Crane v. Bonnell*, 1 Green, Ch., 264; *Robertson v. Campbell*, 2 Call, 421; *Poindexter v. McCannon*, 1 Dev. Eq. Cas., 373.

§ 498. *A borrower who submits to the dictation of the lender, and gives security in the form of an absolute deed, is not held in equity to have consented so as to fix the rights of the parties in the deed.*

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the lord chancellor, in *Vernon v. Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them." The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage. *Floyer v. Lavington*, 1 P. Wms., 268; *Lawley v. Hooper*, 3 Atk., 278; *Scott v. Fields*, 7 Watts, 360; *Flagg v. Mann*, 2 Sumn., 533; *Ancaster v. Mayer*, 1 Bro. C. C., 464. And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

§ 499. *Where there is evidence of the relation of debtor and creditor, and a memorandum showing the amount, assumpsit lies though it contains no promise of payment.*

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money be a conclusive test to determine whether the conveyance was a mortgage. In *Brown v. Dewey*, 1 Sandf. Ch., 56, the cases are reviewed and the result arrived at that it is not conclusive. It has also been maintained that the proviso, or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor. *Ancaster v. Mayer*, 1 Bro. C. C., 464; 2 Greenl. Cruise, 85, n. 3. But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled that an action of *assumpsit* will lie. *Tilson v. Warwick Gas-Light Co.*, 4 Barn. & C., 968; *Yates v. Aston*, 4 Ad. & El. (N. S.), 182; *Burnett v. Lynch*, 5 Barn. & C., 589; *Elder v. Rouse*, 15 Wend., 218.

§ 500. *One's belief that he has no interest in property, and his surrender of the memorandum of conditions, do not destroy his right.*

Some reliance was placed on the facts that in August, 1830, the plaintiff wrote a letter to his wife requesting her to release her dower, and that, in October, 1830, Russell surrendered the written memorandum, under circumstances which will be presently stated. It is urged that these acts show he understood

the original transaction was not a mortgage. But the utmost effect justly attributable to these acts is, that Russell thought he then had no further claim to the property, and this belief may as well have arisen from the terms of the memorandum, as from his knowledge that a sale was intended. In our judgment, however, these acts, taken in connection with other facts proved, do not tend to support the defendants' case. Russell had, by his written contract to procure the release of his wife's dower, subjected himself to pay liquidated damages to the extent of \$3,000; and he might desire to escape from this liability by having his wife release her right, even if he then believed he had a right to redeem and expected to redeem; for, in that event, such release could do neither him nor his wife any harm. But, on the other hand, if he then thought he had no such right, it would be a balancing of disadvantages to have such a release made, and the question would be, whether the right of dower was more important than the liability to damages. And, as to the surrender of the written memorandum in October following, it appears, from the testimony of Colonel Woolley, that Russell, even after this surrender, thought he had a just right of redemption, though he undoubtedly believed that it was greatly embarrassed, if not lost, by his failure to pay on the stipulated day and by his relinquishment of the written memorandum.

The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage. Being of opinion that this was in its origin a mortgage, the next inquiry is, whether the right of redemption has been extinguished. In October, 1830, Russell was temporarily in Louisville, and, while there, called on Southard, and informed him there was a mistake of \$100 in the computation of the amount due on the claims assigned to him. Southard insisted it was the mistake of W. Pope, who, he said, was Russell's agent, and that he, Southard, was not liable to make it good. He also set up a claim that he had a right to redeem, or, as D. R. Southard says, repurchase the farm. This, also, Southard denied. It does not appear, from any proofs, what further negotiations, if any, took place between the parties; but the result was, that, on the payment by Southard of \$100, Russell wrote and signed the following receipt on the back of the written memorandum, which he surrendered to Southard:

"Received, 6th Oct., 1830, of James Southard, by the hand of Daniel Southard, \$100, which makes the two debts of Brown and Johnston, with the \$2,000, amount to the sum of \$4,920.81½; and nothing but the act of God shall prevent the relinquishment of dower of Mrs. Russell being deposited in the clerk's office by the 1st of January next. This is in full of all demands upon J. Southard.

(Signed)

"GILBERT C. RUSSELL." [Seal.]

§ 501. *A mortgagee in possession may take a release of the equity of redemption; but in such transactions no undue advantage is allowed.*

A mortgagee in possession may take a release of the equity of redemption. *Hickes v. Cooke*, 4 Dow., 16; *Hicks v. Hicks*, 5 Gill & J., 85. But such a transaction is to be scrutinized, to see whether any undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skilful to take advantage of the necessities of the borrower.

Strong language is used in some of the cases on this subject. It was declared by Lord Redesdale, in *Webb v. Rorke*, 2 Sch. & Lefr., 673, that "courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given." And Chancellor Kent, in *Holdridge v. Gillespie*, 2 Johns. Ch., 34, says, "the fairness and the value must distinctly appear." *Wrixon v. Cotter*, 1 Ridg., 295; *St. John v. Turner*, 2 Vern., 418. But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule.

§ 502. *The purchase of the equity of redemption by the mortgagee will be closely scrutinized.*

We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized, when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that any one would have been willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist.

§ 503. *The purchase of the equity of redemption for no consideration, or for correcting a mistake, by the mortgagee is a fraud, when it amounts to imposition.*

In this case it is unnecessary to rely on such a rule. For by his own showing, in his answer, it is clear that Daniel R. Southard, as the agent of his brother, either paid no consideration whatever for the extinguishment of the equity, or at the utmost only \$100. We think nothing was paid for it; and that the surrender of this right, claimed by Russell and denied by Southard, was insisted on as a condition for the correction of an actual mistake, which Southard was justly obliged to correct, without any condition; and we do not hesitate to declare that a release of this equity, obtained by the mortgagee in possession, under a denial by him of the existence of the right to redeem, for no consideration at all, or as a condition for the correction of a mistake which in equity he was bound to correct, the written defeasance having been purposely so prepared as apparently to cut off the right of redemption prior to the time when the equity was released, cannot stand in a court of equity.

§ 504. *Petitioner's mistake in believing his rights were probably destroyed, together with other facts, in equity prevents the bar of limitation.*

Indeed, if it were not for Russell's subsequent acquiescence, of which we shall speak hereafter, the question would not admit of a moment's doubt. Though this acquiescence is not without effect upon the complainant's rights, as will presently be seen, yet we do not think that, under the special circumstances, it ought to operate as a bar, to prevent redemption. The absence of all valuable consideration for the surrender of the equity, and the circumstances of distress under which it was made, and which, so far as appears, continued to exist down to the filing of the bill, coupled with the conviction, which we think Russell mistakenly entertained, that his rights were probably destroyed, must prevent us from allowing the lapse of time to be a positive bar.

§ 505. *An account of rents and profits is not an inseparable incident in a decree of redemption.*

The inquiry then arises, on what terms is the redemption to be decreed. An account of the rents and profits is ordinarily an incident to a decree for redemption against a mortgagee in possession. But it is not an inseparable incident. This right to an account may be extinguished by a release or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim as renders it unfair for him to insist on an account extending over the whole period of possession, and unjust towards the mortgagee to order such an account.

§ 506. *A mortgagee is in equity a trustee by implication to prevent injustice to either party.*

A mortgagee in possession is deemed by a court of equity a trustee; but there is no other than a constructive trust, raised by implication, for the purpose of a remedy, to prevent injustice (*Kane v. Bloodgood*, 7 Johns. Ch., 111); and it would be contrary to the fundamental principles of equity to imply a trust, the execution of which might work injustice. And accordingly it will be found that in such cases courts of equity have refused to order accounts against *quasi* trustees. Thus, in *Dormer v. Fortescue*, 3 Atk., 130, Lord Hardwicke, speaking of the case of an heir in possession under a legal title, which he is obliged by a decree to surrender to one having an equitable title, says the court will order an account from the time the title accrued, unless upon special circumstances; as "when there hath been any default or laches in the plaintiff, in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill." So, in *Pettward v. Prescott*, 7 Ves. Jr., 541, a case of constructive trust, Sir William Grant restrained the account of the rents and profits to the time of filing the bill, on account of the lapse of nearly twenty years; and similar cases may be found referred to in *Drummond v. Duke of St. Albans*, 5 Ves. Jr., 433, and note 3 to page 439; and in *Roosevelt v. Post*, 1 Edw. Ch., 579. Indeed, in *Acherly v. Roe*, 5 Ves. Jr., 565, where there was a trust created of a term, for the purpose of raising a sum of money, and the *cestui que trust* had been long in possession without objection, Lord Chancellor Loughborough refused even to carry the account back to the filing of the bill upon the special circumstances of that case. This court, in *Green v. Biddle*, 8 Wheat., 78 (Const., §§ 191-206), gave its sanction to the rule as laid down by Lord Hardwicke, and declared it to be fully supported by the authorities.

§ 507. *A lapse of nineteen years and eight months, under the facts of this case, not a bar to redemption.*

This bill was filed after the lapse of nineteen years and eight months from the time the loan became payable. James Southard, the original mortgagee, had then been dead many years. More than sixteen years had elapsed since the defeasance was surrendered; and though we are satisfied Russell was under great embarrassments, and though we are of opinion he himself believed his right to redeem was probably extinguished by the terms of the defeasance, and its surrender, yet his neglect to look into and assert his rights must not be allowed to subject the defendants to the risk of injustice. The defendants and James Southard have treated the property as their own, and have improved its condition. There is no suggestion of waste in the bill. The value of the land has greatly appreciated, from the growth of the neighboring city; and though we think James Southard designed to take an unconscientious

advantage of Russell, and that the defendant R. R. Southard obtained the surrender of the defeasance under such circumstances as rendered it constructively fraudulent, yet neither of them appears to have concealed any facts from Russell, or to have done anything to prevent him from exhibiting his real case to counsel. To such a case, the language of the vice-chancellor, in *Bowes v. East London W. W. Co.*, 3 Madd., 384, exactly applies. "The plaintiff ought to have looked into his rights; and as by his negligence to obtain information concerning them and to assert them, the lessees may have been led to expenditure on the premises, the benefits of which they will lose, I shall not direct an account beyond the filing of the bill." To this extent his acquiescence must be taken to have concluded his right, and we shall direct that the account of the interest due upon the money loaned, and of the rents and profits of the farm, commence at the date of the filing of the bill.

§ 508. *A mortgagee in possession, who insures the premises, is, as against the mortgagor, entitled to receive the payment of loss.*

We can perceive no ground for charging Southard with the money received from the insurance company on account of the destruction of the house. He was in possession, claiming to be the absolute owner of the farm and its appurtenances. He obtained the policy to cover his interest and paid the premium. If there were any equities against him arising out of the receipt of this money, they would be in favor of the underwriters and not of the mortgagor. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet., 501.

It remains only to advert to the cases of the defendants, who claim as purchasers under D. R. Southard. The questions arising therein were not argued by counsel, and upon looking into that part of the record, we find some of them not capable of being fully settled upon the facts therein disclosed. It was probably understood by counsel that these questions would remain for consideration, in the court below, if the case should be remanded. Samuel D. Tompkins claims to have been a purchaser for valuable consideration of thirty acres of this land, and to have received a deed of conveyance thereof, and paid a part of the consideration money without notice of Russell's title, and before the institution of this suit. He also claims to have made permanent and valuable improvements on the land purchased by him, but whether before or since the institution of this suit does not appear. William H. Pope, as the executor and trustee of his father, William Pope, claims that his father, in his life-time, purchased at a sale on four executions against Southard another part of these lands, and that Southard omitted to redeem the land by paying what was due on three of the executions, and a suit is shown by the record to be pending in the court of appeals of Kentucky, wherein Russell's right to redeem is in contestation.

Matilda Burks, the widow of James Burks, deceased, and John Burks, one of the sons of James, and William L. Thompson, as guardian of other children of James, and James Guthrie, assignee of J. R. Trunshall, the husband of a daughter of James, claim a lien on these lands by virtue of a mortgage thereof executed by Daniel R. Southard, and Southard insists that Guthrie has been paid; it is not ascertained whether the debts intended to be secured on these lands are or are not fully secured upon other lands of Daniel R. Southard, which are embraced in the same mortgage. In this posture of the cause, it is not practicable for the court to pass finally upon the rights of these parties; and the cause will therefore be remanded, without deciding upon the existence or extent of the right of either of them as a purchaser. A decree is to be entered,

reversing the decree of the court below, with costs, declaring that the conveyance from Russell, the complainant, to James Southard, was a mortgage, and that Russell is entitled to redeem the same, and remanding the cause to the circuit court, with directions to proceed therein in conformity with the opinion of this court and as the principles of equity shall require.

MOTION FOR REHEARING.

§ 509. *The supreme court cannot look beyond the record for testimony to influence their judgment.*

Opinion by TANEY, C. J.

The decree of the circuit court, in this case, was reversed during the present term, and a decree entered in favor of the appellant.

A motion is now made in favor of Daniel R. Southard, one of the appellees, to set aside the decree in this court, and to remand the case to the circuit court for further preparation and proof, upon the ground that new and material evidence has been discovered since the case was heard and decided in that court. In support of this motion, affidavits have been filed stating the evidence newly discovered, and that it was unknown to him when the case was heard in the court below. It is very clear that affidavits of newly discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. *Eden v. Earl Bute*, 1 Bro. Par. Cas., 465; 3 Bro. Par. Cas., 546; *Studwell v. Palmer*, 5 Paige, 166. Indeed, if the established chancery practice had been otherwise, the act of congress of March 3, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes. The motion is, therefore, overruled.

ANDREWS v. HYDE.

(Circuit Court for Massachusetts: 3 Clifford, 516-523. 1872.)

STATEMENT OF FACTS.—Woodman, before his bankruptcy, owed Andrews \$6,000, for which he gave his notes and conveyed certain Iowa lands by deeds absolute on their face, but really intended, he asserts, as a security for the debt. After his bankruptcy his assignee filed this bill to redeem the lands and for an account. Defendants, the heirs of Andrews, denied that the conveyance was a security for the debt, and claimed the lands. There was a decree for the complainants, and defendants appealed to the circuit court.

§ 510. *Oral evidence is admissible to show that a deed absolute on its face is a mortgage.*

Opinion by CLIFFORD, J.

The testimony was full to the point that the deeds were given as security, and, if so, the complainants must be permitted to redeem, and they are entitled to an account as prayed in the bill, as repeated decisions of the federal courts have established the rule that oral evidence is admissible for the purpose of showing that a deed absolute on its face was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties. *Wyman v. Babcock*, 2 Curt., 386; *Babcock v. Wyman*, 19 How., 299 (§§ 478-482, *supra*); *Russell v. Southard*, 12 How., 139 (§§ 491-509, *supra*).

§ 511. *Evidence to prove that a deed absolute on its face is a mortgage must be clear and satisfactory.*

Argument to support that rule of law is unnecessary, as it is well settled by authority; but the evidence to prove the agreement ought to be clear and satisfactory, as the rule is one of an exceptional character in the law of evidence. Unquestionably the issue in this case depends entirely upon the credit to be given to the party who made the conveyances, in a case where he is not corroborated by any act or word done or spoken by the other party.

§ 512. *Where the fact that a deed absolute on its face is a mortgage is established by one witness only, his testimony needs confirmation by corroborating testimony.*

Attempt is made to show that he is corroborated by certain circumstances in the case, but the circumstances relied upon are too remote or too slight, in the judgment of the court, to have any substantial weight in that regard. They are as follows: 1. That friendly relations had existed between the parties for many years; but it is difficult to see how that fact tends to show that it was agreed between them that a deed absolute on its face should be held merely as a security for money loaned, and that the grantor might redeem the same at any future period of time during his natural life. Woodman admits that he was buying and selling land-warrants and lands during that period, and it is not unreasonable to suppose that he would be as ready and willing to sell to a friend as to a stranger, especially as it appears that the lands in question cost him only about \$1 per acre. Having purchased the land cheaply, it is quite as probable that he might be willing to give his friend a good bargain for prompt payment, as that his friend should agree to allow him an indefinite and unlimited right of redemption in the lands. 2. That the grantee paid the taxes. The only evidence of that fact is found in his own testimony, and if credit is not given to the witness, the fact is not established. Payment of the taxes, if made by the grantor, could have easily been proved, but the fact, if established, would not amount to much, as persons holding western lands frequently employ agents to pay their taxes. 3. That the grantee retained the possession of the original deeds. The fact as shown in evidence is, that the grantee did not have the deed first described. On the contrary, it was sent to the registry of deeds, where it remained for a long time. True, he states in his deposition that the deeds were returned to him as soon as they were recorded, and that they were retained by him, and remained in his possession until the appointment of his assignees, but it appears from the deposition of Augustine Jones, that Woodman, in August, 1870, told him that the deeds were in the office of the registry of deeds in Iowa, and that he would send for them, and that at a subsequent time, when the witness called for the deeds, he told him that they had not arrived. Superadded to that is the letter of Woodman to that witness, dated September 8, 1870, in which he states that he has received "the original deed from me to Governor Andrew of the Shelby county land, which I inclose to you with two canceled agreements" therein described, showing that the pretense that he had the deeds in his possession all the time is unfounded. Such a pretense is invoked as showing that the deeds were under his control as the real owner of the property, but the pretense being disproved, it tends to discredit the witness, instead of confirming his testimony. Had he retained the deeds, as the pretense is in his testimony, something doubtless might be inferred from that circumstance in support of the theory of the complainants; but he having set up that theory in his examination in chief, and the

pretense being disproved, it must be assumed that the circumstance tends to discredit the grantor as a witness, especially as it is not shown by any other witness that he ever claimed any interest in the land during the life-time of the grantee, or that the grantee ever in any way recognized the pretense that he had any interest in the lands.

Nothing certainly can be inferred in support of the theory of the complainants from the character of the supposed transaction, as the story is quite improbable on its face. It is that the grantor executed an absolute deed of lands, put it on record without the knowledge of the grantee, and kept it a secret from him for the period of three years, without anything to show that the deed was not what it purported to be, both of the parties having experience as conveyancers, and being well aware of the necessity of a defeasance of some kind, and that the same condition of things was continued four years longer, after the grantee was informed of the conveyance, without any step being taken by either party to supply the omission. Such men, whether friends or not, would not be likely to leave their rights in such uncertainty. Much strength is added to that view from the fact that the grantor, from September, 1866, to March 20, 1867, was not indebted to the grantee at all, and yet, as the theory of the complainant is, the title was allowed to stand in the name of the grantee as a security for indebtedness, when nothing was due to the party holding the absolute estate. Debtors are frequently negligent in procuring a renewal of an expiring defeasance in cases where they have been in fault in not making the stipulated payments to their creditor, but when the whole incumbrance is paid, they are much less likely to remain quiet without some written assurance that their rights will be respected.

Administration on the estate of the grantee was first granted to William Rogers, and it appears that the grantor in those deeds was one of the appraisers. Jones was the other, and he testifies that Woodman never, in any of their consultations, stated that his notes to the intestate were in any way secured, and it does not appear that he made any such disclosure when, at a subsequent period, he was appointed administrator *de bonis* of the same estate. In his deposition he states that when these deeds were executed he was indebted to the grantee in the sum before mentioned, which was secured by the conveyances; but Jones says that in their conferences as appraisers, he never mentioned that the notes were secured; that he did say, at another time, that the deeds were given to secure the sum of \$7,000, and that it was agreed, at the time the deeds were made, that they should be security for that sum. Contradictory statements are certainly calculated to impair the credit of a witness; and it is clear that the statement that such an agreement was made at the time the deeds were made is utterly inconsistent with his testimony, given in the case, that the grantee did not have any knowledge of the deeds for three years after they were made and forwarded to be recorded. His statements also to Jones are inconsistent with each other, as at another time he told him that the land conveyed was worth just about \$3,000, which was the amount borrowed of the grantee, and that after 1860 he never owed the grantee less than that amount, which cannot be true if he is to be believed, as he testifies that he owed him nothing from September, 1866, to March 20, 1867, as before explained. He is also contradicted in other particulars. He told Jones he paid the interest regularly, that he took no receipts, and that the notes with the indorsements of interest were all destroyed. Interest was not paid as there stated, as con-

clusively appears from the letter of the grantee, dated December, 1862, to the grantor, which is an exhibit in the case. When cross-examined in respect to those exhibits, Woodman admitted that they showed that he did not pay interest from December 1, 1862, to March, 1867, a period of more than four years. Important parts of the relation he gives of his dealings with the grantee are materially erroneous, if not wilfully false. He claims that his exhibit of those matters is taken from his note-book, and that the statement shows the true state of his indebtedness; but the administrator produces a large number of notes and checks to the amount of \$1,300, to which the witness does not allude in his account, which goes very far to show that no reliance can be placed in his statements as to their dealings, or the amount he owed the grantee when the deeds were given. Witnesses are no longer excluded on account of interest in the event of the suit, but the proof of interest affects the credit of the witness now as well as before, the passage of the act not changing the rule in that regard, as it shows that the witness is not impartial, that he has a motive to color his statements or to suppress the truth, or to state what is false.

§ 513. *The veracity and impartiality of a witness may be considered as affected by his interest.*

Woodman is not impartial, though decreed to be a bankrupt before he testified, as he was a defaulter to a large amount to the estate of the deceased grantee, from which he could not obtain a discharge in the bankrupt court. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, can be discharged by the bankrupt court in any case. 14 Stat. at Large, 533. As administrator of the estate, he is a defaulter to the amount of \$6,759.39, for which he cannot be discharged under the bankrupt act; but if he can establish the theory that those deeds are mortgages, and compel the legal representatives to get the pay for the claim out of those lands, he will be relieved from that liability and embarrassment.

§ 514. *The denial of an answer, though not strictly evidence, is entitled to a certain weight.*

Something also is due to the absolute denials of the answer, in which the respondents not only deny that the real estate was conveyed as a security for any indebtedness, but aver their belief that the deeds were made as absolute conveyances and not as a security. Administrators and heirs cannot be supposed, in such a case, to have personal knowledge upon the subject, but the decision of the supreme court warrants the conclusion that in such a case the complainant is not entitled to decree upon the uncorroborated testimony of a single witness, certainly not unless his statements are positive and the witness appears to be without bias, prejudice or interest adverse to the respondent. *Carpenter v. Providence Washington Ins. Co.*, 4 How., 218. Grave doubts are entertained whether a decree in such a case ought ever to be made upon the uncorroborated testimony of the grantor; but it is not necessary to decide that point, as the court is clearly of opinion that such a decree ought not to be made where it appears that the witness is interested adversely to the respondent, is contradicted by another witness, and has himself given false and contradictory accounts of various matters material to the issue, and especially where it appears that the claim has been long delayed and was never made in the life-time of the grantee. Claims of the kind are easily made, and unless full proof is required to sustain them, it is to be feared that the estates of dead men will afford much less com-

fort and support to their widows and minor children than the decedents supposed the estates would, while they were expending their strength in toil and industry to earn and save the property for that purpose. Decree reversed and bill dismissed with costs.

BENTLEY v. PHELPS.

(Circuit Court for Massachusetts: 2 Woodbury & Minot, 426-449. 1847.)

STATEMENT OF FACTS.—Proceeding in equity alleging a mortgage of the premises by the mother-in-law of complainant to the respondent, to secure a debt of \$165; that the same was paid, but immediately afterwards she borrowed \$567 from said Phelps, to secure the payment whereof she deeded the property to said Phelps absolutely, though the intention was merely to mortgage the same. That from 1827, the date of the latter mortgage, until 1841 said mother-in-law of complainant and her administratrix occupied said premises, when said Phelps ejected her from the premises, claiming to hold as owner in fee; that during all those years Phelps received the interest on the debt regularly, and also part payments thereof, so that the same is now but \$450. The answer of respondent controverting these facts is set forth in the opinion. This action is brought by Bentley and his wife, the daughter of the original mortgagor, for possession.

Opinion by WOODBURY, J.

The task of the court in settling the leading facts in this case is embarrassing; not so much from the doubt how the balance of the testimony stands on the face of it, as from the great errors in memory which the collisions of the testimony disclose, if not some more painful conclusions in respect to portions of the answer. As some apology for the respondent, however, the transaction is one obscured by time, a whole generation having passed since the deed in controversy was given; the only witnesses are also very aged, and some of them nearly related to the complainants; and the respondent himself, after twenty years, would naturally rely more on the written papers as to what the transaction really was than on any obscure or imperfect recollections of anything differing from them. Under all these considerations, the case is likely to be surrounded with some doubt in respect to such remote facts; and this would be peculiarly so from various circumstances, being not reconcilable with the hypothesis assumed on the one side or the other, and there being two or three important and direct contradictions between the answer and the witnesses. But the latter, beside their number, seem the most strongly sustained by some of the written documents. These last are less forgetful than men, less open to improper influences, and, if tampered with, less able to conceal it; and the facts compel me to say that they tend in the main directly to support the positions of the complainants. An analysis of the evidence will show how this matter really stands.

The material facts admitted should be distinguished from those which are controverted, as the former alone possess much weight independent of the others. Those which are material in deciding whether the deed of 1827 was intended to be a mortgage between Mrs. Jones and Dr. Phelps, and which are admitted on both sides, consist, first, of the continued possession of the premises by Mrs. Jones, or others under her, from that time till her death, in 1832, and a like possession by Mrs. McLean, the guardian of her daughter and heir, from that time till 1841. Next, it is the relation of borrower and lender, which had

existed between these parties from 1824 up to the date of that deed, if no longer. Finally, it is the exercise of all acts of ownership by Mrs. Jones and the guardian in letting the premises to others or making any temporary repairs from 1827 to 1841; and the absence of any by the respondent, except the lease to Mrs. Jones for one year at the commencement of A. D. 1872.

The next material facts controverted will next be considered. They are: 1. The value of the property in 1827 as compared with the consideration set up for a sale, whether much more or not. 2. The payment of money to the respondent by Mrs. Jones and Mrs. McLean, and the receipt of it by him during that period, whether as interest on a mortgage, or rent on a *bona fide* lease of what he had bought absolutely. 3. The actual execution of a defeasance to Mrs. Jones in 1827, with a view of making the deed from her a mortgage. 4. The admissions by the respondent, or not, that it was intended to be a mortgage, and was so considered by him, as well as by Mrs. Jones and Mrs. McLean. 5. The continuance of the relation of borrower and lender even in and after 1827.

Now, in respect to these controverted facts, there were generally on the side of the respondent no witnesses and no evidence, but his own oath in his answer; and it ought to be added, some *prima facie* presumption in his favor, which arises from the face of the deed and lease, and of a few of the receipts. But it is to be remembered that the written papers of the grantee belonging to the transaction itself, and more especially the deed, are not in a case like this to possess the controlling influence which is imparted to them in regard to most other contracts. Because the truth of the face of the deed is the very fact in controversy, and if its face be at all conclusive, no mortgage would in any case be allowed to be proved either by other writings or by parol independent facts *in pais* in chancery, any more than at law.

§ 515. *Facts showing a deed, absolute on its face, to be a mortgage.*

It is well settled, however, that in chancery, as this case now is, the parties are allowed to show by parol as well as other writings, notwithstanding the conveyances are absolute on their face, such other facts as may render it probable a mortgage was intended. And hence it follows that the form of the papers makes only a *prima facie* case, and is not to stand against other facts which satisfy the court that in reality a mortgage between the parties was probably contemplated. The parol evidence is thus allowed, not to show here that the deed was made absolute by mistake or accident, when it was meant to be conditional, but that it was by design made absolute, while in truth the real transaction as a mortgage was thus intended to be concealed or covered up, or be left to a separate defeasance. And the other party undertakes to show this from separate writings, or from certain independent distinct facts and doings between the grantor and grantee, which courts of chancery will consider and give to them their due weight in conjunction with the written evidence of the deed the other way, and the oath of the party and anything else corroborative on his part. This course does not conflict with the statute of frauds, when it proves other written papers making the deed or mortgage, or adduces independent facts which show the face of the deed to contain a mistake or a fraud, or not the whole truth.

The first material controverted fact is the value of the premises compared with the debt or sum advanced. The only testimony on this for the respondent is from himself in his answer. It is that the sum due to him was \$567, equal to the full value of the premises at that time. There is no other proof,

except his oath and the consideration named in the deed, that Mrs. Jones then even owed him so much as \$567, by \$150 or \$200. The previous notes and advances fall short of this consideration to that extent, and no note or receipt, or witness, except as aforesaid, shows anything, either more or less. The bill in this respect, and in one or two others, varies from the proof, though not so as to require amendment. Inclining on the weight of the testimony, however, to hold that the true sum was \$537, for the purpose of this inquiry, and to be composed of \$357 old debt and \$200 new, there is the positive testimony of two witnesses against his answer as to the value being no greater. They show that this sum was not equal to more than half or one-third the value of the premises. Mrs. McLean had bought them ten or twelve years previous, and given \$1,300 for them. Mrs. Jones had, in the year before this conveyance, expended on them in repairs \$180 more, with money borrowed of Phelps. Before those repairs, Mrs. McLean testifies they were worth \$1,300, and are now, A. D. 1846, worth \$1,600 to \$2,000; and Mr. Bell swears they are now worth \$1,000. From all this, however meagre, compared with what could be proved on either side, and probably would be, if this was not correct, little doubt exists that, in 1827, the premises were worth from twice to three times the consideration paid; and this fact, therefore, raises a strong presumption in equity that the transaction was a mortgage, and not an absolute sale. One party will not readily be presumed so foolish as to sell outright for half or one-third what his property is worth; nor the other so unconscionable as to buy at that depreciation, when other circumstances combine with this to render the sale a mortgage, and thus make both behave naturally and justly.

But there is another piece of testimony still more striking connected with the income derived from this property, and thus showing something as to its true value. Beside the land, which has been made in argument the basis of its value, buildings existed, which were rented by Mrs. Jones for \$120 a year once, by Mrs. McLean for \$200 once, \$175 once, and \$150; and by Phelps once at \$156. Now the value at this rent would be not merely the four hundred feet of land, but buildings, which, though old, had been well repaired by the money borrowed of Phelps, and rented at the rate of six per cent. on a capital of from \$3,200 to \$2,400. This is subject to some deductions for insurance, taxes, etc., but still increases the improbability of an absolute sale for \$567 of what cost near twenty years before \$1,300, and yielded a rent at least equal to six per cent. on more than \$2,000. On the hypothesis that this was an absolute sale, Mrs. Jones parted with premises for a sum whose interest was only \$34.02, which yielded her an interest or income at that time at least of \$150 yearly, or from four to five hundred per cent. more. But supposing it was done in the form of an absolute sale merely to secure the payment of her debt and interest, and to prevent any creditor of hers from attaching the equity of redemption, as Mrs. McLean testifies Phelps admitted to her, and the transaction becomes more natural and explicable on ordinary principles; and is another piece of corroborative testimony that the equity of redemption was considered worth something, and the sum loaned by no means equal to the value of the premises; otherwise, a resort to this course to prevent attachment would not have been thought necessary.

The next controverted fact as to the subsequent payments, whether for interest or rent, is very material, because, if actually paid and received as rent, it would indicate that an absolute sale had been intended to be made. Whereas, if the payments were for interest, they would furnish strong evidence that a

mortgage was understood to be existing, and meant to exist, rather than a sale. The very first payment which appears in the evidence to have been made by Mrs. Jones was August 6, 1827, or about seven months after the deed was executed, and is stated by Phelps and entered originally on the back of the duplicate lease in his possession, without saying whether it was for interest or rent. I say originally, not merely from the appearances of the paper, the color of the ink, and the punctuation, but the positive evidence of three witnesses, who are experts as to handwriting, and are contradicted by none on the part of the respondent, but are sustained by the appearances on the paper just referred to. Such alterations may have been made at the time and by assent of parties, and different colors in the ink may exist in the same writing, by dipping a pen deeper. Hence I did not and do not now think it expedient to decide such a question without proof *dehors*. That proof is very direct and strong. The apparent alterations, too, are all in such parts, and such only, as to affect this question in dispute; and however disagreeable it may be to find this matter unexplained, my duty is now merely to follow where the positive evidence requires me to go. This evidence is, that a manifest alteration has since been made in this first written receipt by some person, adding the words "rent" and "lease." So in the next receipt on the 8th of October, neither "rent" nor "interest" was named in that originally, but these witnesses testify that "rent" has since been added. So again in the receipt of January 15, 1828, and July 29th. Again, the receipt on the 29th of April, 1830, was originally "interest to this date," which it is proved has been erased, and "rent three dollars" added. And October 29, 1830, "interest" was in the receipt at first, and has been since erased and "rent" substituted. It is not very probable that these additions and these erasures have been made for any purpose than to prevent the inference, which would arise from them as they stood originally, that the deed and lease had been a mere mortgage in design, to secure the debt and interest. If meaning otherwise, it is probable that the receipts would have been originally in terms for rent, and rent alone; and not as they were, in no case, for rent, but in two of them expressly, *ipsissimis verbis*, for "interest."

It is not shown that any person had a motive to make these alterations but the respondent, and the receipts have been in his possession till produced in court. Apparently, and such is the evidence, they are alterations of a subsequent date to the original entry, but in the same handwriting. The court do not decide on the author of them, or the guilt of them, in this collateral inquiry, for it is possible they were afterwards made by consent. But there is no such proof, and it is enough to say here on the proof which exists, that as the receipts appear to have stood originally, they furnished strong evidence that the payments made by Mrs. Jones were as "interest," and were so received by Phelps, and are thus a species of evidence, and written evidence, very decisive that the relation of mortgagor and mortgagee was understood and meant by both parties to continue between them.

Another circumstance connected with these payments by Mrs. Jones, showing them to have been for interest, is that the nominal rent reserved in the lease was \$55 per year, whereas the interest on the \$567 she is claimed to have owed Phelps in January, 1827, is only \$34.02; and on examination it will be found that it was near the amount of interest, and not of the nominal rent, which she paid yearly till the payment stopped in the latter part of 1830. They exceed the amount of interest only small fractions, which were probably added for not being made punctually at the end of each quarter. The difference be-

tween that and the nominal rent reserved yearly is about \$21, or over one-third the whole sum, and is hence the more striking as a payment in reference to interest rather than rent. Beside this, a quarter's interest is eight dollars and a fraction, whereas a quarter's rent would be \$13.75; and the last sum is not in one instance, out of the eleven payments made by Mrs. Jones, the amount paid, or anything within three to four dollars of it, while in six or seven of the eleven payments the amount was eight dollars and a fraction, differing only a few cents from a quarter's interest, but falling short of a quarter's rent about \$5 in each of those cases.

Following the payments further, after the death of Mrs. Jones, the same evidence exists, in some respects, that they were made for interest, with some additional corroboration of it, and, on the contrary, with some counter data. Thus Mrs. McLean, within a few days after the death of Mrs. Jones, testifies that she called on Dr. Phelps as to the premises, and he admitted they were held as mere security for the payment of the principal and such interest as Mrs. Jones had not paid. When these were satisfied, he was willing to reconvey them. He assented to her continuing to occupy them as Mrs. Jones had; and she thereupon did occupy them, and at once commenced making payments on what she considered the mortgage debt.

Dr. Phelps, in his answer, denies so much of Mrs. McLean's testimony as relates to there being any mortgage, and insists that Mrs. McLean was to remain there as if under the lease to Mrs. Jones, continued to her, and on her undertaking to pay also the arrears of rent due from Mrs. Jones, and not the arrears of the mortgage. In this conflict of testimony on these points between the respondent and Mrs. McLean, it will be necessary to turn to the written evidence between them as supporting either. The very first receipt to Mrs. McLean, September 12, 1832, the same month her mother died, is "\$14.50 towards the interest." This receipt has been in her possession, and has no appearance of alteration, and is strong evidence of a mortgage. But the next one, October 29, 1832, is for \$32.50, "being the last quarter's rent, and the rest on the debt due."

This is the first mention of rent originally in a receipt since the deed was given in A. D. 1827; but this is accompanied by the expression of "debt due." This last expression would be evidence of a mortgage debt being thus recognized if Dr. Phelps did not insist it referred to the debt due from Mrs. Jones for rent. Mrs. McLean, however, testifies it was the debt due on what she considered as secured by the deed of 1827, and which Phelps told her was meant to be a mortgage. She is fortified in her position not only by the first receipt having been for interest, but by the third receipt, January 19, 1833, which is \$7.50, "the interest, and the rest, \$8, on the debt," the word "interest" not applying to rent, but to interest on the mortgage, and the debt named in connection with it being probably the mortgage debt. The amount paid for interest strengthens this view, as, being quarterly, it would far exceed the amount of interest on Mrs. Jones' arrears for rent, even as computed by Dr. Phelps at \$248.18, principal and taxes, and would approach near to the interest on the original debt of Mrs. Jones for money borrowed, considering that a part of the principal had been discharged by Mrs. McLean. The amount of principal so discharged by her within a year and a few months appears to have exceeded \$100, leaving only about \$467 debt, the interest on which, quarterly, would be a fraction over seven dollars. Accordingly, as a remarkable verification of her statements, we find in five or six subsequent cases that her payments amount to

seven dollars each and a fraction, or fifteen dollars and a fraction, apparently to cover, in the first instance, one quarter's interest on the mortgage debt, and, in the second instance, two quarters, but not at all agreeing with the position taken by the respondent as to rent.

During 1833 and part of 1834 some of the receipts speak of interest alone, and some of interest and debt, some rent and interest, and some rent alone. But in July 23, 1834, Dr. Phelps gives a receipt in a still more striking form, for a certain amount, "being the interest and \$14 on the principal, which leaves now due me \$450." This indicates in its terms a mortgage debt most strongly, and agrees with what would then be the amount of that debt, reduced as before mentioned, and not with any debt of Mrs. Jones for rent alone. Furthermore, Mrs. McLean testifies it was given on her request to have a statement of the amount due on the loan to Mrs. Jones secured by mortgage. Numerous subsequent receipts to Mrs. McLean are all for "interest," or "interest and principal," or "rent and interest," or "principal," or "rent or interest," considering it the same in at least three of the receipts. They continue down to 1839, and as the principal debt had become still further reduced, the quarter's interest is only \$6.50, or \$6.25, instead of \$7 and a fraction, or \$8 and a fraction, indicating in this way again, that the payment was not as a mere tenant for a fixed rent as rent, but the payment of interest as a debtor, or for a debt, and hence varying in amount as the principal debt varied. It is also a remarkable circumstance that not one of all these payments during fourteen years corresponds in amount annually, semi-annually or quarterly with the nominal rent reserved of \$55 per year, or with the \$100 per year, nearer its true value as rent, but most of them correspond with the interest on the mortgage, indicating that as the guide and standard in the minds of both parties.

The next controverted fact bearing on the question whether the deed of January, 1827, was intended to be a mortgage is the actual execution of a defeasance in writing testified to be admitted by Phelps, to have been made and filed away with the deed, so that in case of his or Mrs. Jones' death written evidence of the designs of the parties might exist. In relation to this fact there is on the one side the denial of Phelps under oath, and against it the express testimony of Bell and Mrs. McLean as to Phelps' positive statements to that effect in detail. It may be proper to say here, once for all, that since Mrs. McLean's near relationship to the complainants would cause her evidence to be scrutinized more closely, and especially where it was contradicted by other evidence from persons not related to the opposite party nor interested, her evidence might in such case require corroboration from others in order to deserve full credit.

But here she is contradicted only by the party in interest, and is fully sustained by another witness. In relation to her and Mr. Bell, as persons advanced in life, and hence excepted to as being more frail in memory, it is certain that as to recent transactions such persons notice them less and think of them less than events in early life. But if, as in this case, they are not deaf so as to prevent hearing, and took a deep concern as in a matter like this, interesting to them and their near friends, and profess to remember it, the confidence due to them is not to be diminished on account of their age, and should in some cases be greater, from their nearer approach to future accountability for false swearing though not actually *in articulis mortis*. I am bound then to believe them in this as in other parts of their evidence, where their recollec-

tions are distinct and positive, and not impugned by any other witness, but merely by the party in interest, and sustained as they are by most of the receipts and other facts. *Carpenter v. Providence Washington Ins. Co.*, 4 How., 185.

It must be considered proved that this deed, though absolute on its face, was made actually a mortgage by a written defeasance. Whether it was sealed or not, or bore date with the deed, or was formally delivered, is not very material in equity, however it might be in law. See *Shapley v. Rangeley*, 1 Woodb. & M., 213; *Brown v. Brown*, id., 325 (§§ 47-50, *supra*). But beside the admissions of Phelps as to the existence of such a defeasance, there are others in respect to the deed in 1827 having been a mortgage, testified to not only by Bell and Mrs. McLean, but by Page. The latter, learning that the respondent had obtained a title to the premises, and wishing to purchase them, called on him for that purpose, after Mrs. Jones' death; Phelps explained that she had been indebted to him, and wanted more money, and he declined letting her have it without an absolute deed, which she gave, but if "they paid the interest promptly, he did not feel that he had any moral right to sell." If they did not, he should, but declined selling then. This not only shows a substantial admission to Page, such as he made again and again to the other two witnesses, that the transaction was a mortgage in a moral or equitable view, but admits that the character of a loan belonged to the money advanced in January, 1827, as well as before. All the receipts for interest also indicate this strongly.

Again, Phelps was not a person wanting to buy in 1827, any more than in 1824; but when hearing that Mrs. Jones wished to borrow, he called on her to lend to her the money, as Mrs. McLean testifies. So in 1827, his was rather the character of a person willing to lend more, and actually doing it, on having the security for it put in a form more safe and acceptable to him. This fact is usually one of the great touchstones whether a deed was really meant to be a sale or a mortgage. See 3 Pick., 433; *Eaton v. Whiting*, id., 491.

Having gone through with this analysis of the testimony on what is material and controverted, it may be remarked generally, that in chancery money transactions are by means of such evidence considered as mortgages, which are not always so at law. On this see 4 Mason, 444; *Flagg v. Mann*, 2 Sumn., 527; *Shapley v. Rangeley*, 1 Woodb. & M., 213; *Almy v. Wilbur*, 2 id., 371; 3 Pick., 490; *Jenkins v. Eldredge*, 3 Story, 291; *Kelleran v. Brown*, 4 Mass., 444.

§ 516. — *the statute of frauds does not make such evidence inadmissible.*

And furthermore, that the objection of the statute of frauds does not apply to any of this evidence which is in writing, or which goes to prove, by parol, either independent facts and not mere contradictions of the deed itself, or loss of papers, or fraud. Our course is next to review and discriminate what particular facts are admitted or satisfactorily proved, which tend to show that the deed of 1827 was actually intended by the parties to be a mortgage, and which are by adjudged cases deemed competent for that purpose in a court of equity.

1. A defeasance was written and lodged with the deed, in order to evince and secure that effect in case of the death of either party.

And the form of an absolute deed was said to be adopted not because the premises had been sold, but because the equity of redemption might be attached by creditors of Mrs. Jones, if it appeared on record as a mortgage. That such evidence is competent in chancery, as tending to show not only the existence of a defeasance but its loss, either by accident or fraud in not producing it, the cases are numerous, and even go to the allowance of proof of a promise to give

such a defeasance, and the presumption of fraud or accident if it was not done. 1 Powell on Mort., 120, note; Jones v. Stratham, 3 Atk., 389; Taylor v. Luther, 2 Sumn., 228; id., 528; 4 Kent Com., 143; 1 Paige, 48; 9 Wend., 237; Jenkins v. Eldredge, 3 Story, 291; 4 Russ., 425; 4 East, 577, note; 2 Jac. & Walk., 182. The greatest doubt under this head is in cases generally whether the agreement to reconvey in a certain event was intended to make the transaction a mortgage, and was evidence of its being so; or was a mere special contract to reconvey on condition, and hence not binding unless the condition was strictly performed. If there had been no previous loans between the parties, and the case grew out of a treaty to sell and buy, or the conditional agreement was of subsequent date, the case is usually not a mortgage. 7 Cranch, 237 (§ 457, *supra*). But if these, or other strong facts, are the reverse, as here, the inference is in favor of its being a mortgage. 10 Sim., 386; 3 Jurist, 1186; 5 id., 114; 4 Kent Com., 143.

2. The next special fact thus proved or admitted, and very material in this inquiry, is that the parties stood here in the relation of lender and borrower, both before and at the time of the execution of the deed in 1827. Such a circumstance is deemed very decisive in a court of chancery that the transaction was meant to be a mortgage. Flagg v. Mann, 2 Sumn., 527, 536; 1 How., 358; 4 John. Ch., 167; and other cases in Hunter v. Marlboro', 2 Woodb. & M., 163; Co. Litt., 204b and note. Her application, in 1824, to a broker, and afterwards to Parkman, was not to sell the premises, but mortgage them; and his intention had never been to buy, but to make loan after loan till, beside a mortgage at first for what was then advanced, he proposed not to buy, but to take an absolute deed to secure the whole, making, as he averred, a defeasance back, and lodging it with the deed for her security as to the right of redemption. Morris v. Nixon, 1 How., 118 (§ 483, *supra*). Whenever the deed is in fact security for a debt, courts are inclined to consider it a mortgage. Porter v. Nelson, 4 N. H., 130; Longuet v. Scawen, 1 Ves. Jr., 406; 4 Kent Com., 158; 3 Pick., 483, 491. The only doubt as to the force of this point is the surrender to Mrs. Jones of her notes, and the taking of no new one, or a bond, or covenant to pay the money advanced and due.

But if a transaction be shown to have been a mortgage, a suit lies for the debt, though there be no note, or bond, or express covenant to pay it. 1 Pow. on Mort., 16, note; id., 374, note; King v. King, 3 P. Wms., 361. It rests on the whole evidence, showing it to be a mortgage; and if a right to redeem exists, there is a correlative right to enforce payment and treat the case as a debt thus secured. But if, *vice versa*, from the nature of the transaction, there is no loan, no debt, no borrowing, then there being no debt, there is no mortgage, and no action lies to recover a debt. 7 Cranch, 237 (§ 457, *supra*). I speak now, of course, of moneyed considerations in deeds and between the parties, and not mortgages to secure against contingencies or liabilities as bail, or surety, or covenantor. Nor do I include what are called Welsh mortgages, because there the mortgagee enters at once and takes the rents instead of interest, and is, by agreement or distinct understanding, to have no remedy for the principal. 1 Pow. on Mort., 374, note; Patch on Mort., 22, 29; 3 Atk., 280. But he agrees merely to reconvey on its payment. Coop., 189; 5 Br. P. C., 275. It is true, likewise, that it must have been a mortgage at first, or *ab initio*, and not by any subsequent parol agreement. 1 Pow. on Mort., 116, note; id., 125; Price v. Perrie, 2 Freem., 258; Copplestone v. Foxwell, id., 150; Vernon v. Bethell, 2 Eden, 110. This case was of that character, confessedly on

both sides at first, in 1824. And if once a mortgage in any way, no subsequent or collateral agreement to prevent a redemption is allowed to bar it; as once a mortgage, it is always a mortgage until a foreclosure, regular and designed as one. 2 Vern., 520; 1 Eden, 59; 7 Ves. Jr., 273; 4 id., 350.

Most of the controverted cases in the books relate to such as where the sale may have been conditional, but not conditional as a mortgage, without raising the question whether there was any debt. 1 P. Wms., 270; 3 id., 360; 1 Ves., 406; 2 Atk., 496; 2 Ball & Beat., 278. That, however, is not the point here; the sale here being clearly absolute, if it is not a mortgage. In such cases, seldom if ever, would the grantee be compelled to resort to a suit for the debt, as the very transaction usually implies that the land is worth more than the debt, else the form of an absolute sale would not be resorted to, so as to try to prevent a redemption. But if the premises actually prove to be worth less than the real debt, and all the facts indicate the deed to have been a mortgage, and so understood by the grantor as well as the grantee, I see no good reason on principle, except in the case of Welsh mortgages, why the grantor as mortgagor should not be liable to pay any balance not discharged by the value of the land. 1 Pow. on Mort., 373, note; *Robinson v. Cropsey*, 2 Edw. Ch., 138; 2 Ball & Beat., 274; *Kelleran v. Brown*, 4 Mass., 444.

3. The next material fact proved here, and which bears strongly on the question whether the deed of 1827 was intended as a mortgage or not, is that the value of the land and buildings was, on all the evidence, double if not treble the consideration or debt due from Mrs. Jones. This has before been illustrated both by the prices given for them, and the opinions of those well acquainted with them, and also the rents actually paid to Mrs. Jones, Mrs. McLean, and in some cases to Dr. Phelps. The law is very clear, for reasons before stated, that such a fact is very decisive to show the transaction must really have been meant not to be an absolute sale. 4 Blackf., 99; *Lewis v. Owen*, 1 Ired. Eq., 290; *Morris v. Nixon*, 1 How., 118 (§ 483, *supra*); *Hunter v. Marlboro'*, 2 Woolb. & M., 168; *Conway v. Alexander*, 7 Cranch, 241 (§ 457, *supra*); Co. Litt., 204, b, note.

4. Next to this in importance is the fact of the possession retained so long by the grantor and her heir after the sale. Remaining in her one year under a lease would in some degree for that year explain and obviate the inference that it was not a sale, if the lease had been for an amount of rent, looking *bona fide* and real; that is, \$150 to \$200, the rate it had usually been leased for to others. But it was for only \$55 nominally, and only about \$34 per year was paid for the first two or three years, and after that still less. This possession was continued likewise for fourteen years by Mrs. Jones and her mother, without any renewal in writing; and the entire control over the premises was thus long exercised by them, and no payment of over \$34 a year, being about the amount of interest on the debt and little over half the nominal rent, and only one-fifth of the real value of rent. During several years the payments varied but little from the true amount of interest on the original debt.

The possession after this formal sale, and this payment of no higher rent than the interest on the original debt, are very decisive evidence that there had been no intention on either side to treat the matter as an outright sale by one and purchase by the other. Nor is there the least danger to the community in such a construction. For it puts the trust estate in the person occupying, and thus the apparent owner, and deceives nobody where the rights all remain in the original parties and their heirs, as here. If third persons acquire interest with-

out notice of secret trusts, that gives rise to different considerations and new equities, especially in respect to personal estate. But as to real estate in this country, where registries exist for notice, they as to third persons are the best guide. 14 Serg. & Rawle, 833; *Leland v. The Medora*, 2 Woodb. & M., 92.

5. In connection with this is another fact just adverted to, not only that interest on the debt was the amount paid quarterly or yearly, and not so much as the rent named, or one-fourth of the real value of the rent, but it was paid and receipted for in writing as "interest" and not as "rent" at all, till after Mrs. Jones' death, and then oftener under the name of "interest" than of "rent." All the evidence on this has been explained at length, and the attempt to obviate the force of it in some degree by alterations proved in such receipts as remained in the respondent's possession from the word "interest" to "rent" in some cases, and in others adding "rent," where the word did not exist before, evinces the importance attached to this written confession of the true relations which existed between the parties. These are pregnant confessions, that the actual transaction originally was considered by both parties as a mortgage. Prec. in Ch., 517; 1 Madox, Ch., 517. They are in writing likewise, and thus obviate any objection as to the statute of frauds. 1 Johns. Ch., 273; 16 Mass., 621; and various cases in *Hunter v. Marlboro'*, 2 Woodb. & M., 168.

6. There are also various confessions of Phelps testified to, and satisfactorily substantiated by the evidence, that the transaction was meant to be a mere security for his debt.

7. Finally, his written memorandum given to Mrs. McLean in 1834 of the whole debt due to him, and which, in the ordinary meaning of the words after the other proof in this case, must be considered as including what remained due on the original consideration of the deed of 1827, indicates the whole affair to have been a mortgage. Nor could this memorandum apply to any other debt accurately, such as the arrears of rent, they being then a sum much less. But it corresponds nearly with the principal of the mortgage debt. So the payments made by Mrs. McLean seem to have been applied to the mortgage debt, and were not on any other claim as now set up, else the mortgage debt in the principal of it would not thus have been reduced about \$100. Some blotting of the word "four" before "hundred" in this memorandum, supposed to be made since the paper was filed, led to some discussion and testimony, but it is not deemed by the court so important to a correct decision of the case as to enlarge on it. But that the word was in fact four and not five when filed, all the evidence combines to show, and Mrs. McLean swears it was made so originally by Dr. Phelps himself. Nor is it possible to reconcile the reduced amount paid for "rent or interest," as the principal of the debt was reduced, except that both parties understood the real rent to be paid to be graduated as interest on the original principal, and to fall as that had been in part discharged by Mrs. McLean, and not some other debt or principal for arrears. Enough of this analysis of the particular facts proved or admitted which are competent, and which in equity entitle the plaintiffs to judgment.

Before closing, it may be added that there is one prominent reason running through the whole transaction, which requires a court of equity to look on it with jealousy, and to protect the wife of the complainant and her mother, in case of doubt, from any imposition or loss. The mother was a widow, the daughter a minor as well as fatherless, and her guardian another widow. They must be unskilled in business compared with the respondent, a man, and famil-

iar with and attentive to it. One strong proof of this is the evidences of payments by Mrs. Jones being all left in his possession, and on his copy of the lease, instead of being, as they should have been, in her custody. He, too, was a money lender, and Mrs. Jones a borrower; she needy and dependent, and he possessed of considerable wealth. This property, by the evidence worth at least from \$1,000 to \$1,500, under these circumstances goes into his hands for the payment or security of only \$565. Considering it as being then, on all the facts and law of the case, as security and by way of mortgage after 1827, as it confessedly was before, the decision would still yield to him all his principal and interest, and require from the complainants the full payment of everything they owed. To do more would evidently violate the original agreement of the parties as proved and admitted, and hence violate the law; and for no purpose but to give the respondent much more than his debt, and take from some helpless women much more than they owed.

Let the deed of 1827 be treated as a mortgage, and an account be taken by a master of what was due to the respondent, deducting rents and profits and part payments, and allowing interest, permanent repairs, and taxes paid.

§ 517. *Parol evidence.*—The rule is well settled that parol testimony is admissible to show that a deed absolute on its face was really intended as security for money loaned. *Peugh v. Davis*,* 2 MacArth., 14.

§ 518. A deed absolute on its face may be declared a mortgage. This is done in those cases only where it becomes necessary to prevent injustice through accident, mistake or fraud. *Sprigg v. Bank of Mount Pleasant*, 1 McL., 384, 390.

§ 519. Oral evidence is admissible to show that a deed absolute on its face is a mortgage. *Amory v. Lawrence*, 3 Cliff., 523 (§§ 948-957); *Taylor v. Luther*,* 2 Sumn., 228. Where a mortgage is given and that mortgage is foreclosed, and the mortgagee is the purchaser, and an absolute deed is made to him, the equity of redemption being foreclosed by judicial proceedings, the proof ought to be strong to make the second deed a mortgage. Such an agreement is a naked promise to buy lands and hold them for the benefit of another, and cannot be enforced in equity. *Howland v. Blake*,* 7 Biss., 40; 7 Otto, 624.

§ 520. *The test.*—Whether a conveyance absolute in form be a mortgage or not is a question that is to be tested by the inquiry whether the conveyance was made to secure the performance of any act or thing. If the transaction resolves itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security, then it may be a conditional or an absolute purchase. *Flagg v. Mann*, 2 Sumn., 538.

§ 521. The test whether an absolute conveyance constitutes a mortgage in equity is the existence of a debt between the parties, and the execution of the deed for the purpose of securing it. *Tufts v. Tufts*, 8 Woodb. & M., 457, 465.

§ 522. *Admissible on ground of fraud.*—A deed, absolute on its face, may be shown by an independent agreement between the parties to have been intended only as a mortgage. Courts of equity will permit such agreements to be set up against the express terms of the deed, only on the ground of fraud; considering it a fraudulent attempt in the mortgagee, contrary to his own express agreement, to convert a mortgage into an absolute deed. *Sprigg v. The Bank of Mount Pleasant*, 14 Pet., 201, 208.

§ 523. The statute of frauds does not stand in the way of the admission of said evidence. *Taylor v. Luther*,* 2 Sumn., 228.

§ 524. The grantor in such deed is a competent witness to show that it was really intended as a mortgage, and that the grantee knew it to be so. *Ibid.*

§ 525. *Parol evidence of loose conversations and statements made by the parties at the time the deed was made* is not admissible to prove that the deed, though absolute on its face, was only intended as a mortgage. *Jenkins v. Einstein*, 3 Biss., 128, 140.

§ 526. A court of equity will not change the terms of an absolute deed unless the testimony is of so unquestioned a character as to satisfy the court that in doing so it is not doing an injustice to either party. *Ibid.*

§ 527. *Understanding of parties.*—A deed absolute on its face will not be held a mortgage, unless such was the understanding of the grantee as well as the grantor. Therefore where one, being indebted to his wife's mother, executed a deed to her absolute in form, his testimony that he inferred from her kindness to her children that she would be willing to accept

the money for the debt at any time before she should dispose of the plantation, was held insufficient to show that the transfer was intended to operate as a mortgage, when the grantee testified that it was intended to be an absolute transfer without the privilege of redemption. *Jones v. Brittan*, 1 Woods, 673.

§ 528. There must be a debt.—Where K. furnished money to B., his son-in-law, and took a conveyance of a farm, and then conveyed to B. conditioned on the payment by B. of a sum equal to the annual interest on the sum advanced during the life of K. and wife; it was held that the conveyance to K. was not a mortgage. The transaction shows that the money was not to be repaid but was to remain, so there was no debt for any mortgage to secure; and without a mortgage debt there can be no subsisting mortgage. *Atwood v. Kittell*, 9 Ben., 473, 475.

§ 529. Grantee has rights of owner.—The grantee of the legal title, whether the transaction be a mortgage or a conditional sale, may exercise all the rights of an absolute owner as to third parties. The mortgagor's equity of redemption is destroyed by a sale of the land by the mortgagee to a *bona fide* purchaser, and the former is limited to his right against the mortgagee personally, the limitation whereof is six years from and after the discovery of the fraud. *Wyman v. Babcock*,* 2 Curt., 386. See §§ 478-482.

§ 530. The grantor in an absolute deed intended as a mortgage is bound by the acts of his mortgagee, who is his trustee, in dealings for value with third persons. *Bleecker v. Bond*, 3 Wash., 529, 539.

§ 531. A purchaser with notice that his grantor, though holding by an absolute conveyance, is nevertheless a mortgagee, acquires a defeasible estate only. Such purchaser stands in place of the equitable mortgagee. *Amory v. Lawrence*, 3 Cliff., 523 (§§ 948-957).

§ 532. Once a mortgage always a mortgage.—The parties cannot, by their agreement that there shall be no equity of redemption after a limited time, change the rights of the mortgagor. *Flagg v. Mann*, 2 Sumn., 538.

VII. THE DEBT SECURED.

SUMMARY—*Mortgage without note or bond*, § 533.—*Parol evidence*, §§ 534, 538.—*Mortgage for future advances, valid; statute otherwise in New Hampshire*, § 535.—*In Connecticut future advances must be particularly described*, § 536.—*Advances after notice of incumbrances*, § 537.

§ 533. A mortgage or deed of trust is valid without any bond or note, although it purports to secure a bond or note, and substantially describes it. Where a bill is filed to set aside such a mortgage, perhaps the mortgage might be reformed by a cross-bill. *Baldwin v. Raplee*, §§ 539-544.

§ 534. But parol evidence to contradict or vary the terms of the mortgage should be carefully scrutinized and should not control the terms, unless it be of the most satisfactory character. *Ibid.*

§ 535. A mortgage for future advances as well as a present indebtedness is valid, unless such a mortgage is prohibited by statute, as in New Hampshire, where, by statute July 3, 1829, a mortgage for future advances or accounts between the parties is invalid. But under this statute a mortgage is valid for the part which secures a debt due or created at the time the mortgage was executed. *Leeds v. Cameron*, §§ 545-549.

§ 536. In Connecticut a mortgage to secure future liabilities, not fully and specifically described, is invalid. It is not sufficient that the debt is of such a character that it might have been secured by the mortgage had it been truly described. *Townsend v. Todd*, §§ 550, 551.

§ 537. In the absence of a binding contract for future advances, a mortgagee is not secured for advances made after notice of subsequent incumbrances upon the property. *Ripley v. Harris*, §§ 552-555.

§ 538. A mortgage given for a definite sum, without specifying the liabilities secured, may be shown by parol evidence to have been given to indemnify the mortgagee against his liability as an indorser or surety for the mortgagor. *Shirras v. Caig*, §§ 556-558.

[NOTES.—See §§ 559-563.]

BALDWIN v. RAPLEE.

(District Court for New York: 4 Benedict, 433-448. 1870.)

Opinion by HALL, J.

STATEMENT OF FACTS.—This is a bill in equity, filed by the plaintiff, as the assignee in bankruptcy of Jefferson T. Raplee, a bankrupt, for the purpose of

setting aside a mortgage for \$10,000 and interest, executed by the bankrupt to the defendant Nehemiah Raplee, and bearing date April 14, 1868. This mortgage appears to have been acknowledged, by the bankrupt, before Spencer S. Raplee, a notary public, who is a brother of the bankrupt, on the 15th day of April, 1868; and it was duly recorded on the 26th of July, 1869, at 8½ o'clock, A. M.; — the bankrupt, who had for several years been doing business as an individual banker, having failed and closed his bank on the 23d of the same month. By an assignment dated on the 24th of the same month, the mortgage was assigned by Nehemiah Raplee to the defendant Ira Raplee, as security for a pre-existing debt, due to him from Jefferson T. Raplee, and for which Nehemiah Raplee was liable as his surety. The creditor's petition against Jefferson T. Raplee, as an involuntary bankrupt, was filed on the 30th day of July, 1869, and under that petition the plaintiff was duly appointed assignee.

The mortgage in question was in the form of a deed or grant, with a provision and declaration in the following language, viz.: "This grant is intended as a security for the payment of the sum of *ten thousand (10,000) dollars and interest*, according to the condition of a bond this day executed and delivered by the said *Jefferson T. Raplee, party of the first part*, to the said party of the second part; and this conveyance shall be void if such payment be made as herein specified." The words of such provision which are above *italicized* were written, and the others were part of the printed blank used in drawing the mortgage. The assignment to Ira Raplee was in form an assignment of the mortgage "together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon;" and it contained a covenant that there was unpaid and "due on said bond and mortgage the sum of \$10,894.18." The mortgage contained the usual power of sale, but no express covenant for the payment of the money therein mentioned.

The plaintiff's bill alleges that the mortgage was executed on the 14th of April, 1868, or on some other day between that date and the filing of the creditor's petition in bankruptcy, as aforesaid; that he was informed by the mortgagee, and believed, that no such bond as was described in the mortgage was ever at any time delivered by the bankrupt to the mortgagee; and that the plaintiff did not know of any other or further condition or terms of payment of the moneys mentioned in said mortgage. The bill also alleges that the United States internal revenue stamp affixed to said mortgage appeared by the record thereof to have been canceled by the bankrupt on the 18th day of April, 1868; that no bond, such as is described in the mortgage, had ever been delivered to or possessed by said Ira Raplee, or been seen by him; and that the assignment to said Ira was made as collateral security, as aforesaid. The bill further alleges that said mortgage was executed and delivered to the said Nehemiah Raplee, as aforesaid, when the said bankrupt was largely indebted to divers persons, and insolvent, and with intent thereby to hinder, delay and defraud the creditors of the said bankrupt; and was taken and received by the said Nehemiah Raplee with the like intent, and with full knowledge of the insolvency of the bankrupt, and of his said fraudulent intent; and that it was executed and delivered by said bankrupt without any good or valid consideration whatever; and also that the assignment of said mortgage to Ira Raplee was also without any valuable consideration, and was received by him with full knowledge of the bankrupt's insolvency, and was utterly void as against the plaintiff; but it was not alleged that the mortgage was executed for the purpose of giving a preference to said Nehemiah Raplee over the other creditors

of the bankrupt, or to defeat the object of the bankrupt act, or evade any of its provisions; or that it was executed or accepted in fraud of that act.

The defendants, by their answer, admitted and stated the execution of the mortgage on the 14th, and the acknowledgment thereof on the 15th April, 1868; the affixing and canceling of the internal revenue stamps on the 18th of the same month; that it was not recorded until the 25th day of July, 1869; and that the assignment thereof to Ira Raplee was executed on or about the 24th day of July, 1869. The answer also admits that no bond was delivered to Ira Raplee at the time of the assignment of the mortgage; and it avers that the mortgage was duly delivered by the said Jefferson T. Raplee to said Nehemiah, on or about *the 19th day of April, 1868*. The answer of the defendants, in respect to the allegation that no bond accompanied the mortgage, and in respect to the consideration of the mortgage, and the debt it was actually intended to secure, is as follows, viz.: "These defendants, further answering, aver and say, and each for himself says, *the said Nehemiah of his own knowledge*, and the said Ira on information and belief, that, at the time the said mortgage mentioned was made, executed and delivered by the said Jefferson T. to the said Nehemiah, in fact, no bond accompanied the same; that the blank used in preparing said mortgage contained said printed clause or words, but which are not expunged or erased at the execution thereof, through inadvertence or oversight; that, in truth and in fact, the real and true consideration of the said mortgage was the sum of \$10,000 *in cash*, before that time lent and advanced to the said Jefferson T. by the said Nehemiah, and for which the said Nehemiah *then held*, and ever since has and still holds, the promissory note of the said Jefferson T.; and to secure the payment of the said sum so lent and advanced, and the said note, the said mortgage was made, executed and delivered by the said Jefferson T. to the said Nehemiah; that no part of said sum so lent and advanced by the said Nehemiah to the said Jefferson T., on the said note or any part thereof, has *never* been paid." And, again, in another part of said answer: "And these defendants, further answering, aver and say, and each for himself avers and says, that he is informed, and believes, that no bond was ever executed to accompany the said mortgage, and the said Jefferson T. did not execute such bond, and the said Nehemiah, of his own knowledge, avers and says that it was intended that the said mortgage should be held as security for the payment of the said sum of \$10,000, *so as aforesaid lent and advanced* by the said Nehemiah to said Jefferson T., and the interest thereon; said sum being represented by the said note given by the said Jefferson T. to the said Nehemiah, and which sum or note has never been paid."

The answer also alleges that the debt of the bankrupt to Ira Raplee, in respect to which Nehemiah Raplee was liable as security as aforesaid, was, in part, upon a note of said bankrupt for \$5,000, given on or about the 4th of July, 1867, and payable thirty days after that date; and the remaining \$5,000 was upon a certificate of that amount made by the bankrupt, as an individual banker, under date of January 1, 1869, and payable in current funds, with semi-annual interest. The defendants denied all knowledge or suspicion of the bankrupt's insolvency, and averred that they had no cause to believe he was insolvent, or unable to pay his debts, until long after said mortgage was executed, and they denied that it was executed or accepted with the intent to hinder, delay or defraud creditors. There are other allegations and admissions in the bill and answer, but it is not deemed necessary to refer to them more particularly in this preliminary statement.

Upon the taking of the proofs in the case, Nehemiah Raplee was sworn as a witness for himself and his co-defendant, and was examined at length in respect to the execution, consideration, delivery and purpose of the mortgage in controversy. Jefferson T. Raplee, the mortgagor, had absconded immediately after his failure, and was absent from the state, and his father testified that he did not know where he was, and, of course, his testimony has not been produced. Nehemiah Raplee's testimony is, in several points, entirely inconsistent with the allegations of his sworn answer. Instead of testifying that the mortgage was delivered on or about the 19th day of April, 1868, he first testified that it was delivered a short time after the 10th of May, 1868; and, instead of testifying that the mortgage was given for \$10,000 in cash, previously lent and advanced by him to Jefferson T. Raplee, for which he then held his note, he testified that the mortgage was given for the transfer by him to Jefferson T. of a mortgage of Daniel Ellis, to the amount of \$3,446.36, and his, the said Nehemiah's, check for \$6,553.77 on said Jefferson T. Raplee's bank; that said mortgage of Ellis was assigned, and said check given and dated on the 18th May, 1868, on which day the mortgage of \$10,000 was delivered, together with a note of Jefferson T. Raplee's for \$10,000, dated on the 10th day of May, 1868. The mortgage, he says, was given as security for the payment of this note, dated more than three weeks after the date and alleged acknowledgment of the mortgage, and more than a week before the date of the check, and of the alleged assignment of the mortgage. The note is produced, and is in the handwriting of Jefferson T. Raplee. The mortgage and the certificate of acknowledgment, including the date, are also in his handwriting. The revenue stamp on the mortgage has on it the date, "Apr. 18, 1868," with initials, "J. T. R." and "N. R.," but neither of these initials are believed to be in the handwriting of either Jefferson T. or Nehemiah Raplee. The certificate of acknowledgment is signed by Spencer S. Raplee, the brother of Jefferson. On the note is an internal revenue stamp purporting to be canceled by J. T. Raplee's signature; but it is evident that this signature is in the handwriting of his brother, S. S. Raplee; and it is almost certain that the date on the stamp was first written April 20 or 21, 1867, and subsequently changed to May 10, 1868. This note appears to have been first indorsed on the back, "N. Raplee, Note, \$10,000," and the letters "J. T." afterwards written above the "N." The assignment of the mortgage from Nehemiah to Ira Raplee is produced, bearing date July 24, 1869, and purporting to have been acknowledged on the same day; but the assignment refers to the record of the mortgage, on the 26th of the same month, or two days afterwards; and gives the exact time of such record, and the book and page on which it is to be found. The revenue stamps on this assignment purport to have been canceled on the 24th July, 1869, and to have on them the initials of Nehemiah Raplee, and also the initials "J. T. A.," but the cancellation is not supposed to be in the handwriting of Nehemiah Raplee. This assignment was also recorded on the 26th, only half an hour after the recording of the mortgage assigned. It also appears from the testimony of Nehemiah Raplee, that he had a mortgage on all the real estate of Jefferson T. Raplee, not embraced in the \$10,000 mortgage; that such mortgage was given him three or four years before the failure of Jefferson T. Raplee, and that it was not recorded until after the failure. The mortgage now in controversy purports to have been executed in the presence of S. S. Raplee—his name appearing as the subscribing witness thereto,—but his testimony fur-

nishes no evidence as to the time of the execution of the mortgage, or of his having canceled the stamp of the note, or being present at its execution.

The testimony of Nehemiah Raplee is certainly open to much criticism, and is, in many respects, indefinite and unsatisfactory. No assignment of the Ellis mortgage to Jefferson T. Raplee is produced, and such assignment is not proved, except by the testimony of Nehemiah Raplee, who also testified that this mortgage was afterwards owned and used by him; having, as he says, been re-assigned, or the assignment from him to Jefferson T. having been given up and canceled before it was recorded; but which he does not profess to be able to state. The bank pass-book of Nehemiah Raplee with his son's bank showed a balance of more than \$2,000 against Nehemiah Raplee. He testified that he could not explain it, but that the balance should have been at least four or five thousand dollars the other way. Nehemiah Raplee swears that he supposed Jefferson T. Raplee to be solvent down to the day of his failure, and had no suspicion of his insolvency; but his testimony shows that he had abundant reason to believe his son to be unable to meet his obligations as they fell due, and the father's denial of his knowledge or belief of such insolvency must, in charity, be attributed to his ignorance of the legal signification of the term, as it would otherwise necessarily be considered a wilful perversion of the truth.

Ira Raplee also testified that, at the time the assignment to him of the mortgage in controversy was executed by Nehemiah Raplee, no bond was delivered to him; that he asked Nehemiah about the bond, and he said he thought there was no bond, but if he had one, he (Ira) should have it also. He further testified that he had given all that occurred between Nehemiah and himself, and, from his testimony, it appears that nothing was said between them in respect to the note, the payment of which, it is now said, the mortgage was given to secure; and that no other writing in respect to that transaction ever passed between Nehemiah and Ira Raplee. The \$10,000 note of Jefferson T. Raplee was not produced by this witness, upon his examination, when he produced the mortgage and assignment, which were marked as exhibits; but it was afterwards produced and marked as an exhibit, upon the examination of Nehemiah Raplee, the payee. The note produced is payable one day after date, to the order of N. Raplee, but there is no assignment or indorsement on the note, transferring it or directing its payment in any form. Ira Raplee also testified that, when the assignment of the mortgage was made to him, he asked Nehemiah Raplee for the bond; and that Nehemiah then said, "I have not the bond here, and I am not sure there is any; I will look when I go home, and if I have it, you shall have it." Nehemiah Raplee further testified, that at the time of the assignment to Ira, he had no bond there, and that he thought Ira asked him about the bond, and that he told Ira that if he had one he should have it; and that he looked afterwards, and did not find any bond. And it is not pretended by him that he in any way intimated to Ira Raplee, at or before the mortgage was assigned to him, that the mortgage was given to secure the payment of the \$10,000 note of Jefferson T. Raplee.

§ 539. *A mortgage is not necessarily invalid because it purports to secure the payment of a non-existent bond.*

It was urged, in behalf of the plaintiff, that the mortgage could not be enforced, because it is, by its terms, a security for the payment of \$10,000, according to the condition of a bond of even date therein described, and no such bond was ever executed.

But the mortgage is declared to be intended as a security for \$10,000 and interest; and, under the cases of *Jackson v. Bowen*, 7 Cow., 13; *Goodhue v. Berrien*, 2 Sandf. Ch., 630; *Shirras v. Caig*, 7 Cranch, 34 (§§ 556-558, *infra*), and similar cases, it must be considered that the fact that the bond so described was never executed, is not of itself necessarily fatal to the claims of the mortgagee, and that parol proof may be received to sustain the mortgage. Whether, under the proofs in this case, it should be sustained, is a different question, and will be discussed after disposing of other objections urged against the mortgage.

§ 540. *Rule as to usury.*

It was also urged that the mortgage was void for usury, because the note produced is dated on the 10th of May, 1868, and bears interest from that date, and the alleged consideration of the note was not received by the maker, or parted with by the mortgagee, until the 18th of that month. It is sufficient to say, in answer to this objection, that there is no allegation in the bill that the mortgage was usurious, or that there was any corrupt agreement, or any intent to secure more than lawful interest; and that there is not sufficient proof to sustain an allegation of corrupt agreement and unlawful interest, if it had been made.

§ 541. *A mortgage assigned to secure a note which was never delivered is not thereby extinguished.*

It was also insisted that the assignment of the mortgage to Ira Raplee was without any assignment of the debt secured by the mortgage, and that, under the cases of *Langdon v. Buell*, 9 Wend., 80; *Jackson v. Blodgett*, 5 Cow., 202; *Merritt v. Bartholick*, 36 N. Y., 44, the transfer of the mortgage without the transfer also of the note which evidenced the debt thereby secured, extinguished the mortgage. It is true, the note was not indorsed or delivered to the assignee at the time the mortgage was assigned, but the assignment itself, by its express terms, assigned the mortgage, "together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon," which is clearly a transfer of the debt, as well as of the mortgage, and would include, as incident to the debt, the note which was the direct evidence of its existence. This objection must, therefore, be overruled. It was also urged that, by the return of the Ellis mortgage to Nehemiah Raplee, the mortgage was extinguished to the extent that the assignment of such mortgage entered into the consideration of the mortgage in controversy; but this testimony of Nehemiah Raplee, which shows that the Ellis mortgage was returned to him, also shows that it was purchased by him of Jefferson T. Raplee, and paid for by giving up evidences of debt then held against Jefferson T. Raplee. There is, therefore, no evidence to show that any part of the \$10,000 note has been paid. The question whether the parol proof in the case is sufficient to sustain the validity of the mortgage in controversy remains to be examined.

§ 542. *A deed which misrepresents the transaction on which it purports to be founded can only be sustained by proof of the most satisfactory character.*

A deed or mortgage which misrepresents the transaction it professes to recite, or the consideration on which it was executed, is, of course, liable to suspicion, and must sustain a rigorous examination. *Shirras v. Caig*, *ubi supra*. And parol proof which contradicts or varies the terms of a mortgage, or is relied upon to give it effect as a security for a debt different from that which it is apparently intended to secure, should be of the most satisfactory character; and it should be carefully scrutinized,—especially when such proof is

the unsupported testimony of the party chiefly interested in sustaining the mortgage.

In this case, the mortgage, on its face, purports to be a security for the payment of a debt of \$10,000, evidenced by the bond of the mortgagor, bearing even date with the mortgage; but it is admitted that no such bond ever existed; and it is alleged that the mortgage was in fact intended to secure the payment of a note of the mortgagor dated nearly four weeks after the date and acknowledgment of the mortgage. The mortgagee, in making an assignment of the mortgage, more than a year after its date, and after the mortgagor had failed and absconded, assumes to assign with it the bond therein described; and when then questioned in regard to the bond, stated that he did not know as there was a bond, but if there was, the assignee should have it, but said nothing whatever in regard to its being accompanied by, or being given to secure the payment of the note which it is now said it was intended to secure, and subsequently, as he testified, he "looked a good deal at different times" for the bond. There is no satisfactory explanation of the circumstance that the mortgage is dated the 14th of April, and the note the 10th day of May, when neither was delivered, or the consideration paid or transferred, until the 18th of May, 1868; there are suspicious circumstances in respect to the cancellation of stamps, and their dates, as before stated; and then there are the entirely inconsistent statements of the sworn answer and oral testimony of the mortgagee, in reference to the time of the actual delivery of the mortgage, and the consideration of the debt it was intended to secure. The sworn answer avers that it was given for \$10,000 in cash, before then lent and advanced to the mortgagor by the mortgagee, and for which the mortgagee then held the note of the mortgagor, and was delivered on or about the 19th day of April, 1868; while the oral testimony of the mortgagee shows that it was delivered on the 18th of May, 1868, and given for the Ellis mortgage, for which \$3,446.36 was allowed, and a check of \$6,553.77; thus assuming that it was given for a present valuable consideration, and not for a pre-existing debt; and not for cash lent and advanced, as alleged in the answer. The insertion of the time and place of the recording of the mortgage in the assignment after its execution and acknowledgment, and before it was recorded, is of little consequence, except as showing that papers executed by some of the parties were altered after their execution, in view of the then existing circumstances.

Besides these circumstances of suspicion, and others which appear in the preceding statement, it is to be observed that the general statement of Nehemiah Raplee, that this mortgage was given upon the consideration stated in his oral testimony, and to secure the payment of the \$10,000 note, is not well supported by his detailed statements of what occurred between him and the mortgagor, in respect to the giving of the mortgage and the purpose for which it was to be given, and was given, and what was said and done at the time the mortgage and note were delivered. In the first part of his examination, and in reply to the question of his counsel, "For what purpose this mortgage was given," he replied, "To secure me for a part of the money I had loaned him." In reply to the question, "Was that indebtedness represented in this note?" he replied, "It was represented there for \$10,000. I wish to be understood; that represented \$10,000 of his indebtedness to me." In reply to the question, "How came he to give you the note and mortgage?" he testified as follows: "Previous to his giving this mortgage, he was up to my house, and said he was to make a payment on the coal property, and *wanted to borrow some more money*. I said I

would help him what I could, and told him he was getting about all I had, and I wanted security. His reply to me was, that he could give me a mortgage on his banking building and lot, which he thought was good security for \$10,000. He came down here; the conversation was at my house; the next time he came he brought the note and mortgage. He was in the habit of coming Saturday night or Sunday morning. I looked them over a few minutes on Sunday, and did not look at them again until several days after, when I took them from my desk and looked them over. I found out that his estimation, in looking over the figures of certain transactions, was correct, and I then put them away satisfied. There was only enough estimated to amount to \$10,000 of what I had let him have. He delivered me a statement at the time of so much of his indebtedness to me as covered the note and mortgage. I have looked a part of two days for the statement, but cannot find it. I have means of stating what made up the amount of the \$10,000. I let him have a bond and mortgage amounting to \$3,446.33. I gave him my check dated on the 18th May, 1868, for \$6,553.77. The two items make just \$10,000."

There are other portions of Nehemiah Raplee's testimony which have some slight bearing upon the questions under discussion, but it is believed that it does not strengthen the case of the defendants. By their answer and the character of their proofs, they have assumed the burden of sustaining the mortgage by parol testimony, and showing that it was, in fact, given to secure the payment of the \$10,000 note referred to; and the testimony on the case has not satisfactorily established their defense. A decree will therefore be made, setting aside the mortgage in controversy, and discharging the premises mortgaged from any lien under the same, with costs.

§ 543. *Quere: Whether a cross-bill to reform a mortgage executed to secure a non-existent bond debt could be sustained.*

It has not been forgotten that it was claimed that there was at least proof of a valid agreement to execute a proper mortgage, and that such agreement would, in equity, be so enforced as to give it the effect of a mortgage. If a cross-bill had been filed to obtain a reformation of the mortgage executed, or to give effect to the agreement for a mortgage, the relative equities of the mortgagee and the assignee in bankruptcy, as the representative of the general creditors of Jefferson T. Raplee, would have been brought into competition, and it is not considered at all probable that a court of equity would have given relief to the holder of the secret lien of the unrecorded mortgage against the representative of creditors who had trusted the bankrupt, and deposited their money in his bank, on the faith of his being the owner of the property covered by the mortgage in controversy here, and of the Pennsylvania property, free of incumbrances, when the defendant, Nehemiah Raplee, held unrecorded mortgages on such property to its full value, with full knowledge that the bankrupt was insolvent, and that he was continually receiving deposits, as a private banker, from persons ignorant of his financial condition.

§ 544. *Rights of assignee in bankruptcy.*

It was substantially conceded, upon the argument, that the assignee in bankruptcy could not avoid the mortgage in controversy on the ground that it was made and taken in violation or fraud of the provisions of the Bankrupt Act — it having been executed and delivered more than six months before the petition in bankruptcy was filed against Jefferson T. Raplee. It has not, therefore, been deemed necessary to discuss the question whether, in a court of equitable jurisdiction, the limitation of six months, contained in the Bankrupt Act,

begins to run, in the case of a concealed fraud, from the time of the commission of such fraud, or from the time of the discovery of such concealed fraud, as in other cases where the statute of limitations is pleaded. See *Carr v. Hilton*, 1 Curt., 390; *Moore v. Green*, 2 id., 202; *Pritchard v. Chandler*, id., 488; and *Martin v. Smith*, Am. L. Reg., November, 1870, vol. II, p. 694; and also the authorities cited in those cases. See *United States v. Maillard*, 4 Ben., 459. Nor has it been deemed necessary to discuss the question whether, under the principles established in *Shawhan v. Wheritt*, 7 How., 627, the holder of a secret lien, under an unrecorded mortgage, can overreach the title of an assignee in bankruptcy, by recording his mortgage after he has knowledge of an act of bankruptcy committed by the mortgagor. A decree will be entered in accordance with this opinion.

LEEDS v. CAMERON.

(Circuit Court for New Hampshire: 3 Sumner, 488-495. 1839.)

STATEMENT OF FACTS.—The mortgage in this case was executed on October 25, 1834, and purported to secure certain specified sums, as well as "all sums of money which now are or may be owing . . . on account or otherwise, with interest," etc. The case was referred to an auditor, who reported that the original debt was paid, including interest, and that if anything remained due it was on an account and a due bill, which, with interest, amounted to \$484.26. It appeared from the account as filed that the goods were purchased on October 20, 1834, and in January and February, 1835. The due bill was dated October 29, 1834. The auditor also reported that at the time the goods were selected it was agreed that they were to be secured by the mortgage.

§ 545. *At common law a mortgage bona fide made may be for future advances and liabilities.*

Opinion by STORY, J.

This is a suit brought upon a mortgage, and the only question which arises upon the facts agreed by the parties and the report of the auditor is, for what sum the judgment is to be entered. Nothing can be more clear, both upon principle and authority, than that, at the common law, a mortgage *bona fide* made may be for future advances and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities. I need not do more upon such a subject than to refer to the case of *United States v. Hooe*, 3 Cranch, 73, and *Conard v. Atlantic Ins. Co.*, 1 Pet., 448.

§ 546. *Construction of New Hampshire statute of mortgages.*

The only point requiring consideration is, whether the fourth section of the statute of mortgages of New Hampshire of the 3d of July, 1829 (New Hamp. Laws, tit. 105, edit. 1830), has in this respect changed the common law in regard to mortgages of lands in that state. It is argued by the defendant's counsel that the legislature intended, by the first proviso of the fourth section, to require, not only that the defeasance should be in writing, but that it should contain such certainty as to the money to be secured, or other thing to be done, as would supersede the necessity of any resort to parol evidence to ascertain the extent or amount of the mortgage. It does not appear to me that this is the true or reasonable exposition of the language. The words of the first proviso are, "That no title or estate in fee simple, etc., of any lands, etc., shall be defeated or incumbered by any agreement whatever, unless such agreement or writing of defeasance shall be inserted in the condition of said conveyance, and

become part thereof, stating the sum or sums of money to be secured, or other thing or things to be performed." Now, if we were to give to these words the restricted construction contended for, one effect would be that the statute would defeat all mortgages given as indemnity to sureties and others upon bonds and agreements; for it could not appear in certainty upon such mortgages what loss or injury the surety or other person would sustain, as that must depend upon future contingencies. So, if a father should receive from a son a mortgage to provide suitable maintenance and support for him during his life, the conveyance would, upon this same construction, be void; for it would be utterly impossible, with certainty, to ascertain what money would, from time to time, be required for such maintenance and support, or what loss or damage the breach of the condition might occasion. It must depend upon future events. There is a large class of cases, which would be in this very predicament, occurring familiarly in the community. Upon the same ground, also, no mortgage would be good given to secure "all debts due" to the mortgagee, or, indeed, any debt, the amount of which was not specifically ascertained and stated in the condition.

§ 547. *The statute of July 3, 1829, meant to require all mortgages to be in writing, and constitute a part of the conveyance by which the estate was to pass.*

It does not appear to me that the legislature had any such broad prohibition in view. It would impose great inconveniences and embarrassments in the common transactions of life. The whole language of the proviso is perfectly satisfied by considering it to require the nature and extent of the claim for which the mortgage is given to be so far set forth as to leave no doubt as to its identity. In short, that the statute meant to require that all mortgages should be in writing, and constitute a part of the conveyance by which the estate was to pass. This was in itself most reasonable, as it would enable creditors, in all cases, to ascertain whether an estate granted was absolute or conditional, and would cut off many of the temptations to create secret, undefined trusts, or fraudulent and collusive securities. But when a mortgage is to secure a present debt, or a present liability, its true character is just as well ascertained as if the specific sum were pointed out. Indeed, if the sum were stated, or the other thing to be performed were set forth, still it would be necessary to ascertain, by parol evidence, what portion of the agreement had been performed, or money paid, since the giving of the mortgage. If a mortgage were to secure the payment of a certain bond or note, contemporaneous with, or antecedent to, the conveyance, it would still be necessary to resort to parol evidence to ascertain the exact sum due thereon at the time of the mortgage, or afterwards, when it was sought to be enforced. I cannot, therefore, adopt the construction contended for.

The present mortgage, in my judgment, falls directly within the first proviso of the fourth section of that act; for the condition of the mortgage does state "the sum or sums of money to be secured, or other thing or things to be performed," in perfect compliance with the requisitions of that proviso.

§ 548. *Under the New Hampshire statute of July 3, 1829, no mortgage can be valid for any future advances or accounts between the parties.*

The second proviso in the same section is, in substance, that "no title or estate, etc., in any lands, etc., which shall hereafter be conveyed in mortgage, as aforesaid, shall be held by the mortgagee for the payment of any sum or sums of money, or the performance of any other thing, the obligation or liability to the payment or performance of which shall arise, be made or con-

tracted after the execution or delivery of such mortgage." Now, it seems to me that the legislature have here expressly intended to cut off all mortgages for the payment or security of any moneys or other things which were not contracted for, or the liability for which did not attach at the time of the execution of the mortgage. It seems to me, therefore, very clear, upon the words and intent of the act, that no mortgage can be valid for any future advances or accounts between the parties, which were not a matter of right and positive obligation between them at the time of the mortgage. A mere provision for prospective advances or accounts, resting in the discretion of the parties, or either of them, would seem to be the very mischief against which the second provision is aimed. Whether the enactment be founded in a wise public policy or not is a question with which this court has nothing to do. The judgment must, therefore, be restricted to the items of the account which were contracted for and delivered before the date of the mortgage. The two items of account, reported by the auditor, under the dates of the 7th February and the 5th of May, 1835, and also the due-bill of the 29th of October, 1834, must be rejected. Judgment ought to be given for the other items and interest. The district judge concurs in this opinion, and, therefore, let the conditional judgment be entered accordingly.

§ 549. *Question of costs.*

If the sum for which the judgment is to be entered is less than \$500, the plaintiffs are not entitled to costs. The defendant is not entitled to costs in a case of this sort, for the defense is grossly inequitable and contrary to the positive agreement of the defendant.

TOWNSEND v. TODD.

(1 Otto, 452-454. 1875.)

APPEAL from U. S. Circuit Court, District of Connecticut.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The validity of the mortgage of \$50,000 is attacked on the ground that it is in violation of the spirit and policy of the statutes and recording system of the state of Connecticut. The district and the circuit judge, each familiar with the statutes and decisions of that state, sustained this proposition. The precise objection to the mortgage is, that it does not truly describe the debt intended to be secured. The mortgage by its terms was given to secure the payment of a note of \$50,000, dated April 12, 1873, executed by George T. Newhall to the order of James M. Townsend, payable on demand, with interest at the rate of seven per cent., payable semi-annually in advance. The bill alleges, and it is found by the district judge to be true, that Newhall was not at the date of the mortgage, and when the same was recorded, indebted to Townsend in any sum whatever, which was secured by said note. The understanding was that Townsend would endeavor to borrow money or available securities to furnish to Newhall's creditors in satisfaction of his debts, and the mortgage was to stand as security for the repayment of the values thus advanced. The mortgage and note were to be placed in the hands of one White; and, if Townsend was unable to render this pecuniary aid, the sum of \$40,000 was to be indorsed upon the note and mortgage by White, and the mortgage was to stand as security for the Chapman mortgage of \$7,500, and a debt of \$2,500 due to Townsend, also secured by another mortgage. Townsend did not obtain or borrow money or securities from any third person

on the faith of this mortgage; but, in reliance upon the security of the mortgage, he did indorse notes for Newhall, and pay money to an amount exceeding \$6,000. The struggle on the part of Townsend is to hold his mortgage for this sum of \$6,000.

§ 550. *How far this court is bound to follow the decisions of a state court in the construction of recording acts.*

The question depends upon the recording acts of the state of Connecticut, and we are bound to follow the decisions of the courts of the state in their construction of those acts, if there has been a uniform course of decisions respecting them. *Allen v. Massey*, 17 Wall., 354; *Swift v. Tyson*, 16 Pet., 1; *City of Chicago v. Robbins*, 2 Black, 428.

§ 551. *In Connecticut a mortgage to secure future liabilities, not fully and specifically described, is invalid.*

The cases of *Pettebone v. Griswold*, 4 Conn., 158; *Shepard v. Shepard*, 6 id., 37; *North v. Belden*, 13 id., 393; *Hart v. Chalder*, 14 id., 77; *Merrills v. Swift*, 18 id., 257; *Bacon v. Brown*, 19 id., 30, and several others, are clear and decisive against the validity of the mortgage in question. In *Brown v. Mix*, 20 Conn., 420, and *Potter v. Holden*, 31 id., 385, the supreme court of that state held to its principles in words, but in effect considerably relaxed the rule. If those cases stood alone, or if there was no later case, there would be some room for doubt what the rule should be. The very recent case, however, of *Flood v. Bramhall*, 41 Conn., 72, fully and distinctly reasserts the rule laid down in the earlier cases. It is there held that the mortgage must truly describe the debt intended to be secured, and that it is not sufficient that the debt be of such a character that it might have been secured by the mortgage had it been truly described. In most of the states a mortgage like the one before us, reciting a specific indebtedness, but given in fact to secure advances or indorsements thereafter to be made, is a valid security, and would be good to secure the \$6,000 actually advanced before other incumbrances were placed upon the property. 11 Ohio St., 232; 12 id., 38; 34 N. Y., 307; 35 id., 500; 22 id., 380; 2 Sand. Ch., 78; 6 Duer, 208. We should be quite willing to give the appellant the benefit of this principle to the extent of his actual advances; but the contrary rule seems to be so well settled in Connecticut that we are not at liberty to do so. The decree below vacating and canceling the appellant's mortgage, being in conformity with that rule, is affirmed.

RIPLEY v. HARRIS.

(Circuit Court for Wisconsin: 8 Bissell, 199-204. 1872.)

STATEMENT OF FACTS.—Proceeding in equity to foreclose a mortgage for \$5,000 given to the complainant to secure the payment of three promissory notes for \$500, \$1,500 and \$3,000, payable, respectively, in sixty days, five and seven months after date, by the defendants Harris and wife and John Reynolds and wife. This mortgage was given and recorded in November, 1868. In June of that year Michael Reynolds, who owned an undivided half in said property in Door county, executed a mortgage for \$5,000 to one Van Slyke on one undivided one-fourth of said property, being the undivided one-half part of three thousand two hundred and twenty acres of land, subject to the half of a debt of \$480 due the state of Wisconsin on school land certificates, to secure a bond of said John Reynolds to said Van Slyke for money, drafts or acceptances which might thereafter be advanced to said John Reynolds by said

Van Slyke, and this mortgage was recorded on the 16th of June, 1868. In April, 1869, Van Slyke assigned this mortgage to one Sexton for \$5,000. Harris & Reynolds were partners in business in Door county, Wisconsin. Van Slyke, Sexton and the First National Bank of Madison are co-defendants herein. Complainant claims that the Van Slyke mortgage covers only a fourth interest in the land, and that as to the remainder his mortgage is a valid first lien. Sexton, the assignee of the Van Slyke mortgage, insists that his mortgage covers a half interest in said property, or the whole share of Michael Reynolds, and is therefore a first lien. The other material facts appear in the opinion.

§ 552. *The clause creating the lien in a mortgage determines the amount of land covered by the mortgage.*

Opinion by MILLER, J.

The mortgage of Michael Reynolds to Van Slyke is a recorded mortgage lien on the one undivided *fourth* part of the premises described. That part of the description of the land as being the undivided *half* part cannot control the clause creating the lien, as against subsequent incumbrances. As to them the clause creating the lien is the test.

§ 553. *A mortgage to secure future advances is valid.*

The record of this mortgage is constructive notice of an apparent lien in favor of Van Slyke to the amount of \$5,000, according to the terms and conditions of the bond mentioned; and Ripley accepted his mortgage with that constructive notice. He might have inquired after the bond to ascertain its real conditions, but he did not. He testifies that he never saw the bond, nor never knew nor inquired what had been done under it. The mortgage did no injustice to Ripley. It was a legal lien for \$5,000, expressed on its face, and of which he had lawful notice by the record. It was not required that the condition of the bond be recited in the mortgage. The reference to the bond was sufficient. *Shirras v. Caig*, 7 Cranch, 34 (§§ 556-558, *infra*). And a mortgage to secure future advances is valid. *Lawrence v. Tucker*, 23 How., 14. Such a mortgage is good to the amount specified in the bond. This mortgage stands as a security for the real equitable claims of the mortgagee, whether they existed at the date of the mortgage, or arose afterwards, but prior to the receipt of actual notice of a subsequent sale or mortgage. The pleadings and proofs involve the equitable interests of the complainant under his mortgage, and of Andrew Sexton as assignee of N. B. Van Slyke's mortgage. It is understood that there did not exist any indebtedness from Reynolds to Van Slyke at the date of the bond and mortgage.

§ 554. *The assignee of a mortgage acquires no greater rights thereunder than the assignor had.*

It is also understood that Sexton cannot acquire by the assignment of the bond and mortgage a greater equity than Van Slyke had at the date of the assignment of these securities. The notes of Reynolds had been discounted by the First National Bank of Madison, of which Van Slyke was the president, at his instance and request, made on the faith and credit of the securities. Notes were made by Reynolds and handed to Van Slyke, and he procured them to be discounted by the bank; and on the books of the bank the money was placed to the credit of Reynolds. The notes were renewed from time to time, until they came to be represented, so far as any indebtedness existed, by two notes of \$2,000 each, numbered 3334, 3360, dated September 25, 1868, and prior to complainant's mortgage. These notes were payable

to the First National Bank of Madison. It does not appear that they were indorsed by Van Slyke. They were a continuation of the original indebtedness. Van Slyke, being president of the bank, had the bond and mortgage made to himself, the bank being prohibited by the national banking act of June 3, 1864, from taking real estate security for present loans. The loan was made by the bank, and Mr. Van Slyke's ingenuity does not relieve the bank from the imputation of violating the statutory prohibition. But the point of invalidity of the securities, for this reason, is not made by the pleadings. The bank became the creditor in fact of Reynolds, and Van Slyke stood as surety, the loan having been made by the bank at his request and on his responsibility. The bank could hold Van Slyke for the debt in equity, upon the strength of the securities of indemnity held by him in his own name. The bank had the legal right to hold Van Slyke for the debt, or to require him, in equity, to surrender the securities. The securities to Van Slyke were, in equity, securities to the bank, the real creditor. The legal liability of Van Slyke to the bank was not prohibited by the statute of frauds. It was not a promise to pay the debt of another, but an original contract with the bank, upon which the loan was obtained. The two notes of \$2,000 each fell within the condition of the bond and mortgage to Van Slyke. Five thousand dollars were appropriated to the discharge of the two notes of \$2,000, with interest, and the residue applied to the credit of Reynolds on some other indebtedness to the bank.

§ 555. *In the absence of a contract for further advances, a mortgage does not secure sums of money advanced after notice of a subsequent mortgage.*

It appears that Van Slyke, the president and agent of the bank, had notice of Ripley's mortgage in December, 1868. Reynolds, on the day of the transfer of the securities to Sexton, gave a note to Van Slyke, or bearer, for \$5,000, payable at the bank one year after date. This was done under the impression that the mortgage of Reynolds was a lien for the full amount of the debt mentioned on its face, without regard to its reference to the condition of the bond. Van Slyke and the bank, upon the payment of \$5,000 by Sexton, relinquished all further claim or right under the bond and mortgage, and to the note of John Reynolds, made at the same time, to Van Slyke or bearer, by which Van Slyke evidently intended all obligations or liability for the debt of Reynolds and all further interest in the securities to cease, and Sexton to collect the debt at his own cost and charges, as expressed in the assignment. And the note of \$5,000, payable to Van Slyke or bearer, was intended as evidence that Sexton held an indebtedness against Reynolds equal in amount to the bond and mortgage. The note of Reynolds, given in April, 1869, the time of the assignment of the securities to Sexton, was merely an evidence of a personal promise on the part of Reynolds for the difference between the two \$2,000 notes and the note of \$5,000. For this difference the mortgage was no security, being an advance made subsequent to the 10th December, 1868, when Van Slyke had notice of Ripley's mortgage, and he was not under obligation to make further advances upon such note. Equity excludes both Van Slyke and Sexton as to the surplus over the two notes and interest. To that extent Sexton has a prior lien on the one undivided fourth part of the mortgaged premises. Decree accordingly.

SHIRRAS v. CAIG.

(7 Cranch, 34-51. 1812.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This is an appeal from a decree rendered by the circuit court for the district of Georgia.

Shirras and others, the appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the 1st of December, 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner, his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance, as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was. It appears that, on the 17th May, 1796, the premises were conveyed to James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and copartners of the city of Savannah. In 1799 this partnership was dissolved; and, in December in the same year, James Gairdner made an entry on the books of the company charging this property to Edwin Gairdner & Co., of Charleston, at the price of \$20,000. This firm consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney authorizing Edwin Gairdner to sell and convey his interest in this and other real property. In March, 1801, a partnership was formed between Edwin Gairdner and John Caig to carry on trade in Savannah, under the firm of Edwin Gairdner & Co.; and in the same month, Robert Mitchel conveyed his one-third of the lots in question to Edwin Gairdner and John Caig. About the same time it was agreed between the house at Charleston and that in Savannah to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner & Co., of Savannah. Such was the state of title in December, 1801, when the deed of mortgage bears date.

§ 556. *Title conveyed by a mortgage of land made by one who has the legal and equitable title to a moiety of the property.*

The plaintiffs claim the whole property, or, if not the whole, five-sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the court is of opinion that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner — he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently the power of attorney may be put out of the case, and the conveyance could only operate on his own legal or equitable interest. In law, he was seized under the original deed, and the deed from Robert Mitchel, of one undivided moiety of the property. Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest. In law and equity he held one moiety of the premises in question. The other moiety was in John Caig. To one-sixth Caig was legally entitled by the conveyance from Robert Mitchel, and to two-sixths he was equitably entitled by the agreement with Edwin Gairdner and the consequent entries on the books. Of the equitable interest of John Caig the mortgagees were bound to take notice, because the purchaser of an

equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property. The mortgage deed of December, 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed respecting the extent of the property comprehended in it. The plaintiffs contend that both lots are within the description; the defendants that only the wharf lot is conveyed. The property conveyed is thus described: "All that lot of land, houses and wharfs in the city of Savannah as is particularly described by the annexed plat, and is generally known by the name of Gairdner's wharf." The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected. The words descriptive of the property intended to be conveyed do not appear to the court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe, that lot No. 6 was "generally known by the name of Gairdner's wharf." The court, therefore, cannot consider that lot as comprehended within the conveyance. The mortgaged property is in possession of the defendants, Caig and Mitchel, who derive their title thereto in the following manner:

On the 7th of January, 1802, a new partnership was formed between Gairdner, Caig and Mitchel, and, by the articles of copartnery, which are under seal, the Savannah property is declared to be stock in trade, and an entry was made on the books of the old firm transferring this property to the new concern. On the 12th of the same month, the copartnership of Gairdner and Caig was dissolved. On the 27th of July, 1802, by deeds properly executed; one-third of the property became vested in John Caig, and one other third in Robert Mitchel. On the 3d of November, 1802, Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because, they say, 1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy. 2d. That the transaction is not *bona fide*, there being no real debt, nor any money actually advanced by the mortgagees. 3d. That the mortgage was kept secret, instead of being committed to record. 4th. That the whole transaction is totally variant from that stated in the deed.

They therefore claim the property for the creditors of Gairdner, Caig and Mitchel. 1st. From the testimony in the cause it appears that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent. 2d. It appears, also, that the mortgage was executed, in part, to secure the payment of money actually due at the time, and, in part, to secure sums to be advanced, and to indemnify some of the mortgagees for liabilities to be incurred. 3d. The mortgage is dated the 1st of December, 1801, and was recorded in September, 1802.

§ 557. *A person cannot be charged with fraudulently secreting a deed who places it upon record as soon as the law requires.*

By the laws of Georgia, a deed is valid if recorded within twelve months;

but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or previously on the record. It appears to the court that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the dispatch which the law requires. If subsequent purchasers, without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition. In this case, the subsequent purchasers might have proceeded to record their deeds within ten days, and have thereby obtained the preference they claim, but they have failed to do so. They are themselves chargeable with the very negligence which they ascribe to their adversaries; and, were they to be preferred, the court would invert the well-established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

§ 558. *It is not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure.*

4th. It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation. That cannot have happened in the present case. There is the less reason for imputing blame to the mortgagees in this case, because the deed was prepared by the mortgagor himself, and executed without being inspected by them, so far as appears in the case.

It is, then, the opinion of the court that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot or parcel of ground, commonly known by the name of Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the circuit court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

§ 559. A mortgage debt is essential to constitute a mortgage. Therefore, where K. furnished money to B. and took a conveyance of a farm, and then conveyed to B., conditioned on the payment by B. of a sum equal to the annual interest on the sum advanced during the life of K. and wife, it was held that the conveyance to K. was not a mortgage. *Atwood v. Kittell*, 9 Ben., 475.

§ 560. The debt described in the mortgage is the debt secured. A reference to a larger amount in an unexecuted agreement between the parties cannot control the description in the mortgage. *Turnbull v. Thomas*,* 1 Hughes, 172. A covenant in a mortgage to pay the joint debt of two named persons does not embrace a partnership obligation of a firm composed of those two and another person. *In re Shevill*,* 11 Fed. R., 858.

§ 561. Bond overdue.—A mortgage for the payment of a debt, according to the condition of a bond recited in the mortgage, will not be avoided in equity for the reason that the day

of payment of the bond has already passed. At law, the condition being impossible, the deed would be regarded as absolute; but in equity it is a security merely like an ordinary mortgage. *Hughes v. Edwards*, 9 Wheat., 489 (§§ 919-925).

§ 562. A mortgage to secure future advances is valid. *Schuelenburg v. Martin*, 1 McC., 348 (§§ 765-767); *United States v. Hooe*, 3 Cr., 73. 89. See § 906.

§ 563. A mortgage made to secure future advances is a valid security for the advances actually made on it. *Schulze v. Bolting*,* 8 Biss., 174.

§ 564. A mortgage to secure future advances to a certain amount secures such advances though they are made after the docketing of judgments against the mortgagor. *Turnbull v. Thomas*,* 1 Hughes, 172.

§ 565. Mortgages may as well be given to secure future advances and contingent debts as those which already exist, and are certain and due. The only question that properly arises in such case is the *bona fides* of the transaction. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 443.

§ 566. The *cestui que trust* of a trust deed will be protected against the fraud of his debtor in declaring a homestead, and, without giving notice of that fact, obtaining further advances. *In re Haake*, 2 Saw., 241.

§ 567. Although a mortgage be given for a definite sum, it may be shown that it was simply one of indemnity. *United States v. Sturges*,* 1 Paine, 525.

§ 568. To secure agreement.—Where it was stipulated in a mortgage that it should also stand as security for the performance of a certain agreement, should the mortgagor elect to perform the same, it was held that, after he made the election and gave notice, the mortgage became security for the faithful performance of such agreement as effectually as if it had been fully set forth in the mortgage. *Furbish v. Sears*,* 2 Cliff., 454, 456.

VIII. INSURANCE.

SUMMARY — *Mortgagor's covenant to insure for the mortgagee*, § 569.—*Loss payable to mortgagee*, § 570.

§ 569. Where a mortgagor covenants to insure for the benefit of the mortgagee, such covenant creates an equitable lien in favor of the mortgagee upon the money due for a loss under such policy to the extent of his interest, although the mortgage contains a provision that the mortgagee, in default of the mortgagor's insuring, may take out a policy at the expense of the latter. *Wheeler v. Insurance Co.*, § 571.

§ 570. The provision of a policy, that the loss shall be payable to the mortgagee, operates to give the mortgagee precisely the same rights and interest in the policy which he would have had if, without such words, the policy had been assigned as collateral security to the mortgage debt. *Connecticut Mut. Life Ins. Co. v. Scammon*, §§ 572-575.

[NOTES.—See §§ 576-582.]

WHEELER v. INSURANCE COMPANY.

(11 Otto, 439-443. 1879.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—Johnson & Goodrich, commission merchants of New Orleans, being creditors of John H. Green, a planter, for advances made, suggested to him that he should authorize them to effect insurance on his buildings, gin-house, machinery and cotton in the gin-house, for their better security. He accordingly wrote them a letter authorizing them to effect such insurance; and they procured from the Factors and Traders' Insurance Company of New Orleans insurance on an open policy in their own names for \$5,500 on the buildings and machinery, and \$2,000 on the cotton. This was in November, 1872, and the insurance was for sixty days. In January, 1873, this insurance was renewed for sixty days longer; and before its expiration, in March, 1873, the buildings, machinery and a small quantity of cotton were destroyed by fire. Johnson & Goodrich took measures to recover the insurance, and received \$900 for the loss on the cotton, leaving a balance still due to Green of \$3,450, for

the payment of which, Green having become insolvent, they relied on the insurance upon the buildings and machinery, and presented to the insurance company the necessary proofs to collect the same. At this point the appellants, Ezra Wheeler & Co., interposed, and set up a claim to have the insurance money on the buildings and machinery paid to them, and for this purpose filed their bill against the insurance company, Green, and Johnson & Goodrich. The defendants severally answered, proofs were taken, and upon due hearing the court below made a decree dismissing the bill of complaint. From that decree the present appeal was taken.

The case as developed by the pleadings and the evidence appears to be substantially as follows: Prior to the employment of Johnson & Goodrich by Green as his commission merchants, he had employed the firm of Foster & Gwyn, of New Orleans, in the same capacity, and had become largely indebted to them. In 1870 he had given them his note for \$10,000; in 1871 another note for \$3,723.61; and in March, 1872, a third note for \$3,009.55. To secure the payment of each of these notes, with interest at eight per cent. per annum, he gave successive mortgages on his plantation, buildings, machinery and stock, with an agreement in the last two mortgages to insure the buildings and machinery and to transfer the policies of insurance to the mortgagees for their better security, or, in default of doing this, that the mortgagees and all subsequent holders of the notes secured by those mortgages should have the right to effect such insurance at his expense. These mortgages were all given and recorded before Johnson & Goodrich procured the insurance now in question. Foster & Gwyn, in July, 1871, under the reserved right contained in the second mortgage, effected an insurance for one year upon the buildings and machinery, but did not renew the same. In the spring or summer of 1872, Foster & Gwyn being largely indebted to the appellants, transferred to them the three notes and mortgages of Green by way of collateral security, and the appellants rely on this security for making their claim against Foster & Gwyn. Being thus the holders of the notes and mortgages of Green, the appellants claim the insurance money in question on two grounds: First, on the ground that, although the insurance was effected in the name of Johnson & Goodrich, they acted merely as agents of Green, and the insurance was really taken out for his benefit; and he having agreed in and by the last two mortgages to insure the property for the benefit of the mortgagees and to transfer the insurance to them, the appellants, as holders of the notes and mortgages, are equitably entitled to the insurance money. Secondly, on the ground, as the appellants allege, that when the insurance in question was about to be renewed in January, 1873, they were assured by Green and by Johnson & Goodrich that it was effected for the benefit of them, the mortgagees, or at least they were led to believe that this was so done.

An examination of the evidence in the case fails to convince us that the latter charge is true, at least so far as Johnson & Goodrich are concerned. Foster testifies that, about the time of the renewal, he, on behalf of the appellants, called on Green at his plantation, and requested him to have the property insured, and that Green promised that he would write to Johnson & Goodrich to renew the insurance. The witness does not say, and Green in his answer denies, that he promised to have any insurance effected for the benefit of the mortgagees or the appellants; and the evidence is clear that Johnson & Goodrich had no such understanding. They regularly renewed their policy, and on the same day Gwyn called at their office and asked a clerk whether they had

taken out a policy on the cotton-gin and buildings of Green, and the clerk answered that they had; and nothing more appears to have been said. Johnson & Goodrich both swear that they had no knowledge of the stipulation about insurance in the mortgages, or that Green was under any engagement to effect insurance, and that their only motive for effecting insurance on the property was to protect themselves. They charged the premiums to Green, it is true; but this they had a right to do under the circumstances, inasmuch as he authorized them to effect the insurance, and was entitled to any benefit to accrue therefrom after their claim against him was satisfied.

The appellants insist, however, that Johnson & Goodrich had no insurable interest in the buildings and machinery, and, therefore, that they have no lawful claim to any part of the insurance in question. But it does not lie in the mouths of the appellants to make this argument. If it has any force (which it is not necessary for us to decide), it can only be urged by the insurance company, and they do not urge it. Since, therefore, there is no proof that Johnson & Goodrich did not act with entire fairness in the whole transaction, and without notice of Green's covenant to insure; and since there was no privity between them and the appellants, we do not see how the latter can sustain any claim at law or in equity against them.

§ 571. *Where a mortgagor agrees to insure property for the benefit of the mortgagee, the latter is entitled to any insurance money accruing to the mortgagor on a policy afterwards taken out by or for him.*

But as the debt due to Johnson & Goodrich will not exhaust the whole amount of the insurance, and as the balance rightfully belongs to Green, the question arises whether, as to that balance, the claim of the appellants is not maintainable. It is, undoubtedly, the general rule that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him. *Carter v. Rockett*, 8 Paige (N. Y.), 436. But it is settled by many decisions in this country, that, if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. *Thomas v. Vonkapff*, 6 Gill & J. (Md.), 372; note to 3 Kent, Com., 376; *Angell, Fire and Life Ins.*, sec. 62; 2 Am. Lead. Cas., 834, 5th ed.; 1 *Herman, Mortgages*, sec. 424, and cases there cited. And this equity exists, although the contract provides that, in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense. *Nichols v. Baxter*, 5 R. I., 491. Of course the mortgagee's equity will be governed by the scope and object of the agreement; as, if the agreement be to insure for a certain amount, the equity will not apply beyond that amount; and as its object is to afford better security for the payment of the debt, it will not be enforced farther than is necessary for such security; if the debt is abundantly secured by the property which remains liable to the mortgage, a court of chancery will properly decline to enforce it. The present case, however, is not embarrassed by any questions of this sort. The appellants have proceeded to sell the immovable property mortgaged, which did not more than satisfy the first mortgage; and the amount of insurance money remaining after satisfying the claim of Johnson & Goodrich is less than the insurance stipulated for in the other mortgages.

The equitable doctrine upon which the appellant's claim is founded undoubtedly obtains in Louisiana. It is derived from the principles of the civil law,

which is the basis of the civil code of that state; and it is supported by the authorities cited from the Louisiana reports. See Civil Code La., art. 1965; *Williams v. Winchester*, 7 Mart., N. S. (La.), 22; *Citizens' Bank v. Dugue* and *Louisiana State Bank*, 5 La. Ann., 12; *Braden v. Louisiana Ins. Co.*, 1 La., 220. Our conclusion is, that the decree of the circuit court should be reversed, and the case remanded with instructions to enter a decree in conformity with this opinion; and it is so ordered

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* SCAMMON.

(Circuit Court for Illinois: 4 Federal Reporter, 263-276. 1880.)

Opinion by DYER, D. J.

STATEMENT OF FACTS.—This is a bill for foreclosure of a mortgage executed to complainant in 1866 by the defendants J. Y. Scammon, Florence A. D. Reed, formerly Scammon, and Arianna E. Scammon; the two defendants last named being daughters of the defendant J. Y. Scammon. The mortgage originally covered lot No. 5, in block No. 11, in Fort Dearborn addition to Chicago, and was made to secure the payment of \$30,000 and interest. It is admitted in the bill that in 1867 the sum of \$10,000 was paid to apply on the principal, and it is alleged that the balance of the original principal, namely, \$20,000, with interest, remains unpaid, besides certain sums of money paid by complainant to redeem the mortgaged premises from tax sales. Defenses have been interposed by the defendants Florence A. D. Reed and Arianna E. Scammon, and the case has been heard upon their exceptions to the report of the master to whom the cause was referred.

Originally, the mortgaged premises were owned in her separate right by Mary Ann H. D. Scammon, then the wife of the defendant J. Y. Scammon, but since deceased. Upon her death, the property by descent passed to her three children, Charles T. Scammon, and the defendants Florence A. D. Reed and Arianna E. Scammon, subject, however, to a life estate therein of their father. Subsequently, but prior to the execution of the mortgage in suit, Mr. Scammon acquired the interest of his son, Charles T. Scammon; so that at the date of the mortgage he was the owner in fee of an undivided one-third interest in the premises. This being the state of the title, on the 10th day of September, 1866, Mr. Scammon and his two daughters joined in the execution of a bond to the complainant, conditioned for the payment of the sum of \$30,000 on the 10th day of September, 1871, with interest payable half yearly at eight per cent.; and to secure the payment of this bond they executed the mortgage in question. This bond and mortgage were given to secure the repayment to complainant of a loan then made for the purpose of erecting a building on the premises; and the money thus borrowed and secured was so used.

The mortgage contained a clause binding the mortgagors to keep the buildings thereafter erected on the premises insured against loss or damage by fire, and to assign and deliver to complainant the policies of insurance therefor, whenever such insurance should be effected; and it was further provided that the complainant should hold such policies of insurance as collateral and additional security for the payment of the principal sum, secured by the mortgage and interest, and should have the right to collect and receive all sums of money that might at any time become collectible upon such policies of insurance, and apply the same, when received, in the same manner, as far as possible, as was provided in the mortgage in case of a sale of the mortgaged

premises under the power of sale therein contained. Pursuant to these requirements of the mortgage insurance was obtained, in the sum of \$15,000, upon the building erected on the premises. The policy of insurance, in terms, run to J. Y. Scammon alone, and contained a clause in the usual form: "Loss, if any, payable to the Connecticut Mutual Life Insurance Company."

On the 10th day of September, 1867, by agreement between J. Y. Scammon and his daughters, a partition of the mortgaged premises was made by which the south one-third thereof was set off to Mr. Scammon as the parcel in which he should thereafter have a clear estate in fee; and the north two-thirds were set off to the defendants Florence A. D. Reed and Arianna E. Scammon, to be held by them in fee, subject, however, to the life estate of their father. The object of this agreement of partition appears to have been to enable Scammon to convey the south one-third of the lot to the Marine Company of Chicago, and to enable his daughters, at his death, to hold the north two-thirds of the lot free from all other claims of title under Mr. Scammon. Concurrently with the making of this partition \$10,000 was paid to complainant to apply on the principal of the bond and mortgage in suit, and the south one-third of the mortgaged premises so set off to Mr. Scammon was then released by complainant from the lien of the mortgage, and thereafter his interest in the mortgaged premises yet covered by the mortgage consisted of a life estate; and it is understood that the building then situated on the premises stood upon that part of the same set off under the partition to Mr. Scammon's two daughters. This building was totally destroyed in the great fire of October, 1871.

In settlement of the insurance on the same the fire insurance company delivered to the defendant Scammon a draft for \$15,000, payable to the order of complainant; and thereupon Scammon, in a communication addressed to the secretary of the complainant, informed him that he had commenced rebuilding the burned structures, and inclosed therein the draft received for insurance, and requested that authority might be given to complainant's Chicago agent to pay over to him (Scammon) or to the Marine Company, the proceeds of the draft, to be expended in such rebuilding. This request resulted in an agreement, made on the 5th day of January, 1872, between complainant and J. Y. Scammon alone, by which it was agreed that complainant should and did waive its right to apply the insurance money on the mortgage indebtedness, and that this money should be deposited in such bank as should be selected by Scammon and assented to by complainant to the credit and at the risk of Scammon, to be used in the erection of buildings on the mortgaged premises; that this money should be paid out in the erection of such buildings, from time to time, on the drafts or checks of Scammon, countersigned by complainant's agent, until it should be thus fully expended; further, that such drafts or checks should be so countersigned on presentation thereof to complainant's agent, accompanied with the certificate of an architect that the amount of such check or draft, together with all previous checks or drafts drawn or paid out on such account, had been actually expended in permanent improvements upon the mortgaged premises; further, that so soon as the building or buildings so erected should be in a situation to be insured, Scammon should cause the same to be insured in the fair insurable value thereof, and assign the policies of insurance to complainant, and that thereupon all the provisions contained in the mortgage should apply to such insurance.

By this agreement it was further provided that any receipt or acknowledgment given by complainant, either alone or jointly with others, to any such in-

insurance company, for the purpose of facilitating the collection by Scammon of any insurance money intended to be placed back on the mortgaged premises, should not be construed as a collection of the money by complainant under the conditions of the mortgage, wherein it was provided that complainant might collect and apply such insurance money upon the indebtedness secured to be paid thereby, but should be regarded as merely enabling Scammon to collect such insurance money; and it was expressly provided that this money was not to be so applied, and that the mortgage should remain a lien on the premises for the full amount of the principal sum mentioned in the bond, with interest, as if said insurance money had never been collected. It was also agreed that in case the insurance money should not be expended in rebuilding, within six months from the date of the agreement, then said agreement of waiver should have no effect, but that the right of Scammon to use and expend the same should thereupon cease, and that complainant should have the right to draw from the bank where the same was deposited, upon its own check, said insurance money, or so much thereof as had not then been actually expended, and apply the same in payment, *pro tanto*, of the indebtedness secured by the mortgage.

Thereupon complainant, by its secretary, by indorsement on the draft for \$15,000 received from the fire insurance company, made the same payable to J. Y. Scammon, or order, who designated the Marine Company, of Chicago, as the banking office in which the insurance money should be deposited, and delivered the same back to Scammon so indorsed, and the proceeds of the draft were then received by Scammon and deposited with the Marine Company. Thereafter the money thus realized on account of the insurance, and so deposited, was drawn out by the defendant Scammon on his own checks or drafts, and not in pursuance of the aforesaid agreement between him and complainant; but new structures were not erected on the mortgaged premises, and the proceeds of insurance were not used by Scammon for that purpose as contemplated by the agreement. Further material facts in the case are that when complainant originally took the mortgage in question, it, by its agent, knew the state of the title of the mortgaged premises; that in the erection of the building on the premises, in causing it to be insured, and in collecting rents, and paying premiums and taxes, the defendant J. Y. Scammon dealt with the property as if it were his own; and that the entire business connected with the loan from complainant, from the time of its original negotiation down to the time of the before-mentioned agreement in relation to the insurance, was transacted by the defendant Scammon. The evidence tends to show that he kept an account with the property on his bank ledger, in which rents received by him were credited; and that, either in this or in a separate account, moneys paid by him for insurance premiums were also entered.

It appears, further, that the defendants Florence A. D. Reed and Arianna E. Scammon knew nothing at the time of the insurance obtained upon the property, nor of the agreement in relation to the insurance money between their father and complainant, made in 1872. There is no doubt that when complainant consented to the payment of the insurance money to Scammon, it was expected that it would be used in rebuilding, and that it was paid to and received by him in good faith for that purpose; and there is evidence to the effect that the officers of the bank understood at the time that this money was placed in the bank in the character of a special deposit, and subject to the conditions of the agreement between complainant and Scammon. Further, it

seems clear that Scammon was never expressly authorized by complainant to draw out or appropriate the money as he seems to have done. Indeed the performance of the agreement, under which the insurance money was surrendered to Scammon and deposited in the bank, seems to have been abandoned by both parties thereto, as it does not appear that the contract was at all regarded by Scammon in the appropriation of the money, nor was it insisted upon by complainant, so far as the evidence discloses.

The two mortgagors, Florence A. D. Reed and Arianna E. Scammon, according to the evidence, were not consulted about the disposition of the insurance money, and, so far as is shown, had no knowledge of and gave no consent to its payment to their father, or to its deposit in the bank; nor have they ever asserted any rights in relation thereto until the commencement of this suit.

Upon the case stated it is insisted by the defendants, who contest complainant's right to a decree, that the insurance money in question was in legal effect collected by complainant, and, in fact, came to its hands; that complainant had no authority to surrender the same to the defendant J. Y. Scammon; that its receipt by complainant constituted satisfaction *pro tanto* of the mortgage; that the covenant in the mortgage for insurance operated as an assignment of the insurance fund, when collected, to the mortgagee; and that it could not, under any arrangement made with J. Y. Scammon, without their consent, be legally paid back to him and the mortgage be still kept in force, to their prejudice, and as a continuing or renewed incumbrance upon their interest. On the other hand, it is contended that the defendant J. Y. Scammon had an insurable interest in the mortgaged premises; that all of the mortgagors agreed in their mortgage to furnish insurance to the full value of their insurable interests; that the two defendants who make defense procured no insurance on the property or their interest therein; that the policy of insurance run to J. Y. Scammon alone, and, therefore, that he could recover upon the policy, no matter what his interest in the property was; that his daughters had no interest in the proceeds of the insurance; that the policy was held by complainant as collateral security; that it could elect, if it chose, not to collect the insurance, and, if collected, it could rightfully pay the money back to the party insured; that the daughters had no interest or concern in the transaction, and that the insurance which was obtained only in legal effect covered the interest of J. Y. Scammon in the property.

In reply it is urged that the insurance was procured as additional security to the mortgage; that, though it was taken in the individual name of J. Y. Scammon, it was furnished under the covenants of the mortgage, and that it did not inure to the benefit of J. Y. Scammon alone, but was treated by all the parties as, and was in fact, a proceeding for the benefit of all, and which protected the interests of all. Upon complainant's theory, therefore, the \$15,000 received on account of the insurance is not to be treated as a payment upon the mortgage, or as money received by complainant which it was bound to apply upon the mortgage; while, on the theory of the contesting defendants, that money should have been applied in payment of the mortgage indebtedness, and its receipt by complainant operated as a satisfaction *pro tanto* of the mortgage, so far as the interests of those defendants were involved, and so left unpaid only the sum of \$5,000 and interest.

Upon the assumption that the policy of insurance covered not only the interest of J. Y. Scammon in the insured property, but also that of his daughters, it becomes important, first, to inquire whether, in making the agreement

with complainant by which the insurance money was surrendered to Scammon, he acted not only for himself but also as the authorized representative of his daughters; because, if in that transaction he was their authorized agent, it is obvious they could have no ground of complaint, and that would end this controversy. Manifestly he stood in a twofold relation to the property — *First*, as the owner of the life estate; and, *secondly*, as the representative, to a certain extent, of the owners of the reversion. The individual acts of Mrs. Reed and Arianna Scammon in connection with the property, done at the time of, and subsequent to, the original loan, appear to have been limited to the execution of the bond and mortgage in the suit, and the making of the agreement of partition with their father. It must be assumed that he was left with unrestricted authority to manage the property to the extent of erecting buildings thereon, collecting rents, paying taxes, and procuring insurance. So far as those acts affected the interests of the owners of the fee, they must be considered as done under authority, express or implied. Moreover, as to some, if not all, of such acts, he had not only the legal right, but as the owner of the life estate, receiving the rents and profits, it was his legal duty to do them.

As the mortgage contained a covenant to keep the buildings insured, and as the care and management of the property were intrusted wholly to Mr. Scammon, it is clear that his act of procuring insurance as additional security to the mortgage was within the scope of his agency as the representative of the interest of his daughters. It was a legitimate incident to the business of managing and preserving the property. But it is not to be overlooked that this and the other acts before specified were such as touched the property in its character as real estate, and the question is, could authority to make the special agreement in relation to the insurance money, so far as it affected the interests of his daughters, be implied from the general power he possessed and exercised over the property? I am of opinion it could not. In support of this conclusion, it is to be borne in mind that the instrument which required insurance to be obtained, and which in its provisions controlled the destiny of the insurance money, was executed not by Mr. Scammon, for and as the agent of his daughters, but by those persons acting for themselves. The covenants and stipulations of the mortgage were made effective by their own signatures and seals. The origin of the obligations and rights of all the parties with reference to insurance and any moneys derived therefrom was the mortgage; and direction having been therein given as to the ultimate disposition of the same, so serious a departure therefrom as a waiver of valuable rights and a diversion of the fund would involve, would require the sanction of the owners of the fee, so far as their interests were concerned. The waiver of rights established by the mortgage, the virtual revocation of special contract provisions, involved an extraordinary power, not falling within such general control over the property as the owner of the life estate was accustomed to exercise. It was outside the scope of his agency, and not properly incident to any general powers pertaining thereto. Consent on the part of the owners of the fee to any diversion of the insurance moneys cannot be inferred from their silence, because they had no knowledge of the transaction.

It will be understood that all this is said upon the theory that the contesting defendants had an interest in the insurance, and in such application of the insurance fund as the mortgage contemplated; and it is also said, in the light of the fact that that fund was allowed to be personally appropriated by the owner of the life estate, and was not used in rebuilding. How far the equities of the

parties might have been affected if the moneys had been used in rebuilding, and whether that might not have been regarded as a restoration of the lost property, and therefore a benefit to the parties interested equivalent to an application of the moneys on the mortgage debt, are questions not necessary here to be considered. The facts, as we now have them, are that this agreement was made; that the owners of the fee were not parties to it, and never authorized it; that that agreement, even in the form in which it was made, was not performed; that performance was not required by complainant; and that the insurance moneys were ultimately diverted so that they neither benefited the mortgaged property nor were applied upon the mortgage debt.

§ 572. *Powers of a life tenant to bind reversioners in the arrangement of insurance upon the property.*

The more difficult question is, had the owners of the fee any such interest in this insurance, or any such rights in the ultimate disposition of it, as to enable them to question the transaction in relation thereto between their father and complainant? The proposition that the insurance only covered the interest of Mr. Scammon in the property was urged with so much force on the argument that I have not been without doubt in considering the question. Undoubtedly, as life tenant, he had an insurable interest in the property. And when the language of the policy, which is that the insurance company "do hereby insure J. Young Scammon . . . against loss or damage by fire to the amount of \$15,000 . . . on the four-story and basement brick building," etc., is considered, disconnected from other extrinsic facts, there is certainly force in the view that his interest only was insured. But it is to be borne in mind that the interests of all the mortgagors in the mortgaged property, in common and without severance, was pledged for payment of the debt. Further, that the mortgage covenanted generally for insurance, and that it did not specify the several interests of the covenantors. The building was part of the realty, and the interests were undivided. They were dealt with as a unit. The obligation was not in terms that each mortgagor should cause his and her interest to be severally insured for the benefit of the mortgagee. Further, as before indicated, it was the legal duty of the defendant Scammon, as the life tenant receiving the rents and profits, to keep the building, as an entirety, insured, and in procuring insurance he must be held the agent of his daughters so far as their interests were involved. And when we consider the terms of the policy of insurance, as it is right to do, in connection with the covenants and stipulations in the mortgage, and the relations at the time of all the parties to each other, the conclusion must be, I think, that this insurance was obtained in pursuance of the requirements of the mortgage, and under the circumstances the presumption is that it covered what the mortgage specified, namely, the fair insurable value of the building, as an entirety, and in which were united the undivided interests of all the mortgagors.

§ 573. *Mortgagee contracting with life tenant to rebuild with insurance money bound to reversioner mortgagors to see that the houses are rebuilt.*

The view thus taken is strongly confirmed by the manner in which the insurance proceeds were dealt with by complainant. The loss was payable by the terms of the policy to the mortgagee. The draft of the fire insurance company was payable to the mortgagee's order. It was evidently received and treated as a fund to be either applied on the debt or to be used in restoring the original security. The acts of complainant were equivalent to a collection of the insurance, for it had the draft in hand, indorsed it to Mr. Scammon by

ordinary commercial indorsement, and assumed to control the ultimate destiny and use of the proceeds. If the money was to be relinquished and not to be applied on the mortgage debt, it is clear that complainant understood that the legal rights of the parties required that it be placed back on the mortgaged premises, and hence the stringent provisions to that end in the agreement of January, 1872; and it was, of course, understood that the restoration of the building on the premises would inure as well to the benefit of the owners of the fee as to that of the owner of the life estate. So I say complainant dealt with the insurance not as Mr. Scammon's money, but as a further security furnished under the mortgage, and as something which affected the rights of all the mortgagors in the property, and in which all were interested.

§ 574. *Effect of a stipulation in a mortgage that the insurance money, in case of a loss, should be paid on the mortgage debt.*

If this be the correct view of the question the remaining question, which relates purely to the *rights* of the parties, would seem not to be difficult of solution. The provision of the policy, that the loss should be payable to the mortgagee, operated to give the mortgagee precisely the same rights and interest in the policy which it would have had if, without such words, the policy had been assigned as collateral security to the mortgage debt. 1 Jones on Mortgages, § 407, and cases cited. The proceeds of the insurance in the hands of complainant represented the insured property and the interests of all the mortgagors therein. The control exercised over the same by the mortgagee was equivalent to an election by it, under the provisions of the mortgage, to collect and receive the money. This being so, it was complainant's duty to use and apply it in accordance with the spirit of the provisions of the mortgage, and for the benefit of the parties beneficially interested, unless they consented to some other disposition of it. Indeed, it is difficult to perceive why, upon general principles of equity, so far as the rights of the owners of the reversion were concerned, complainant could not have been required to have had recourse to the insurance money as collateral security for payment *pro tanto* of the mortgage. If, in any view of the equities of the case, complainant might, without the knowledge of the owners of the fee, agree with the life tenant to place the money back on the mortgaged premises, it was bound to see that such agreement was carried out, and that the money was so used. Failing in this, and having as mortgagee received and undertaken to deal with the insurance proceeds as a fund representing the property, equity will consider that as done which ought to have been done, and must, therefore, so far as the interests of the non-consenting mortgagors are concerned, charge complainant with this fund and treat it as operative to satisfy the mortgage *pro tanto*.

The case at bar is distinguishable from *Gordon v. Ware Savings Bank*, 115 Mass., 588, which was cited by the learned counsel for complainant on the argument. That was a case where mortgaged premises were injured by fire, and the amount of the loss was paid by the insurer in pursuance of its agreement with the mortgagor to the first mortgagee, who subsequently paid the amount to the mortgagor to be applied in repairing the premises, so as to make them as valuable as before the fire; and in this case it was held, under the facts, that the holder of a second mortgage had no equity to have the amount so received applied in reduction of the debt secured by the first mortgage. The facts were that at the time the first mortgagee received the insurance money the mortgage debt was not due, and the mortgagor did not consent to the application of the money on the mortgage; and, moreover, and as a controlling feature

of the transaction, the money was applied by the mortgagor to the restoration of the impaired security, for the benefit alike of all parties interested. These circumstances, of course, vitally affected the equities of the second mortgagee.

§ 575. *Powers of a court of equity properly to apportion the benefit of insurance money between life tenants and reversioners.*

The point was made on the argument that the insurance money could not be applied on the mortgage debt without reducing the liability of the defendant Scammon equally with that of his co-obligors on the bond, which would be manifestly wrong. And the question was put, where can the line be drawn in the proposed application of this money in reduction of a liability which is joint, and which is secured by the pledge of interests that are undivided? The answer is that the rules of equity practice are sufficiently flexible to meet the case. The life estate may be charged with the same burden of liability as it was originally chargeable with, added to which is the personal liability of the defendant Scammon; and the estate of the owners of the fee may be charged with the proper proportion of liability, namely, \$5,000, and interest. The decree can provide for a sale of the life estate as a security for the debt, unaffected by anything that has transpired between its owner and complainant, and suitable provision can be made touching the personal liability of the defendant Scammon for any deficiency. Further, the same decree can direct a sale of the interest of the other mortgagors to pay so much of the debt as is in excess of the \$15,000 realized from the insurance. To the extent indicated the exceptions to the master's report will be sustained, and decree in conformity to this opinion.

§ 576. *Policy obtained by mortgagee.*—The mortgagor cannot claim the benefit of insurance made by the mortgagee at his own expense for his own benefit. *Russell v. Southard*, 12 How., 139 (§§ 491-509).

§ 577. Where a mortgagor covenants with the mortgagee to keep the premises insured for the benefit of the mortgagee, the latter has a lien upon the proceeds of the policy which will be enforced by a court of equity for his benefit, and if his mortgage is duly recorded, the covenant for insurance is regarded as running with the land, and as giving of the right to others, so that no subsequent assignment of the policy would affect his rights. *In re Sands Ale Brewing Co.*, 3 Biss., 175, 178.

§ 578. The fact that the policies are not assigned to the mortgagee does not defeat his equitable interest therein. *Ibid.*

§ 579. In the absence of a covenant or agreement on the part of the mortgagor that the premises shall be insured for the benefit of the mortgagee, the latter cannot claim the benefit of a policy underwritten by the mortgagor on the mortgaged property. *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet., 508.

§ 580. A mortgagee may insure his interest in the property without regard to the mortgagor, and, in case of loss, he may recover the amount without any liability to account to the mortgagor. The mortgagee's right to recover under a policy providing for an apportionment of the loss in case of any other insurance on the property, is not affected by an insurance of the mortgagor's interest where the policy is made payable to the mortgagee without his knowledge. *Johnson v. North British & Mercantile Ins. Co.*, 1 Holmes, 117.

§ 581. *Insurance at expense of mortgagor.*—There is an implied obligation arising from the procuring of the insurance upon the request of the mortgagor, or at his expense, that the insurance money, when paid, shall be applied to the mortgage debt. *Holbrook v. Am. Ins. Co.*, 1 Curt., 193.

§ 582. *Alienation clause.*—A conveyance which equity will treat as a mortgage does not terminate the interest of the assured, or make void the policy under the alienation clause. *Ibid.*

IX. FIXTURES.

SUMMARY — *Steam-engine, when not a fixture*, § 588.

§ 588. A mortgagor may remove a steam-engine not connected with the freehold which was placed on the land after the mortgage was executed. *Cope v. Romeyne*, § 584.

COPE v. ROMEYNE.

(Circuit Court for Michigan: 4 McLean, 884-387. 1848.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is an action of trover. A mortgage was given to the Bank of the United States on the 8th of April, 1840, to secure the payment of the sum of \$10,641.57 on lots fifteen, sixteen and seventeen, in Port Sheldon, a town on paper only, by the Port Sheldon Land Company. An association was formed, called the "Port Sheldon Land Company," in Michigan, to lay out a town, build a steam mill, and to make other improvements. The assignees of the bank bring this suit. Before action was commenced on the mortgage, the trustees of the land company released the equity of redemption to the plaintiffs. The loan was made to the company by the Bank of the United States, the 18th of April, 1838, which was negotiated by Mr. Jaudon, who was cashier of the bank, and was one of the land company. When the release of the equity of redemption was given, it was stipulated that the proceeds of the property should be applied in payment of the mortgage debt. Mr. Jaudon, being sworn, stated that he acted as agent for the land company, and in that character purchased an engine to put into a saw mill which they had constructed on one of the lots mortgaged. That being in possession in 1843, as agent, and one of the land-owners, he took down the engine and shipped it with its apparatus to Detroit, accompanied by a bill of lading, which was indorsed to Romeyn, and which he indorsed to the "Bank of Sinclair." Romeyn was authorized to sell the engine, and he did sell it to the Bank of Sinclair, and indorsed to it the bill of lading. Pitts purchased it for the bank in good faith, without notice from Romeyn, the bank having made advances on the engine. A bill was filed to foreclose the mortgage — defense withdrawn. No steps have been since taken on it. Mr. Jaudon says the release of the equity of the mortgage was released only on the condition that it should be in full payment of the mortgage, and the assignors so understood at the time of the assignment. The plaintiffs admitted by a letter to Jaudon, 11th March, 1847, that the mortgage was limited to the lots expressed.

The counsel for the plaintiffs insist that the mortgagee, after forfeiture, may sue in trover for any part of the freehold, severed before or after the mortgage became due, though out of possession. 17 Eng. Com. Law, 272. Mortgagor is less than a tenant. The personal property, when severed, still belongs to the mortgagee. Admits that if the mortgagor had sold the property, including the engine, the title would have been good. But he insists that, the engine being severed, a sale by the mortgagor does not give a good title. Recording acts have nothing to do with the present question. 3 Wend., 104; 8 id., 584; Powell on Mort., n. 165; 2 Greenl., 387; 33 Eng. Com. Law, 115; 1 Doug., 21, 256; 15 Eng. Com. Law, 486. The only question which is raised by the pleadings is, whether the engine could properly be claimed by the mortgagees.

§ 584. *When mortgagor may remove steam-engine.*

At the time the mortgage was executed there were no improvements on the lots. A saw mill was subsequently constructed. Now, it is admitted that all improvements, such as a saw mill, essentially connected with the freehold, could not be removed by the mortgagors. But was the engine so connected as to make it the property of the mortgagees? It was necessary to the operation of the mill, but was it so attached to the soil, as a fixture, that the mortgagors could not remove it? The mortgagors, after building their mill, were not bound to keep it in operation or to repair it. They, having erected it, had a right to abandon it. Had the improvements been on the premises at the time the mortgage was executed, the mortgagees, by an action, might have turned them out of possession, or restrained them from committing waste. The mortgage debt was due at the time the mortgage was given. But if it be admitted that the engine was a fixture, and could not be severed from the freehold, that could not affect the right of the Bank of Sinclair. Pitts, the agent of the bank, purchased it, without notice, *bona fide*, and the bill of lading was indorsed to him by Romeyn, to whom the engine was consigned. The bill of lading, in regard to the transfer of the property, like a bill of exchange, is good, unless affected by notice. And it is not pretended that there was bad faith on the part of the Bank of Sinclair, or that its agent had notice. We think, therefore, that as a matter of law, the above facts being admitted, the jury must find the defendants not guilty. On this intimation, a non-suit was suffered, and a motion was afterward made to set it aside, which the court overruled.

X. REGISTRATION AS AFFECTING PRIORITY.

SUMMARY — *Mortgagee an innocent purchaser*, § 585; *so is trustee in a deed of trust*, § 586.

§ 585. A mortgagee in good faith, of land of which the mortgagor is in full possession under a regularly recorded deed, is "an innocent purchaser," and acquires a valid lien. *Bailey v. Crim*, § 587.

§ 586. A trustee in a deed of trust is also a purchaser for value. He occupies the same ground with respect to notice, either actual or constructive, of any outstanding equities, that a mortgagee does. *Kesner v. Trigg*, §§ 588, 589.

[NOTES. — See §§ 590-619.]

BAILEY v. CRIM.

(Circuit Court for Indiana: 9 Bissell, 95-98. 1879.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—On the 18th day of September, 1877, Henry Bailey, of Randolph county, and Noah Crim, of Henry county, entered into a written agreement for the exchange of the farms upon which they were then living, each surrendering to the other full possession. Crim's farm was incumbered, and by the terms of the agreement he was to pay all the liens, except \$2,000, on or before the 25th of December. Deeds were duly signed and acknowledged and placed in the hands of James Brown, a loan agent residing at New Castle, Henry county, there to remain until the terms of the contract were complied with. At the time Brown became custodian of the deeds it was understood and expected by the parties that Crim, through Brown, would raise money on the land conveyed to him, to remove the incumbrances, less \$2,000, upon the land which he conveyed to Bailey. This seems to have been the reason for depositing the deeds with Brown. On the 22d of November, 1877, Brown,

without the knowledge of either party, had Bailey's deed to Crim recorded in Randolph county, and made one or more unsuccessful efforts to negotiate a loan for Crim. Just what Bailey was to do before being entitled to his deed from Crim, the agreement and evidence fail to show, but on the 29th day of January, 1878, he demanded and received from Brown Crim's deed for the Henry county land. On the 22d of April, 1878, James Moorman, of Randolph county, loaned Crim \$2,100, and took a mortgage on the land described in Bailey's deed to Crim to secure the loan. This Moorman did in good faith, and without any knowledge of the circumstances under which the deeds had been placed in the hands of Brown or of Bailey's rights. Instead of applying the money obtained from Moorman to remove the incumbrances on the lands conveyed to Bailey, Crim used it for other purposes, and a few days thereafter went into bankruptcy. Bailey paid off the incumbrances and filed his bill against Moorman and Crim's assignee to enforce his vendor's lien, for the amount so paid, against the land conveyed to Crim, demanding priority over the mortgage held by Moorman.

§ 587. *Mortgagee an innocent purchaser.*

Moorman set up his mortgage in a cross-bill, demanding protection as an innocent purchaser. The master reported in favor of Moorman, and the case is now submitted on exceptions to the report. Moorman had reason to believe, and did believe, that Crim was the absolute owner in fee of the lands upon which he took the mortgage. He found Crim in full and undisputed possession under a deed from Bailey, which was duly recorded. It is not pretended that he knew any fact or circumstance which was sufficient to put him on inquiry as to Bailey's rights. While laches cannot be imputed to Bailey for depositing his deed to Crim with Brown as an escrow, yet in doing so Bailey put it in Brown's power to mislead Moorman. On account of Brown's conduct either Bailey or Moorman must suffer loss, and I think the latter has the better equity. The agent of Bailey, in disregard of instructions, had his deed recorded before Crim had complied with his agreement to remove the liens on the lands conveyed to Bailey. This was Bailey's misfortune. He put it in the power of Brown to inflict the injury, and it would be against natural justice to require Moorman to sustain the loss. At the time of the exchange, Bailey understood that Brown was to assist Crim in raising money by mortgaging the land described in Bailey's deed. It was in this way that Crim was expected to be able to comply with his agreement to remove the liens, and it may be that Bailey was less surprised at finding his deed to Crim and the latter's mortgage to Moorman recorded than he was by Crim's refusal to use the money in discharging the liens.

It is urged by counsel for plaintiff that the paper placed in Brown's hands by Bailey was no more than an escrow; that the recording of it did not make it a deed; that its delivery without compliance with the conditions upon which it was held passed no title to Crim, and that therefore Crim conveyed no title to Moorman. *Berry v. Anderson*, 22 Ind., 40, and *Everts v. Agnes*, 6 Wis., 453, are cited in support of this position. In *Everts v. Agnes* it was held that the fraudulent procurement of a deed deposited as an escrow from the depository, by the grantee, did not operate to pass the title, and that a subsequent purchaser from such grantee, without notice and for a valuable consideration, derived no title thereby, and could not be protected. In *Berry v. Anderson* the deed was procured from the custodian, who held it as an escrow, by fraud, and the grantor still remained in possession, which latter fact, of itself, was

sufficient to put the purchaser on inquiry. It has been held that a deed delivered to an agent as an escrow, and by him delivered to the grantee contrary to the conditions, passes a title voidable only. *Blight v. Schenck*, 10 Penn. St., 235; *Pratt v. Holman*, 16 Vt., 530. Without deciding that Bailey's recorded deed to Crim was voidable only, I hold, for the reasons already given, that Moorman cannot be postponed in favor of Bailey. *Blight v. Schenck*, *supra*; *Haven v. Kramer*, 41 Ia., 382. Exceptions overruled and decree in accordance with the master's finding.

KESNER v. TRIGG.

(8 Otto, 50-56. 1878.)

APPEAL from U. S. Circuit Court, Western District of Virginia.

STATEMENT OF FACTS.—Mrs. Kesner filed a bill to enjoin the sale under a deed of trust, executed by her husband, conveying a tract of land of which he held the legal title, but which she claimed as her own, because it had been obtained by exchanging for it her land, and that there had been a distinct understanding between her and her husband that she would claim none of his property and he none of hers. The land was conveyed to her husband alone in 1851. Kesner, the husband, about 1872 became a bankrupt; the deed of trust was executed in 1862. The bill sought to establish Mrs. Kesner's claim to the whole tract of land. Upon the hearing below the bill was dismissed. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE SWAYNE.

The bill, so far as it relates to the debt claimed to be owing to the estate of John C. Greenway, deceased, secured by the deed of trust to Bekem, cannot be sustained for several reasons. It is silent as to the objection of usury. In Virginia, a party cannot avail himself of this defense without averring and proving it; and in such case he is required by statute to pay the principal of the debt. *Brown v. Toell*, 5 Rand. (Va.), 543; *Harnsbarger v. Kinney*, 6 Gratt. (Va.), 287. It is asserted that the consideration of the note was a loan of Virginia and North Carolina bank-notes; that at the time of the transaction they were largely depreciated; that the value of the consideration should be fixed by scaling this currency; and that the amount to be paid on the note should be reduced accordingly. But, upon looking into the record, we find no evidence whatever upon the subject. The depreciation may have been more or less, or there may have been none. We cannot, as is suggested, take judicial notice of the facts, whatever they may have been. We must take the record as it is, and we cannot look beyond it.

§ 588. *The trustee and cestui que trust are purchasers, and are not affected by any infirmity of the grantor's title of which they had no notice.*

No notice of any infirmity in the title of Kesner to the premises is brought home either to the trustee or to the *cestui que trust*, and it is denied by the latter. Like a mortgagee, they are regarded as purchasers; and, in this case, they must be considered as such, *bona fide*, and without notice of the adverse rights of the appellant, if any she have. *Wickham v. Lewis*, 13 Gratt. (Va.), 427; *Evans v. Greenhouse*, 15 id., 156. This part of the case may therefore be laid out of view. The premises in question are clearly liable for the amount secured by the deed of trust. The position of the judgment creditors is different. They were not purchasers, and they can take by virtue of the liens of their judgments only what Kesner was entitled to. 15 Gratt., *supra*. It remains to consider the claim of the appellant touching the premises in contro-

versy. It is clear that she inherited from her father one-third of Lyon's Gap farm, and received, as a distributee of the estate of her father and mother, several slaves; that she and Kesner bought another third of the farm from her sister, Mrs. Moffett, and took from Asbury, the attorney of her sister and her sister's husband, a bond for the execution of a deed. The purchase money was procured by the sale of slaves which came to Kesner by the appellant. On the 26th of May, 1852, the appellant and her husband, Kesner, conveyed the two-thirds of the Lyon's Gap farm to Sheffy, as executor of Hull. On the 25th of January, 1851, Dutton and wife conveyed to Kesner alone the Cedarville farm, which is the property in controversy. The transaction was an exchange of lands; \$600 was paid to Dutton, as the difference in value of the two tracts. Kesner raised the money in the same way as that before mentioned. The appellant is neither named nor referred to in the deed to her husband. On the 29th of January, 1862, Kesner alone executed the trust deed to Bekem. It embraced the entire Cedarville property. The tract contained about a hundred and fifty acres. In his first inventory in bankruptcy Kesner gave in half of this farm and his life interest in the other half, which was stated to belong to his wife. In an amended schedule, subsequently filed, he gave in all his interest in the entire tract, which he alleged was conveyed to him chiefly in consideration of the deed to Sheffy of his wife's lands near Lyon's Gap. He stated that she claimed one-half of the tract, and that if her claim were sustained, then he surrendered his life interest in that half. The whole tract must be sold to satisfy the debt secured by the deed of trust. If there should be any surplus, the appellant's rights will be the same with respect to that fund that they were as to the land. *Jones v. Lackland*, 2 Gratt. (Va.), 81; *Graham v. Dickens*, 3 Barb. Ch. (N. Y.), 1; *Olcott v. Bynum*, 17 Wall., 44.

§ 589. *A post-nuptial contract on sufficient consideration, partly executed, is valid in equity.*

If there were no valid contract between the appellant and her husband, as claimed, the slaves — by the law of Virginia being chattels — were the absolute property of the latter, and at his death would have been assets in the hands of his personal representative. So by the common law, if the husband and wife sell and convey her land, and he receives the consideration money without any reservation of rights on her part, the money belongs to him. *Hamlin v. Jones*, 20 Wis., 536; *Schouler*, Domestic Relations, 120. No question is raised as to the statute of frauds, and we need not, therefore, consider that subject. It is now well settled that a post-nuptial contract made upon sufficient consideration, and wholly or partly executed, will be sustained in equity. *Gosden v. Tucker*, 6 Munf. (Va.), 1; *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.), 537; *Bullard v. Briggs*, 7 Pick. (Mass.), 533; 2 Kent Com., 139; *Cord*, Married Women, secs. 36, 37. The counsel on both sides have argued the case upon the hypothesis that the contract set out in the bill, if made, was valid. The contention between them is only as to the sufficiency of the proof of its existence. Our further examination of the case will be upon this basis, and our remarks will be confined to that subject. The alleged contract is thus set out in the bill. Speaking of her marriage to Kesner, the appellant says: "It was then agreed, and has always since been agreed and understood between herself and her husband, that she was to take no interest in his property, and he was to take no interest in hers. On their marriage they settled on a farm owned by Mr. Kesner in this county of Washington, and in pursuance of this agreement she relinquished her rights in this land."

With reference to the conveyance by herself and Kesner to Sheffy, executor of Hull, and the conveyance by Dutton and wife to Kesner, she says: "Your oratrix being assured this was an exchange of land, and that she would thereby acquire an interest in this land exchanged for her land, assented to it. Your oratrix never would have consented to a sale of her land for money, or to any arrangement which would have deprived her of her inheritance in her land, and have her fee-simple converted into a mere dower right. With this distinct understanding between her husband and herself, and believing she would have in the Cedarville land the same rights she had in her own land, she assented to this arrangement. But, being a *feme covert*, and ignorant of business, she intrusted the whole management of her business to her husband." She claims one-half of the land free from her husband's tenancy by the courtesy, and the reversion of one-half of the residue at her husband's death.

While Kesner, in his schedule, speaks of his wife's means as having chiefly paid for the property in question, he is wholly silent as to any contract between them. She claims three-quarters, while his concession is only to the extent of one-half; and he does not put that admission upon any ground of right growing out of a contract. They seem not to have understood her claim alike. His deposition was subsequently taken, but he was asked no question upon the subject. In Dutton's deposition this question was asked: "Was the trade and exchange intended to preserve to Jane Kesner the same rights in the Cedarville land which she had in the Lyon's Gap land?" *Ans.* "This was my understanding of it." From whom, or in what way, he got his understanding is not disclosed, James C. Porterfield, who married the sister of the appellant, was present at her marriage to Kesner, and had known them both thirty years, testified fully as to the means which came to Kesner in right of his wife. He was asked no question, and said nothing, as to any contract between them. Mrs. Porterfield, the sister, also testified. At the close of her deposition this question and answer are found: "After the trade for the Cedarville land, did you hear Mrs. Kesner claiming it as her land?" *Ans.* "I don't recollect hearing her claim it as her land."

There is no other testimony in the record bearing in any wise upon the subject. It is, perhaps, not a violent presumption that the appellant knew in 1852 that Dutton and wife conveyed the land to her husband alone, and that she knew he treated it as exclusively his in 1862 by conveying it, without her concurrence, to Bekem, in trust, to secure the debt to Greenway. It does not appear that she set up any special claim, or alleged the contract set up in her bill, until Kesner went into bankruptcy in 1873. But irrespective of those deeds, it is too clear to admit of doubt that the contract set forth in the bill is wholly unsustained by the proofs in the record. See *Harris' Ex'rs v. Barnett et als.*, 3 Gratt. (Va.), 339.

Decree affirmed.

§ 590. A mortgagee in a mortgage given to secure a prior indebtedness is not a purchaser for value, and his lien is postponed to that of a prior unrecorded mortgage. *Bybee v. Hawckett*, 12 Fed. R., 649, 654.

§ 591. In New York a mortgage for a pre-existing indebtedness is not protected by a prior record against a non-recorded mortgage for value, that is, for some new consideration advanced at the time. But as between two mortgages—one for a past indebtedness, and one for an indebtedness to be subsequently incurred,—the one for the past indebtedness must have precedence, if it be first recorded and taken without notice of the other. *National Bank v. Whitney*, 13 Otto, 99, 104.

§ 592. A trustee in a deed of trust is, like a mortgagee, a purchaser, within the meaning of the recording laws; he occupies the same ground with respect to notice, actual or con-

structive, of any outstanding equities that a mortgagee does. *New Orleans, etc., Co. v. Montgomery*, 5 Otto, 18.

§ 593. A mortgage for purchase money, executed simultaneously with the deed of conveyance, is not subject to dower, though dower be not released. If the instruments be delivered at the same time, it does not matter that they were executed on different days. *Maybury v. Brien*, 15 Pet., 21.

§ 594. Dower in mortgaged premises.—A mortgage is not an absolute alienation of an estate which prevents the attaching of the right of dower so as to preclude dower in behalf of the mortgagor's widow attaching to the mortgaged premises and the improvements thereon made after the mortgage. *Powell v. Monson Manuf. Co.*, 8 Mason, 463.

§ 595. Good without record.—A mortgage is good against the mortgagor without record. *Moore v. Thomas*, * 1 Or., 201.

§ 596. Record of assignment.—An assignee of a mortgage is not bound to record his assignment in order to protect himself against subsequent purchasers. The record of the mortgage is sufficient notice of its existence without the record of the assignment. *Oregon Trust Co. v. Shaw*, 5 Saw., 386 (§§ 752-755). See § 872.

§ 597. A mortgage recorded before the filing of a mechanic's lien has priority. *Moran v. Schnugg*, 7 Ben., 399, 400.

§ 598. Under a statute of Indiana, providing that a mortgage not recorded within ninety days after its execution is fraudulent as against subsequent *bona fide* purchasers, a mortgage recorded after the time limited is constructive notice to all persons who purchase thereafter. *Wyman v. Russell*, * 4 Biss., 807.

§ 599. Louisiana.—A decree of the proper court establishing a mortgage under a special act of the state of Louisiana, for restoring records destroyed by fire, operates, when recorded, as a reinscription of the mortgage. *Hunt v. Innis*, * 2 Woods, 103.

§ 600. In this state a notarial act confirming a mortgage by conveyance, and recorded in the proper office, has effect as a mortgage. *Ibid.*

§ 601. In Louisiana a mortgage of lands must be inscribed in the proper office, and, except in case of a minor's mortgage, reinscribed within ten years from the date of the original inscription. Without such reinscription the mortgage becomes, after that time, without effect as to all persons other than the parties to it, though as against such parties and their heirs the mortgage is valid without either inscription or reinscription. *Bondurant v. Watson*, * 13 Otto, 231; *Cucullu v. Hernandez*, * 13 Otto, 105.

§ 602. Moreover, purchasers with knowledge of an existing mortgage are affected by it though it be not inscribed and reinscribed in accordance with the code; for here, as elsewhere, such knowledge is equivalent to notice by registry. It is the effect of the inscription when not renewed which ceases, not the effect of the mortgage. The object of requiring reinscription is to dispense with the necessity of searching for evidence of mortgages more than ten years back. *Patterson v. De La Ronde*, * 8 Wall., 292.

§ 603. In Michigan the act of April 12, 1827, relating to "deeds and other conveyances," and the act of same date "concerning mortgages," are not repugnant, and a mortgage of land situate in Detroit is valid, if recorded in compliance with either. *Beals v. Hale*, * 4 How., 37.

§ 604. In Mississippi deeds of trust and mortgages are valid as against creditors and purchasers, only from the period at which they are delivered to the proper recording officer. By the law of the same state a judgment *proprio vigore* operates a lien upon all the property of a defendant from the time that it is rendered. Therefore, a judgment rendered between the time of the execution and the recording of a mortgage is a lien upon the land prior to the mortgage. *Taylor v. Doe*, 13 How., 287, 292.

§ 605. In Ohio, under statute of 1831, a mortgage takes effect only from the time it is recorded. This statute makes the recording of a mortgage essential to its due execution, and shuts out equitable liens in the form of unrecorded mortgages. Where a judgment is entered one day before the recording of a mortgage it constitutes a prior lien to the mortgage. *Sturges v. Bank of Cleveland*, * 3 McL., 140.

§ 606. In Pennsylvania a mortgage becomes effective as between the parties *eo instanti* upon delivery. Though not recorded it is good against an assignee for the benefit of creditors, the heirs of the mortgagor, and every one claiming under the mortgagor who had actual notice thereof before his rights attached. *Curry v. McCauley*, 11 Fed. R., 365, 369.

§ 607. In Texas, judgment creditors who levy executions on lands acquire a lien superior to that of an unrecorded mortgage of which they have no notice, and the purchaser under such execution succeeds to all the rights of creditors, although the mortgage may be recorded before the sale. *Stevenson v. Texas Ry Co.*, 15 Otto, 703, 707.

§ 608. The recording laws of Virginia, making deeds of trust and mortgages void for failure to record them, may be taken advantage of by a trustee of an insolvent debtor in the District of Columbia. *Bank of Alexandria v. Herbert*, * 8 Cr., 36.

§ 609. A deed of trust is technically a deed, and its execution and acknowledgment in such manner and form as are required by statute in the case of deeds is sufficient. *Branch v. Atlantic & Gulf R. Co.*, 3 Woods, 481, 487.

§ 610. The clause creating the lien prevails as to the interest conveyed. Thus a mortgage of an undivided fourth part of certain lands is not enlarged by a recital in the description as being one undivided half part. *Ripley v. Harris*, 3 Biss., 199 (§§ 552-555).

§ 611. A mortgage attested by one witness under a statute requiring two witnesses is good in equity as between the parties. *Moore v. Thomas*,* 1 Or., 201.

§ 612. Acknowledgment.—A mortgage is not notice to parties subsequently dealing with the property, unless acknowledged according to the terms of the statute. *Branch v. Atlantic & Gulf R. Co.*, 3 Woods, 487.

§ 613. A notary public authorized to take acknowledgments may take and certify an acknowledgment of a deed of trust, although he is interested as a beneficiary in the trust. *National Bank of Fredericksburg v. Conway*, 14 N. B. R., 518.

§ 614. A mortgage by a married woman of her separate property, regular in appearance, and bearing her genuine signature, with a proper certificate of acknowledgment, can be impeached only by clear and convincing proof of fraud. *Insurance Co. v. Nelson*,* 13 Otto, 544.

§ 615. Certificate not conclusive.—In Minnesota, a certificate of acknowledgment is not conclusive. It may be shown that the deed when acknowledged was void by reason of its containing material blanks. *Drury v. Foster*,* 1 Dill., 460.

§ 616. No relief in equity.—Where a creditor fails to have his mortgage recorded, and thereby loses his priority as against other creditors, he can have no relief in equity. *Kurtz v. Hollingshead*,* 3 Cr. C. C., 68.

§ 617. Mortgagee not bound to give personal notice.—Having recorded his mortgage, the mortgagee is not bound to give personal notice of his mortgage to one who purchases of the mortgagor; and a delay for ten years, or for any other period less than the statute period of limitation, to make any claim of the purchaser under the mortgage, does not impair his rights under the mortgage either at law or in equity; and the fact that the mortgagor has in the mean time become insolvent does not prejudice his claim upon the property. *Dick v. Balch*,* 8 Pet., 30.

§ 618. Junior mortgage first recorded.—By the laws in force in Utah in 1873, a junior mortgage taken without notice of a prior mortgage, actual or constructive, and first recorded, is to be preferred in its lien to a mortgage prior in execution but subsequently recorded. *Neslin v. Wells*,* 14 Otto, 423.

§ 619. The maxim *qui prior est tempore potior est jure* only applies in cases in which the equities are equal. *Ibid.*

XI. NOTICE AS AFFECTING PRIORITY.

SUMMARY — *Recitals in deeds*, §§ 620, 621. — *Notice by possession*, § 622.

§ 620. A recital in a deed of land that the premises are subject to a certain mortgage estops the grantee from denying the lien of the mortgage, though the description in that is defective. *Reeves v. Vinacke*, §§ 623-626.

§ 621. So, also, purchasers from such grantee are bound by the recitals in the deed to the grantee. Purchasers are bound by the recitals contained in any of the deeds through which they claim title. *Ibid.*

§ 622. The record of a deed is notice to creditors and subsequent purchasers; and actual, visible and open possession is in Illinois equivalent to registry. *Noyes v. Hall*, §§ 627, 628.

[NOTE.— See §§ 629-633.]

REEVES v. VINACKE.

(Circuit Court for Minnesota: 1 McCrary, 213-217.)

STATEMENT OF FACTS.—Suit to correct a mistake in a mortgage and to foreclose it. The mistake was the omission of the words "of the southwest quarter," so that as it stood the description indicated a body of land in which the mortgagor had no interest whatever. Jordan, the mortgagor, afterwards conveyed to Vinacke, with notice of the mortgage expressed in the deed. Vinacke conveyed to Kennedy, who also had notice of the mortgage, but his grantees, George and Horace Jewett, had not actual notice.

§ 623. *A court of equity will correct a mistake and reform a deed when it can be done without detriment to innocent purchasers.*

Opinion by NELSON, D. J.

The evidence in this case establishes the fact of a mistake in the mortgage executed by Jordan to Morrison, and a court of equity will, when appealed to, correct such a mistake and reform the instrument so as to express the intent of the parties thereto. This is a fundamental rule of equity jurisprudence, and, the mistake being mutual, the mortgage will be declared a lien upon the property intended as between the parties. If the titles of the Jewetts, as *bona fide* purchasers, have intervened, a reformation of the mortgage will not be allowed to prejudice their titles. But if their rights were subsequently acquired with notice, actual or constructive, they are subject to Morrison's lien. The delay in bringing suit to correct the mistake, which shows laches on the part of the complainant, is satisfactorily accounted for.

§ 624. *Grantee of the mortgagor estopped by the recitals of his deed.*

The recital in the deed from Jordan to Vinacke is evidence against him; and it being stated that a mortgage had been given, and Vinacke agreed to pay it, such recital is intended as the agreement of the parties and estops them. Vinacke has thus admitted conclusively the lien of the mortgage and assumed a personal liability. It cannot be doubted that the doctrine of privity prevails, and all persons claiming title to the property under and through Vinacke & Kennedy are privies in estate, and can be in no better situation than they are from whom the title is obtained. *Carver v. Jackson*, 4 Pet., 83; 6 Pet., 250; 9 Wend., 209; *Story's Equity*, secs. 152, 165.

§ 625. *A purchaser of lands is bound to take notice of the recitals in deeds through which he claims title.*

The defendants, Geo. F. and Horace A. Jewett, on investigation of the title, would necessarily discover the recital that the mortgage was intended to cover the land described in the deed, and at least were required to make inquiry of Jordan or Vinacke or Kennedy. 41 N. H., 560. The registry law of this state does not require a description of the property to be contained in the index book or reception book. R. S. Minn., secs. 156, 157, p. 126. The names are indexed, through whom the titles would be traced; and in so doing, the defendants Jewett were required to look beyond the index book and examine the book where the description is recorded, and are charged with knowledge of all facts recited therein. If they failed to do so it was negligence. The case of *Shroyer v. Nickel*, 55 Mo., 264, has no application to the one at bar. In that case the deed sought to be reformed was executed by a married woman, jointly seized with her husband, and the court placed the decision upon the *statutory regulation specifically pointing out* how a married woman could bind herself; and inasmuch as the deed, as executed (according to the statute), did not convey the land intended, a reformation of the instrument was beyond the reach of equitable interposition. The distinction between reforming a deed as to the husband and as to a wife is clearly stated in the discussion of the case above referred to. Vol. 7, Central L. J., 183.

§ 626. *Statute of limitations.*

It is claimed the cause of action is barred by the statute of limitations, enacting (Title II, ch. 66, p. 451, sec. 3): "Actions can only be commenced within the periods prescribed by this chapter, after the cause of action accrues, except where, in special cases, a different limitation is prescribed by statute." Sec. 6. Within six years. An action upon a contract, etc. Is this an action upon

a contract? The complainant by his bill seeks to foreclose a mortgage, and states therein that, as executed, it did not cover the property intended to be mortgaged by the parties thereto, and asks a correction of the mistake, so as to express the intention of the mortgagor and mortgagee, and make it such as they supposed was executed and delivered. If the instrument to be reformed was an agreement to execute a mortgage, the limitation of six years within which actions on contracts can be commenced might control. In my view of the case, if any statutory limitation governs, it is that prescribed by section 11 of chapter 66, viz.: "Every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues." The complainant is entitled to a decree for the relief prayed, and it is so ordered.

DILLON, J., concurs.

NOYES v. HALL.

(7 Otto, 34-39. 1877.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Antecedent to the claim of the respondent, the unincumbered fee-simple title of the premises was in the father of the complainant. On the 26th of April, 1858, the owner of the tract, consisting of a farm of eighty acres, being indebted to the respondent in the sum of \$1,075, mortgaged the farm to him to secure the payment of that sum. Sufficient also appears to show that the fee-simple owner of the premises, on the 4th of June, 1859, contracted in writing with the brother of the complainant to convey the same to the other contracting party for the sum of \$8,000, payments to be made as therein specified; and that the brother, eight months later, sold out his interest thus acquired to the complainant, the new contract being made by consent to bear the same date as that previously given to the brother, the complainant giving his notes in the place of those given by the brother, except for \$300, which he paid in cash. Payments, except for that amount, were to be made as in the previous arrangement; and the complainant alleges that prior to the commencement of the next year he entered into the possession of the premises, and that he has continued in the possession of the same from that time to the present. By the terms of the agreement, the premises were to be conveyed to the complainant by a good and sufficient deed; and he alleges that the covenantor and his wife, on the 10th of February, 1864, by deed duly executed and acknowledged, conveyed the same to him; and it appears that the deed, on the 19th of the same month, was duly recorded.

Process was served; and the respondent appeared and filed an answer, in which he sets up the mortgage given by the original owner, the foreclosure of the same, the sale of the premises by the master, and his title to the same by virtue of the master's deed to the purchaser from whom he acquired the title to the premises. Proofs were taken, the parties heard, and the court entered a decree in favor of the complainant. Due appeal was taken by the respondent to this court; and he assigns, among others, the following errors: 1. That the complainant has not made such a case as to warrant a court of equity in granting him relief. 2. That the bill of complaint does not allege any sufficient reason why it was not commenced at an earlier date. 3. That the bill of complaint does not allege that any tender of the amount required to redeem the mortgage was ever made before the commencement of the present suit. 4. That

the contract to convey the land to the complainant was subsequent to the execution of the mortgage.

Both of the notes secured by the mortgage were transferred, and it appears that the assignee instituted the suit for foreclosure. When the foreclosure suit was commenced, the present complainant was in possession of the premises, having previously paid \$1,000 towards the purchase of the same under his contract; and the record shows that he was not notified of the commencement or pendency of the suit. Though in the sole possession of the premises, the complainant alleges that he was not served with process; and that no answer having been filed in the case, the bill of complaint was taken as confessed, and that a decree of foreclosure was entered, under which the premises were sold by the master for the sum of \$400. None of these matters are controverted; and it is also alleged that conveyance of the premises in due form was made by the master to the bidder, and that he conveyed the same to the respondent. Since that time, as the complainant alleges, the respondent has commenced a suit against him to recover the possession of the premises.

All of these matters are formally set forth in the bill of complaint; and the complainant alleges that the respondent neither claims nor has any other or further interest or title to the premises than that derived by purchase under the decree of foreclosure, and he avers that such title is subject to his right to redeem the premises described in the bill of complaint. Appropriate allegations are also made to show that he is entitled to such relief, upon the ground that he has been at all times since the sale of the premises ready and anxious to redeem the same from the sale and purchase; that he has offered to redeem the premises of the respondent by the payment of the said sum of \$400, with interest at the rate of ten per cent. from the date of the sale to the time of such tender of redemption, and that the respondent refused and still refuses to accept such payment and to release the claim and title to the premises by him so acquired; wherefore he prays that he may be declared entitled to redeem the premises by the payment of the amount of the purchase money, with interest to the date of the decree, and that the respondent, upon the payment of such amount, may be decreed to convey to the complainant all the title and interest in the premises which he acquired by such purchase.

§ 627. *The recording of a deed is notice to creditors and subsequent purchasers, and so is open, actual, visible possession.*

Deeds, mortgages, and other instruments of writing which are authorized to be recorded, take effect, by the law of that state, from and after the time of filing the same for record, and operate as notice to creditors and subsequent purchasers. R. S. of Illinois, 1874, 278, sec. 30. Argument to show that the respondent had due notice of the claim of the complainant is quite unnecessary, as the case shows, beyond controversy, that the deed under which he acquired the title to the premises was duly recorded, and that he was, before that time, in the open, visible and exclusive possession of the same, which, by the settled law of that state, is constructive notice to creditors and subsequent purchasers. *Truesdale v. Ford*, 37 Ill., 210. Record evidence of a conveyance operates as notice, and so may open possession; the rule being that actual, visible and open possession is equivalent to registry. *Cabeen v. Breckenridge*, 48 id., 91; *Dunlap v. Wilson*, 32 id., 517; *Bradley v. Snyder*, 14 id., 263. Viewed in the light of these authorities and the allegations in the bill of complaint, it is clear that the first assignment of error must be overruled. Nor is it necessary to enter into any discussion of the second error assigned, as it appears that the

complainant filed the bill of complaint to redeem the premises as soon as it became necessary to vindicate his title and possession against the ejectment suit instituted by the respondent.

§ 628. *One in possession of mortgaged premises, claiming them, who is not made a party to a bill for foreclosure, is not bound by the decree.*

Beyond all doubt, the contract under which the complainant claims the right to purchase the premises is subject to the mortgage held by the respondent; but it is a sufficient answer to the third and fourth assignments of error to say that the decree sustains the validity of the mortgage, and makes ample provision to secure to the respondent all the rights which he acquired by virtue of the sale and purchase under the foreclosure. Parties interested in the premises who were not served with process are not bound by that decree, and it follows that the respondent took his title subject to the rights of the complainant acquired under the deed, just the same as if no such decree had ever been made. Suppose that is so, then it only remains to examine the decree, and ascertain whether it makes due provision to preserve all the rights of the respondent. Coming to the proofs, it will be sufficient to say that the finding of the court below shows that all the material allegations of the bill of complaint are fully sustained, which is all that need be said in support of the theory of fact embodied in the decree. Such being the fact, the court decreed that the complainant was entitled to relief, he paying to the respondent, within one hundred days from the date of the decree, the sum of \$913.33, with costs of suit; and that in default of such payment the bill of complaint shall stand dismissed; and that the respondent, if the payment be made, shall, within thirty days thereafter, execute to the complainant a good and sufficient deed, as prayed in the bill of complaint. Examined in the light of these suggestions, as the case should be, it is clear that the decree is correct, and we are all of the opinion that there is no error in the record.

Decree affirmed.

§ 629. *Actual notice.*—The grantee in a deed of trust is bound by actual notice of a prior unrecorded deed; and where such grantee sells the property for more than the amount of the debt secured by the unrecorded deed of trust, he becomes a trustee for the amount of the claim of the grantee in such unrecorded deed of trust. *Kurtz v. Bank of Columbia*, 2 Cr. C. C., 701.

§ 630. The title of a purchaser from the second grantee, who takes with notice of the prior deed, but with an assurance from the grantee in such prior deed that all will be right, cannot be disturbed. *Ibid.*

§ 631. A purchaser having knowledge of a prior unrecorded mortgage takes subject thereto. *Lord v. Doyle*, 1 Cliff., 453, 458.

§ 632. It is no defense to one who takes a deed of land with actual knowledge on his part of a previous mortgage upon it that the parties to the mortgage agreed that it should not be recorded, and the mortgagee received a written guaranty "to hold him harmless from any loss by reason of not recording the deed." *Ibid.*

§ 633. *Constructive notice* of the possession of a part of the premises covered by a mortgage does not affect lands outside the limits of the possession. *Daggs v. Ewell*,* 8 Woods, 244.

XII. VOID AND USURIOUS MORTGAGES.

SUMMARY — *Mortgage executed on Sunday*, § 634. — *Intent to give unlawful preference*, § 635. — *Illegal consideration*, § 636.

§ 634. A mortgage executed on Sunday, without the knowledge of the mortgagee, and dated, acknowledged and delivered on the following day, is not void. The mortgagor is stopped from showing that the instrument was executed on a day other than that of which it bears date. *Wilson v. Winter*, §§ 637-640.

§ 635. A mortgage made with the intent to give the mortgagee an unlawful preference is not affected by that fact, if such intent was not carried out. *Corbett v. Woodward*, §§ 641-647.

§ 636. A mortgage founded in part on a legal and in part on an illegal consideration will be held valid as to the former and void as to the latter. *Ibid.*

[NOTES.— See §§ 648-656.]

WILSON v. WINTER.

(Circuit Court for Wisconsin: 6 Federal Reporter, 16-23. 1881.)

Opinion by BURN, D. J.

STATEMENT OF FACTS.— This action is brought by the plaintiff, who is a resident of New Jersey, against the defendants, who reside in the county of Eau Claire, Wisconsin, to foreclose a mortgage for the sum of \$1,200, executed by the defendants to the plaintiff on July 8, 1878, upon certain land of the defendants. The mortgage is collateral to a bond executed by the defendants at the same time. The defendants' answer, which is under oath, sets up several defenses: First, they deny the execution of the bond and mortgage sued upon. Second, they allege that they are Germans by birth, and cannot read or write the English language; that they made an agreement with an attorney and agent of the plaintiff for a loan of \$1,200 on five years' time, with ten per cent. annual interest; that to carry out said agreement they executed, acknowledged and delivered the bond and mortgage set out in the complaint, which had been prepared for them by the plaintiff's attorney, supposing, without reading them, that they were a bond and mortgage running five years, with ten per cent. interest, payable annually, whereas the mortgage was, in fact, so drawn as to fall due in four years' time, and the interest was made payable semi-annually; and the mortgage also contained a provision that, in case the interest remained at any time overdue for ten days, it should be optional with the mortgagee to declare the whole sum due, of which provision they were ignorant when they signed the mortgage. Third, that the bond and mortgage were made, executed and delivered on Sunday, the 7th day of July, 1878, instead of July 8, 1878, the day of their date, and are consequently void under the Sunday law. There is no evidence whatever to support the first defense. There was a great deal of testimony taken in support of the second, but it all goes but a small way to defeat the mortgage.

§ 637. *An unauthorized stipulation in a mortgage will not, in the absence of fraud, vitiate the mortgage.*

The defendant Johann Winter testifies that he applied to R. D. Campbell, residing at Augusta, near where defendants reside, to obtain for him a loan of money, and offered to pay him \$50 to get him a loan of \$1,200 for five years, at ten per cent., and that Campbell agreed to get it for him; that after Campbell had arranged with J. F. Ellis, an attorney at Eau Claire, to secure the loan, and after Ellis had obtained a promise of it from the plaintiff, Campbell, who was himself an attorney, drew up the papers, and presented them to the defendants for their signatures, stating that they were all right. Defendants thereupon executed the bond and mortgage without requiring them to be read or explained to them, and not being able to read them themselves; and on the next day went to Eau Claire and consummated the loan with Ellis by delivering the papers and getting the money, without reading the bond and mortgage, or requiring any further explanation of their contents. The mortgage contains a stipulation for the payment of semi-annual interest on the 1st day of December and June in each year; is drawn to become due on July 7, 1882, four years

from date, and contains the option clause above referred to. The testimony to show these facts is quite voluminous, but it constitutes no defense to the action. There is no evidence of any fraud. Campbell, instead of being the agent of the plaintiff, was the agent of the defendants in procuring the loan and drawing the papers; and if the defendants did not understand the stipulation contained in the bond and mortgage it was their own fault. If they did not understand the English language, there was the greater need on their part of having the writing explained to them before they signed it; and they cannot set up their own gross negligence in that behalf to defeat a written contract, entered into with all the solemnities and formalities of law. The defendant testifies before the examiner at great length as to what the terms of the contract were as agreed upon between him and his agent, Mr. Campbell, as though it were possible to substitute that agreement in the place of the writing itself.

§ 638. *Construction of statute. When, under Wisconsin law, a mortgage executed on Sunday is valid.*

As to the third and last defense, I think the case made by the defendants is quite as defective and unsatisfactory. The bond and mortgage are dated on July the 8th, which fell on Monday. The acknowledgment before J. R. Button, the justice, also bears date on that day. Button testifies that he took the acknowledgment of both the bond and mortgage on that day, in his office at Augusta; that the defendants were both present in his office at the time. He says: "I was sitting at my table where I do my business, and Mr. Winter and his wife came in, and one of his sons (I could not say which one it was; I was busy writing, I think, at the time), and wanted I should take the acknowledgment of some papers. They sat down, and I took the acknowledgment. I inquired of them if they signed these papers of their free will and accord. They did not appear to understand,—kind of looked around,—and their son spoke to them and told them what I said, and they turned to me, both of them, and said 'Yes.' Mr. Schroeder was present. He came in at some time which I cannot testify to. Mr. Winter and this son brought the papers there. Campbell I don't think was present. They took the papers away. It was somewhere along in the morning—from 8 to 10 o'clock. I could not say exactly. That is the correct date of acknowledgment."

William Schroeder testifies circumstantially to being present about that time when defendants came into Button's office and acknowledged some papers, but he does not know what papers, nor the exact time; but from the circumstances he testifies to it was evidently the same occasion testified to by Button. The defendants deny, under oath, going before Justice Button at all to acknowledge the mortgage, but they and their sons all testify that they executed the mortgage at their son's house, in Augusta, on Sunday, July 7th. Campbell does not remember the day; but they all agree that defendants and Campbell went to Eau Claire on Monday, the 8th, and consummated the loan by delivering the papers to Ellis for the plaintiff and getting the money. Ellis testifies that he also was acting as agent for the defendants in getting the loan for them.

So far as the question of acknowledgment is concerned the defendants admit the acknowledgment under oath in their answer, and are, therefore, estopped from denying it on the trial. But they allege it was done on Sunday. Besides, I think the testimony of Button and Schroeder should be taken as conclusive that the acknowledgment was made on Monday, and I so find. As to the time of the execution, as that rests wholly on the testimony of the defend-

ants and their family, I think I must find that it was done on Sunday; and if that fact alone makes the mortgage void, then the plaintiff, who was in New Jersey, and entirely innocent of any knowledge of the fact of defendants breaking the Sunday law in Wisconsin, must suffer in their stead, while the defendants must be rewarded for their crime in the sum of \$1,200 ready money. But I am not ready to believe that such is the law.

§ 639. *Sunday law. Execution of deeds on Sunday. Estoppel.*

I think there is a general feeling among judges that the courts have gone quite far enough in holding contracts void that have been entered into on Sunday. If the question were unadjudicated I would, for one, think it going far enough to hold that where the parties are mutually guilty, the court would not lend its aid to enforce a strictly executory contract entered into on Sunday; but that when the contract is fully executed on one side, and the consideration passed, as in the borrowing of money or sale of and delivery of property, to require the defaulting party to restore the consideration and perform his agreement. According to some of the decisions, if I borrow a thousand dollars of my neighbor on Sunday, promising to return it at some future day, there is no contract, either express or implied, which the courts will enforce against me to repay the amount, not even though I renew the promise on a subsequent week-day, because, the contract being void, there can be no affirmation, there being nothing to be affirmed. This may be, and doubtless is, from the premises assumed, logical enough, but it will not be claimed for the law, as it stands, that it metes out a very exalted species of justice. The statute simply provides that any person who shall do any labor or business on the first day of the week, except works of necessity and charity, shall pay a fine of \$10. The law itself, for what it was intended, which was to make the doing of labor on Sunday a misdemeanor, is, as everybody knows, a dead letter on the statute book. It is too often violated by persons belonging to almost all classes, and during a residence of over a quarter of a century in the state I have never known a single prosecution under it. The statute is never invoked except by defaulting defendants, who are seeking to take advantage of their own wrong to defeat and get rid of paying a just debt. But I know of no decision, and have been referred to none on the argument of this cause, that holds a contract void because one party, unknown to the other, in the private recesses of his own home, draws up and signs a mortgage on Sunday, dates and acknowledges it on a week-day, and on a week-day consummates a contract for the borrowing of money, on the faith of the mortgage, with a person who is innocent of any knowledge that the law has been violated. Such law would indeed be a disgrace to the jurisprudence of any age or country. That is, just this case, and I think it safe to say that the statute will be fully vindicated by a prosecution and fine of the offending parties in a court of justice of the peace, without punishing the innocent and rewarding the guilty by a forfeiture of the sum loaned.

The vital defect in the defendants' defense is that it is not true. The contract was not made on Sunday. The drawing up and execution of the bond and mortgage were a step necessary for the defendants to take in order to consummate the loan. But it did not of itself constitute a contract. Nobody was bound by it, and there was no contract made until the delivery of the money and papers on Monday. Besides the papers being dated on the 8th, which was a week-day, and the plaintiff having no reason to suppose they were not executed on that day, the defendants are undoubtedly estopped from showing

that they were really executed on another day, which was Sunday, because such a proceeding would operate as a gross fraud upon an innocent party.

§ 640. *Option to declare principal due upon default in payment of interest. Notice.*

There is only one other question, which is whether the plaintiff is entitled to a foreclosure for the entire amount of principal and interest, the principal not being due yet by the terms of the mortgage. The first six months' interest fell due on December, 1878. It was not paid, nor has any interest ever been paid. But the notice of the plaintiff's option to declare the whole amount due was not served until February 7, 1879, some six weeks after the ten days had elapsed, during which the defendants might pay the interest before the plaintiff could elect to declare the principal due. I think this was too late, and that the option should have been declared at the expiration of ten days, or within a very short and reasonable time thereafter; and that the plaintiff's decree should be for the foreclosure of the mortgage for default in the payment of interest. Decree of foreclosure for the plaintiff, with costs.

CORBETT v. WOODWARD.

(Circuit Court for Oregon: 5 Sawyer, 408-421. 1879.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This suit is brought to enforce the lien of a mortgage upon the works, tools and machinery of the Oregon Iron Works, a corporation doing business at Albina. The case was heard upon the bill, answer, replication, exhibits, and the testimony of witnesses.

The material facts of the case are as follows: On December 3, 1874, the Oregon Iron Works was duly incorporated under the laws of Oregon for the purpose of "establishing a foundry and manufacturing agricultural implements and all kinds of machinery, boilers, locomotives and iron, with power to borrow and loan money, as well as to purchase and dispose of real and personal property, and all other business pertaining to a foundry," at Albina, Oregon, with a capital stock of \$50,000, divided into shares of \$100 each. The stock was subscribed as follows: Edwin Russell, two hundred and forty-eight shares; Mrs. M. A. H. Berry, by her attorney, Edwin Russell, two hundred and fifty shares; Bernard Goldsmith, one share, and John McCracken one share — the shares of Goldsmith and McCracken being in fact given to them by said Russell to enable them to serve as directors, with the understanding that he would pay all assessments thereon. At a meeting of the stockholders, held on December 5, 1874, said Russell, Goldsmith and McCracken were duly elected directors of said corporation, and remained such directors until said corporation was adjudged a bankrupt, as hereinafter stated. At the same meeting by-laws were adopted, by which, among other things, it was provided that the officers of the corporation should consist of a president, secretary and three directors; that a regular meeting of the directors should be held at the principal office of the company at Albina, on the first Saturday in December; that special meetings might "be called at any time by the president by giving written notice of the time and place of such meeting to every director;" and that the president should have the "general care and superintendence of the business of the company," and be authorized to borrow money for its use not exceeding \$50,000, and to deposit and check for the same.

On May 28, 1875, the Oregon Iron Works, by Edwin Russell, its president,

entered into a contract with the United States to build and "deliver afloat and complete in all respects . . . at the port of Albina, opposite to Portland, Oregon, a steam propeller of about two hundred and twenty-seven tons burden," for a revenue steamer, for which it was to receive \$92,000, in five instalments of \$18,400 each, as the work progressed, upon the certificate of the superintendent of construction — the last of said instalments to be paid upon the final completion of the vessel, and "a successful trial trip at sea of not less than twenty-four hours," and on the same day executed a bond to the United States for the faithful performance of said contract in the penal sum of \$16,000, with said Goldsmith and Philip Wasserman as sureties. See *The Revenue Cutter No. 2*, 4 Saw., 144.

On March 18, 1876, John F. Steffen, a subcontractor under said corporation for the construction of the hull of said vessel, made his promissory note for the sum of \$2,000, payable three months after date to the order of said Goldsmith, who then and there indorsed the same for the accommodation of said Steffen, which note said Steffen then and there negotiated to William Druck without discount; that when said note became due it was not paid, and Goldsmith, on June 19th, indorsed thereon a waiver of notice of demand and protest, and said corporation being then indebted to said Steffen upon the subcontract aforesaid, at the request of said Steffen and with the consent of said Goldsmith and Druck, guaranteed in writing the payment of the same within sixty days thereafter, and paid it in on September 23d, with interest, amounting to the sum of \$2,146.08, — but not until after an action was commenced thereon, to wit, on September 18th, against said Steffen and Goldsmith. On and before September 21, 1876, the Oregon Iron Works was hopelessly insolvent, and thereafter, on November 18th, it was duly adjudged a bankrupt, and the defendant Woodward chosen assignee of its estate.

No assessment was ever made upon the shares of the stockholders, except one of forty per centum, on April 30, 1875, which was paid by Russell by a sale to the corporation of the river blocks in Albina, numbered 16, 17 and 18, upon which its works are erected, for \$4,000, and his note for \$6,000. The nominal paid-up capital of the corporation was therefore \$20,000, which, on January 1, 1875, as appears by its books, had been reduced to \$13,435.27. When it was adjudged a bankrupt, its liabilities, as appears from its schedules, exclusive of interest on bills payable, amounted to \$93,140.90, and its assets to \$55,246.02; but of this latter sum, \$18,791.03 consists of a claim against Steffen for damages for non-performance of his contract, which is of doubtful validity, and certainly of no value; \$17,795.07 of indebtedness due from Russell, which has no value — \$6,000 upon his note given in payment of the assessment aforesaid, and the balance, \$11,795.07, upon an open account; and \$4,077.94 due upon sundry open accounts, and \$548.77 upon bills receivable, out of which the assignee, up to February 8, 1878, had only been able to collect about \$3,000, the remainder being probably worthless. The remainder of the assets are material on hand, \$2,883.66, and portable and other engines, complete and incomplete, \$11,148.66, which were sold for less than \$8,000; the blocks 16, 17 and 18 aforesaid, and the works not valued in the schedules, but charged in the books at \$4,000, and \$29,710.85, respectively, and worth, taken together, according to the evidence, not exceeding \$20,000; so that the indebtedness exceeded the available assets at least \$63,000, or more than threefold.

Early in September, 1876, Russell went to San Francisco to obtain aid for the iron works, and while he was absent the workmen employed upon the vessel

refused to continue, unless provision was made for the payment of their wages, the corporation being unable to meet its engagements with them, whereupon Goldsmith guaranteed such payment until Russell's return, telling the secretary to keep only such hands in the mean time as were absolutely necessary. Upon the return of Russell, between the 18th and 21st of September, he informed Goldsmith that the corporation needed at least \$20,000 to complete the construction of the revenue vessel and other business on hand, and induced him, on September 21, 1876, to sign the note of the corporation for the sum of \$20,000 as surety, payable to the First National Bank of Portland one day after date, in consideration that said corporation would give him a mortgage upon its works, machinery and tools, to secure said Goldsmith against loss by reason of such signing, and would also pay him a commission of \$1,000 or five per centum of the amount of such note; and with the farther understanding between said Goldsmith and Russell, that said corporation would immediately pay the note aforesaid, held by Druck, upon which an action was then pending against Goldsmith and Steffen, and, also, as soon as they became due, two notes amounting to \$6,000, made by Russell in his individual capacity and indorsed by Goldsmith for his accommodation, and payable to Ladd & Tilton within a short time. In pursuance of this arrangement, Russell, on September 21, made the note of the corporation for \$20,000 with Goldsmith as surety, and payable as aforesaid, and with the proceeds thereof paid the Steffen note with interest, \$2,149.08, and the \$1,000 commission to Goldsmith, but did not pay the notes due Ladd & Tilton as aforesaid, but the same were afterwards paid by Goldsmith; and on September 22d, said Russell mortgaged the property of the corporation to Goldsmith to secure him against loss as aforesaid.

The authority for executing the mortgage was as follows: At a special meeting of the directors called by the president and held on September 21, 1876, in the office of Goldsmith, at Portland, about a mile distant from Albina, and but a short distance from the place of business of John McCracken, a resolution was passed, authorizing Russell to obtain the loan and execute the mortgage to Goldsmith, as president, as aforesaid; but only the directors, Goldsmith and Russell, were present at such meeting; McCracken being confined to his house by a serious illness, and unable to attend, although Russell left a written notice for him of the time and place of meeting at his place of business on the same day, and but a short time before the meeting was held, which McCracken did not receive, and could not have complied with if he had.

There was no desire or intention upon the part of Russell or Goldsmith to hold this meeting without the presence of McCracken, for it was understood and expected that both he and Goldsmith would act in all matters, if otherwise lawful, as desired by Russell, to whom, as between them, the enterprise in fact belonged, and by whom it was expected it should be controlled. At the date of this loan and mortgage the first four payments on the contract to construct the vessel had been received by the corporation, and the fifth and last one had been hypothecated to the National Bank aforesaid, to secure \$17,031.63 of a prior indebtedness to such bank of \$18,399.96; and the corporation was also indebted to Ladd & Tilton, bankers, on its notes \$16,000, nearly all of which was overdue eighteen months, and \$12,101 on overdraft.

The corporation having failed to pay said note of \$20,000, and Goldsmith being unable to do so when demanded, the latter procured Elijah Corbett to take up the same on January 3, 1877, by giving his note for the sum then due thereon, \$20,686.67, payable one day after date to the said bank, in consideration

of which said Goldsmith duly assigned to him said mortgage, and, together with Philip Wasserman aforesaid, made and delivered to him a writing, by which they undertook and agreed to make up and pay any loss which said Corbett might sustain by reason of taking up said note, he using due diligence to enforce said mortgage. The defendant maintains that the mortgage is void, and therefore the complainant is not entitled to the relief sought, because: 1. The execution of the note and mortgage was unauthorized; 2. The transaction constituted an unlawful preference to Goldsmith, contrary to section 35 of the bankrupt act (sec. 5128 of the R. S.); and, 3. In taking such preference, Goldsmith violated his trust as a director of the corporation.

§ 641. *In Oregon a mortgage is a chose in action and passes to an assignee subject to all the equities between the mortgagor and mortgagee.*

This mortgage was given to Goldsmith to indemnify him against loss as surety upon the note of the corporation to the bank, and as a contract it included only himself and his principal. And although the mortgage and note are a part of the same transaction, yet the former was not given to the bank to secure the payment of the latter, and therefore it is not an incident of it, and does not in equity pass with it, as such, to a third person. Neither is it a negotiable instrument, which would, under the law merchant, pass into the hands of a third person, by indorsement or delivery, freed from any equities or defects which might attach to it as between the original parties to it. It is a mere chose in action, and passes by assignment subject to the equities existing between the mortgagor and the mortgagee. Therefore, in this suit, the complainant, Corbett, stands in the place of his assignor, Goldsmith, with the same, and no other, rights in the premises. *In re Kansas City, etc.*, 9 B. R., 82; *United States v. Sturges*, 1 Paine, 534; *Fales v. Mayberry*, 2 Gall., 564. The question arises, then, was this note and mortgage authorized by the corporation? The power conferred upon the president by the by-laws, to borrow money when the necessity of the corporation might require it, has been invoked by the complainant to sustain the loan, but as the limit of this authority, \$50,000, had already been exceeded by the president, no support to the transaction can be derived from this source. It is also contended by the defendant that the use of the money obtained by the loan in the affairs of the corporation was a ratification of the act of the president in making it. The authorities cited in support of this proposition are all cases where there was a formal ratification of an informal or unauthorized act by the directors or governors of the corporation assembled in a formal meeting. But in this case, there never was any meeting of the directors after the making of the note and mortgage, and therefore there could be no ratification by them. A corporation acts by its directors; and to do so, they or a majority of them must meet together as a board, and that fact, and their action thereat, must appear from its records. *In re St. Helen Mill Co.*, 3 Saw., 92.

§ 642. *Meeting of directors of a corporation at a place other than its usual offices.*

Failing upon these points, the complainant maintains that the note and mortgage were duly authorized at the meeting of the directors on September 21st. The defendant objects to the authority of this meeting, that it was not duly called, and the directors not being all present, it had no authority to act. It is claimed that the meeting was not duly called, because not called at the place where the corporation had its principal place of business, and because McCracken was not duly notified of it. There is nothing in the corporation act of

this state which requires the directors of a corporation to hold their meetings at the place where it has its principal office or place of business, or elsewhere. The statute is silent upon the subject. The matter is left where it properly belongs, to be regulated by the by-laws of each corporation to suit its own convenience. The by-laws of this corporation provided for the holding of one regular meeting a year, of the directors, at its principal office or place of business, Albina, and gave the president unqualified authority to call special meetings at any time by giving written notice of the time and place thereof. The plain inference from this is, that the president was authorized to name the place as well as the time of a special meeting, and therefore he might exercise his judgment in the premises, and name some other place than Albina — Portland, for instance, the place where the other two directors lived, and carried on business, and could most conveniently attend such meeting.

The notice to McCracken was a written one. It was left by the president at his place of business, and was doubtless sufficient to have secured his attendance if he had not been confined to his house by illness. His indisposition appears to have been well known, and the notice to him was naturally regarded somewhat as a matter of form. The corporation act, section 11 (Or. Code, p. 527), provides that the powers vested in the directors may be exercised by a majority of them. True, the by-laws of this corporation provided that all the directors should have notice of the time and place of a special meeting. But no particular notice is prescribed, and I think, under the circumstances, this was sufficient. Indeed, it is not certain that in this case it was absolutely necessary to give notice to McCracken at all. The business of the corporation could not nor need not be delayed to await his recovery; and if he was clearly too ill to attend, notice to him would have been a useless act. But, be this as it may, such notice was left for him at his place of business as gave him an opportunity, if he had been able, to be present at the meeting. The note and mortgage having been fully authorized by the directors, and duly executed by the president and secretary, was the transaction an unlawful preference to Goldsmith under the bankrupt law?

As counsel for the defendant admits, to bring this transaction within section 35 of the bankrupt act (sec. 5128 of the R. S.), it is necessary to show: 1. That the corporation was insolvent at the date of the mortgage; 2. That Goldsmith was then a creditor of the corporation or under a liability for it; 3. That the mortgage was made with a view to give Goldsmith a preference; and, 4. That the latter had reasonable cause to believe that the corporation was insolvent, and that he knew the mortgage was made in fraud of the law. About the insolvency of the corporation there can be no doubt; and if Goldsmith was a creditor of the corporation or under a liability for it, and the money obtained upon the transaction was applied upon his claim, or to discharge such liability, then he received a preference, and the reasonable inference is, that the mortgage was made with that view — for that purpose. *Toof v. Martin*, 13 Wall., 48; *In re Sutherland*, 1 Dedy, 348. But upon the facts it does not appear that Goldsmith was a creditor of the corporation or under any liability for it.

§ 643. *The indorser of a note for the maker, which is guarantied by a third person who pays it, is under no obligation for such third person.*

The claim of the defendant is, that Goldsmith was under a liability for the corporation upon the Steffen note. But certainly this is not well founded. Goldsmith's relation to this note was simply that of an accommodation indorser for Steffen. He thereby came under a liability for Steffen, but for no

one else. Nor was his relation thereto changed by the fact that the corporation subsequently guarantied its payment. The only effect of this was to put the corporation under some sort of liability for Goldsmith. Neither did the transaction make Goldsmith a creditor of the corporation, although that was probably the effect of it as to Druck. The plain fact is, that the corporation agreed to pay this note to Druck for Steffen, because it was indebted to Steffen and unable to pay him, and the subsequent payment of it out of the money obtained on this note and mortgage, if it operated as a preference at all, it operated as a preference in favor of Druck and Steffen, and not Goldsmith.

§ 644. *The surety on a bond which is not forfeited is not "under a liability" for his principal within the meaning of section 35 of the bankrupt law.*

It is also claimed by the defendant that Goldsmith, being on the bond of the corporation for the construction of the vessel, was to that extent "under a liability" for it; that this money was procured for the purpose, and applied to the discharge of such liability by paying the debts incurred in its construction, and purchasing labor and material for its completion. It is difficult to say upon the evidence what disposition was made of all this \$20,000, but it appears probable that the greater portion of it was applied as suggested. But the bond was not forfeited—at least no claim to that effect was or is made, and the reserved or last payment was largely in excess of what was necessary to complete the vessel. Goldsmith's liability on the bond was yet contingent and not absolute. In my judgment, the liability contemplated by the statute is an absolute, and not a contingent one. No authorities on this point have been cited by counsel for either party. In *Bean v. Laffin*, 5 B. R., 333, it was held that when the principal on a note, though insolvent, paid it at maturity and was adjudged a bankrupt, that the assignee could not recover it from a co-maker who was a surety in fact, because his liability up to the maturity and payment of the note was contingent, and never became absolute, and therefore was not "benefited" by such payment in the legal sense of the term. This ruling is in consonance with the provisions of section 19 of the bankrupt act, and the decisions thereunder, to the effect that contingent liabilities, including that of an indorser prior to demand and notice, are not debts provable in bankruptcy. See sec. 19, Bankrupt Act; sec. 5067 *et seq.*, R. S.; *In re Loder*, 4 B. R., 190; *In re Nickodemus*, 3 *id.*, 231. The case of *Bartholow v. Bean*, 18 Wall., 635, cited by the defendant, which arose out of the same bankruptcy as *Bean v. Laffin*, *supra*, does not differ from this; for there, although the payment by the insolvent debtor and principal of the note was held to be a preference to his indorser, the liability of such indorser had already become fixed and absolute.

§ 645. *A mortgage made with a view to give a preference.*

This mortgage is also claimed to be void on the further ground that the transaction was had with a view to procure money to pay the individual notes of Russell, amounting to \$6,000, due Ladd & Tilton, upon which Goldsmith was an indorser. But there are three answers to this claim, either of which are sufficient: 1. The individual debt of Russell to Ladd & Tilton was not the debt of the corporation, and whatever liability Goldsmith might have been under on account of it, it was for Russell and not the corporation which is alleged to have made this mortgage with intent to give a preference. 2. So far as appears, Goldsmith's liability upon those notes was yet contingent and not fixed—they were not yet due. 3. The purpose to pay these notes with this money was never carried out, and the amount was otherwise applied by the

corporation, without in any way benefitting Goldsmith. Indeed, Russell failed to pay the notes at all, and Goldsmith was compelled to pay them himself. An intention to prefer or to make any unlawful use of this money did not affect the legality of the transaction, if it was never carried into action.

But admitting that this mortgage is valid, notwithstanding the bankrupt law, the defendant insists that it is void in equity, because, the corporation being insolvent, Goldsmith, as a director, by means of this transaction, secured an advantage to himself at the expense of the creditors of the corporation, in plain violation of his trust. In support of this, it is claimed that Goldsmith, being liable to pay the Steffen note and the two individual notes of Russell, as a director, authorized and procured this loan and mortgage with the understanding and for the purpose of obtaining funds, by mortgaging the principal property of the corporation to pay off these notes, and thus free himself from such liability at the expense of the creditors. So far as the Russell notes are concerned the transaction is valid. For, although the loan and mortgage was undoubtedly made with a view, among other things, of raising money to pay them with, yet the fact being that for some reason the money was not so applied, the creditors of the corporation suffered no inconvenience on that account. But as to the Steffen note the circumstances are different. At the date of the mortgage, Goldsmith, although not a creditor of the corporation, was liable as a principal upon the Steffen note. This instrument was overdue, and he had waived demand and notice. The guaranty of the corporation did not affect him. That was merely a collateral security to the holder. It is even doubtful if there was any extension of time of payment as to Goldsmith and Steffen. The guaranty of the corporation was that the note should be paid in sixty days, but there was no agreement between Druck and Goldsmith and Steffen, or either of them, that they should have any further time to pay in. But assuming that the agreement between Druck and the corporation impliedly extended the time of payment sixty days, that did not discharge Goldsmith from his liability. In the first place, the note being overdue, and demand and notice having been waived, Goldsmith's liability was no longer contingent, that of an indorser, but absolute, that of a maker or principal. But if the supposed extension had been given while he was yet only an indorser, he would not have been discharged thereby, because: 1. The agreement or guaranty was not between the principal in the note, Steffen, and the indorsee, Druck, but between the latter and a third person, the corporation; 2. There was no consideration for the supposed agreement to extend the time, as between Druck and Steffen; and, 3. If the facts were otherwise in these particulars, it is manifest that the agreement between Druck and the corporation, which it is claimed operated as an extension of time as to Steffen, was made in the interest of Goldsmith, and with his full knowledge and assent, and therefore he cannot claim to be discharged by it. Upon these points it is unnecessary to consume time in argument or citation of authorities. It is sufficient to refer to Daniel on Neg. Inst., sec. 1312 *et seq.*

It is also contended that Goldsmith was not aware of the insolvency of the corporation, Russell having told him at the time that it was "prosperous and perfectly solvent." It is difficult to see how a director of this corporation could have been ignorant of its insolvency, except upon the theory that he was a director only in form, and knew nothing thereby of its internal arrangement or affairs, and this appears to have been the character of Goldsmith's directorship. It was probably accepted and held by him as a matter of form to accom-

modate Russell in an enterprise which substantially belonged to the latter, and in which he had nothing invested.

§ 646. *A director of a corporation is a trustee for stockholders and creditors.*

But, be this as it may, the law will not permit a person to become a director in a corporation, and neglect the duties and avoid the responsibilities thereof, as to third persons, with impunity. A voluntary ignorance of what it is his duty to know and understand is no excuse for him when the rights of others are in question. By becoming a director, which includes the taking an oath to "faithfully and honestly discharge" the duties of the office, he engages to take good care of the interests of the stockholders and creditors intrusted to his charge, and this necessarily implies that he will use due diligence to keep himself properly informed concerning the same. An examination of the books of the corporation at any time for a considerable period of time prior to the date of the mortgage would have shown Mr. Goldsmith that it was insolvent; and that as far back as January 1, 1876, it had sunk nearly \$7,000 of its nominally paid up capital. A director of an incorporation is a trustee of its property and assets for its stockholders and creditors, and it is contrary to the first principles of equity that he should deal with such property for his own advantage and to their injury. *Koehler v. Black River Co.*, 2 Black, 720 (§§ 1236-40, *infra*); *Drury v. Cross*, 7 Wall., 302 (§§ 1643-45, *infra*); *Butts v. Wood*, 38 Barb., 188; *Curran v. State of Arkansas*, 15 How., 527 (CORPORATIONS, §§ 1316-1329; *Sawyer v. Hoag*, 17 Wall., 620; *Bradley v. Farwell*, 1 Holmes, 437.

In *Koehler v. The Black River Co.*, *supra*, the corporation being in embarrassed circumstances, the directors secured debts due some of themselves to the prejudice of the other creditors. In delivering the opinion of the court Mr. Justice Davis says: "Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and are obliged, by accepting that trust, to execute it with fidelity; not for their own benefit, but for the common benefit of the stockholders of the corporation. In executing this mortgage, and thereby securing to themselves advantages that were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees." In *Drury v. Cross*, *supra*, the directors of a corporation provided for the payment of debts upon which they were liable as indorsers, with the assets of the corporation. In delivering the opinion of the court Mr. Justice Davis says: "The transaction which this case discloses cannot be sustained in a court of equity. The conduct of the directors of this railroad company was very discreditable and without authority of law. It was their duty to administer the important matters committed to their charge for the benefit of all parties interested, and in securing to themselves advantages not common to the others, they were guilty of a plain breach of trust."

In *Bradley v. Farwell*, *supra*, the directors of an insolvent corporation transferred its assets to a creditor composed of a partnership of which one of them was a member. The transaction was declared void, and the court, Shipley, J., says: "The fiduciary relation between the directors and the creditors being established, and the fact that the trustees in dealing with the trust fund have secured to themselves a benefit or advantage over the creditors, or a benefit or advantage to themselves as creditors over and above other creditors, taints the transaction and invokes the aid of a court of equity to see to the right execution of the trust. Not that the trustees cannot prefer one creditor to the others at common law, and outside the provisions of the bankrupt act, but that,

in equity, a trustee cannot contract with himself as he may with a third party. If he exercises in his own favor the powers he may rightfully exercise in favor of another, the court does not stop to inquire whether he gained or lost. It is enough that the beneficiary is dissatisfied with the transaction for the court to set the transaction aside, without requiring the beneficiary to prove actual loss or fraud."

The \$1,000 taken out of this loan by Goldsmith as a compensation for going on the corporation note, in my judgment comes within the spirit of the rule laid down in these authorities. The transaction was in fact a dealing with a trust fund by a trustee — a dealing with himself, that is liable to great abuse, and I think ought not to be tolerated. When Goldsmith went security for his corporation for a loan for the benefit of its business or creditors, it was so far proper and right that he should be indemnified by a mortgage of its property; but to take five per centum, or any other portion, of the loan as a compensation for an act which was voluntary, and for which he was secured against loss, appears to me to have been an unlawful appropriation of the trust fund.

The great extent to which corporations have become the agency through which the business of the country is transacted, and its property is held and managed, makes it necessary that the salutary rules enforced by courts of equity in other cases of fiduciary relation should be rigidly applied to the numerous and important trusts held by the managers of these organizations. And in the case of insolvent corporations, like the Oregon Iron Works, there is every reason to exact the most scrupulous conduct at the hands of their directors when dealing with the trust property. As was well said in *Bradley v. Farwell, supra*: "Standing in a fiduciary relation as it were at the bedside of a dying friend, if they are subsequently found in possession of a portion of his effects, they must show title by a conveyance, untainted by the exercise of that power which the trust relation gave them to influence the disposition made by the decedent of his property in their favor to the prejudice of others having equal claims to the inheritance." Goldsmith also admits that at the time of making the mortgage he was under a liability for the corporation of \$125, due the workmen on the vessel, which he had guarantied the payment of, and which was paid out of this loan, and expected to be. Standing by itself, the rule *de minimis non curat lex* might have applied to so small a matter as this, compared with the magnitude of the transaction, but as it is, it must be added to the other circumstances of the transaction which the law pronounces unlawful.

§ 647. *A mortgage founded in part on a legal, and in part on an illegal, consideration.*

Much has been said by counsel about the knowledge and purpose with which Goldsmith participated in this transaction. It is probable, as has been suggested, that he regarded his official relation to the subject as one of mere form, and did not stop to consider or was unaware that in law he was a director under the same obligation to the creditors of the corporation as if he had been actually engaged in the management of its affairs and familiar with its financial condition. So far as the payment of the Steffen note is concerned, the taking of the commission for signing the corporation note, and the payment of the sum guarantied to the workmen, I find that the consideration for this mortgage is unlawful, because the transaction was so far contrary to equity and the rules prescribed for the conduct of trustees; but I do not find a conscious purpose or actual intention upon the part of Goldsmith to gain an advantage for himself at the expense of the creditors of the corporation, although such was the effect.

of his conduct, viewed in the light of all the circumstances, including the final result.

It remains to be considered what is the effect of this illegality upon the mortgage. Does it avoid it wholly or *pro tanto*, only so far as the illegal consideration extends? The matter is not free from doubt, and was not noticed by counsel. But I think the better rule is, that where the illegal consideration is clearly separable from the legal, that the contract is good for the latter, and only void as to the residue. In *Denny v. Dana*, 56 Mass., 161, it was held that a mortgage of personal property, which, as to some of the debt thereby secured, was contrary to the solvent laws, is wholly void. But in *Bucknam v. Goss*, 13 B. R., 343, the correctness of this rule is questioned, and Fox, J., expressed the opinion that where a certain part of a loan became part of the assets of the debtor's estate, that the assignee should not be allowed to avoid the security therefor; and in *In re Stowe*, etc., 6 B. R., 431, the same judge held that, when a mortgage is given for a debt which was an unlawful preference, and another that was not, it was valid as to the latter though void as to the former.

In *United States v. Bradley*, 10 Pet., 343, it was held that a deed may in many cases be good in part, and void for the residue, where the residue is founded in the illegality, but not *malum in se*. The illegal consideration in this case is the sum paid on the Steffen note, \$2,149, the sum paid to a director as commissions, \$1,000, and the wages guaranteed by him, and paid by the corporation out of this loan, \$125, making in all the sum of \$3,274; which, deducted from \$20,000, leaves \$16,726, which sum, with interest at one per centum per month from the date of the mortgage, makes the amount \$19,569.42, for which the complainant is entitled to a lien upon the premises from the date of the mortgage, and to a sale of them to satisfy the same; and there will be a decree accordingly.

§ 648. A mortgage founded on a past consideration is valid. *Wright v. Shumway*, 1 Biss., 28 (§§ 435-439).

§ 649. The fact that a mortgagor was unable to read, and that the mortgage was not read to him, does not enable him, in the absence of proof of fraud on the part of the mortgagee, to object that the instrument contains an unauthorized stipulation, especially when it was drawn by his own agent. *Wilson v. Winter*, 6 Fed. R., 16 (§§ 637-640).

§ 650. A mortgage covering a large amount of property, purporting to secure the sum of \$90,000, but having no other foundation than a debt of \$4,000, is fraudulent as against creditors, because it has the appearance of an attempt to place a large amount of property beyond the reach of creditors and with pretense of paying a small sum. *Hubbard v. Turner*,* 2 McL., 519.

§ 651. A conveyance in fraud of the law binds parties and privies, and is not a nullity. *Randall v. Phillips*,* 3 Mason, 378.

§ 652. Usurious interest by way of lease.—Where a mortgage was given to secure a loan of \$3,000, without any agreement about interest, but the mortgagee, in accordance with an agreement made at the time, leased the mortgaged premises to the mortgagor at an annual rent of \$270, it was held that the lease was made to secure usurious interest and was void; but legal interest was allowed for the whole period upon the mortgage. *Gordon v. Hobart*, 2 Story, 243, 262.

§ 653. Usurious interest must be proved.—Where a contract on its face is for legal interest only, a corrupt agreement must be proved to establish the fact that it is usurious. *Hotel Co. v. Wade*, 7 Otto, 18 (§§ 1440-46).

§ 654. What law governs.—Where a mortgage of land in Michigan was executed in New York, the mortgagee then residing there, where also the mortgage was made payable, and the rate of interest was ten per cent., which was usurious in the latter state, but was valid in the former, it was held that the mortgagee might elect to proceed to enforce the mortgage in Michigan; for it was to be presumed that the contract was made with reference to the interest laws of that state. *Fitch v. Remer*, 1 Flip., 15.

§ 655. In a suit in Oregon to enforce a mortgage made in that state on land situate there, it appeared that the plaintiff was a foreign corporation which had not complied with the Oregon law by appointing an attorney resident there; that through its agent at Portland, Oregon, it contracted with defendant to loan him \$10,000 on his note, which was given, payable at Dundee, Scotland, and secured by mortgage. Only \$9,800 was paid on the note. Default of payment having taken place, a bill was filed, and upon the hearing it was held that the contract was not usurious, but that, having been made in Oregon contrary to the laws thereof regulating foreign corporations, it was invalid. A rehearing was granted and a reargument had before the district judge. Upon the first hearing, it was held that a note made in Oregon to be paid in Scotland is subject to the laws of that country, but that the mortgage to secure such note on real estate in Oregon must be governed by the laws of Oregon. The case was then reargued again on the ground that the provisions in the statute of the state in regard to foreign corporations did not apply to the complainant corporation, because this statute by its title referred to "insurance, banking and express companies," and the complainant corporation was neither of these. The constitution of the state provides that every act shall embrace but one subject, which shall be expressed in the title. It was held that the act in question did not apply to the complainant corporation, which was, therefore, entitled to the relief sought. *Oregon & W. T. & I. Co. v. Rathbun*,* 5 Saw., 32.

§ 656. Although the law of the place of contract governs as to the question of usury, yet a law of the place of contract relating to the manner of enforcing the remedy is not binding upon the courts of another state. Thus a statute of the state of New York, authorizing a borrower to obtain a cancellation of securities without payment, upon the ground of usury, will not be enforced in Massachusetts. *Matthews v. Warner*, 6 Fed. R., 461 (§§ 735-737).

XIII. MORTGAGOR'S RIGHTS AND LIABILITIES.

SUMMARY—*In Oregon mortgagor entitled to possession until foreclosure, § 657.—Rents when receiver has been appointed, § 658.—Possession by grantor, § 659.—Mortgagor cannot deny seizin, § 660.—Acquiring outstanding title, § 661.—Acquiring outstanding title after discharge in bankruptcy, § 662.—Mortgagee may have action for injury to the security, § 663.*

§ 657. In Oregon a mortgage is a mere security for the debt, and the mortgagor is the owner and entitled to possession until foreclosure and sale. The mortgagee has no right to take possession, though he can do so peaceably, without the consent of the mortgagor. Without such consent the mortgagee's entry is tortious and can avail him nothing. *Witherell v. Wiberg*, §§ 664-636.

§ 658. In Indiana the mortgagor is entitled to the rents of the mortgaged premises, though a receiver of the property has been appointed, until the rents are intercepted and applied to the mortgage debt by an order of court. *Hunter v. Hays*, §§ 667, 663.

§ 659. Where, in a deed of trust to secure a debt, it is provided that the grantor may remain in possession until default, when he shall surrender possession upon demand, it has been held that the grantor's interest is not an estate upon condition, but an estate upon a conditional limitation which terminates with the happening of the contingency, and the right of possession would cease without any entry or demand, except for the contract to make demand. The demand in such case is not a demand for the purpose of avoiding the estate, but in fact a mere notice to quit upon a tenant at will. If the grantor or his assignee wrongfully refuses to surrender possession after such demand, he is liable to the trustee in damages. *Walker v. Teal*, §§ 669-673.

§ 660. A mortgagor is estopped by his deed from denying seizin. His only defenses are payment, want of consideration or fraud. *Bush v. Marshall*, §§ 673-675.

§ 661. If the mortgage has been given in part payment of the purchase money to one of whom the mortgagor has purchased the property by deed of warranty, the mortgagor cannot defeat his mortgage by purchasing the outstanding title. Having purchased such title, he can only require the amount he has paid for the outstanding title to be refunded to him by his vendor. *Ibid*.

§ 662. A discharge in bankruptcy, obtained by the mortgagor, releases him from his personal debt, but does not destroy the covenant contained in his mortgage; and, therefore, if after his discharge he purchase the property at a sale under a prior incumbrance, he is still estopped to set up this title as superior to the title conferred by his mortgage. *Bush v. Person*, §§ 676-679.

§ 663. A mortgagee may have an action for an injury done to the mortgage security by a third person, if the mortgagor is insolvent. *Morgan v. Gilbert*, § 680.

[NOTES.—See §§ 681-687.]

WITHERELL v. WIBERG.

(Circuit Court for Oregon: 4 Sawyer, 232-240. 1877.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—'This action is brought by the plaintiff, as a citizen of New Jersey, against the defendant, as a citizen of Oregon, to recover the possession of the undivided one-half of two hundred and twenty-two acres of land, situate in Multnomah county. Among other defenses, the answer contains a plea that the defendant "has a right to the possession" of the premises; "that the nature and duration of said right is that of a mortgagee in possession under a certain mortgage executed by H. F. Davis, the owner of said lands in fee, to I. A. Davenport, on January 11, 1859, of which defendant is assignee, and upon which there is now due the sum of \$4,786; and that he is entitled to the possession of said property until the payment of said amount due upon said mortgage.

§ 664. *A plea that defendant is in possession as assignee of an unsatisfied mortgage is frivolous. Sham and frivolous defenses considered.*

The plaintiff moves to strike out this defense "because the same is sham, redundant and frivolous." The defense is neither sham nor redundant. A sham defense is one which is palpably false. *Bachman v. Everding*, 1 Saw., 72; *Hadden v. N. Y. S. Man. Co.*, 1 Daly, 388. Nothing appears from which the court could even surmise, let alone declare, that this plea is false. If redundant matter be inserted in a pleading, it may be stricken out on motion. Sec. 84, Or. Civ. Code. But an answer or defense cannot be stricken out, as a whole, upon the ground of redundancy. Redundancy consists in irrelevant allegations or unnecessary repetitions, or perhaps prolixity of statement of such as are material; and the motion to strike out must be directed at such allegations, repetitions or statements. *Bowman v. Sheldon*, 5 Sandf., 657; *Fasnacht v. Stehn*, 53 Barb., 651. Section 74 of the code authorizes an answer or defense to be stricken out as a whole if it be frivolous. Under the New York Code (sec. 247) the plaintiff, in case of a frivolous answer or defense, is entitled on motion to judgment on the pleadings. An answer or defense is frivolous when it contains nothing which affects the plaintiff's case—when it denies no material averments of the complaint and sets up no defense thereto. *Hall v. Smith*, 1 Duer, 641. Counsel for the plaintiff maintains that this plea contains no defense to this action, because: 1. It does not comply with section 316 of the Civil Code, which provides that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license, or right to the possession, shall be set forth with the certainty and particularity required in the complaint;" and 2. It does not allege that the defendant took possession of the premises with the consent of the mortgagor.

On the argument it was suggested by counsel for defendant that the phrase, "nature and duration of such estate," etc., was uncertain, and therefore it was difficult to say how much or how little particularity and detail is required in a defense of this kind. But the force of the suggestion is not perceived. The "duration" of an estate, whether it be in fee or at will, signifies the quantity or duration of the tenant's interest in the premises. The term is well known to the common law. 2 Black., 103; 1 Wash. St., 45. To set forth in a plea, then, the duration of the estate or right to the possession which a defendant

may claim in the premises, is simply to state the quantity of his interest therein, or the length of time he is entitled to the possession thereof. The "nature" of an estate signifies its qualities or incidents, without reference to its duration or extent, as that it is upon condition, or is held jointly or in severalty. This term is also well known to the common law. 2 Black., 152, 178; Wash. St., 406. To set forth this "nature" and duration, then, in an answer, "with the certainty and particularity required in a complaint," must ordinarily be a very simple matter. It is sufficient to allege that the party is the sole or part owner in fee-simple or upon condition, or for life or years, of the premises, as the case may be; or, in case of some special license or right to the possession for a limited time or special use, to state succinctly the license or right to the possession as claimed, with the necessary facts constituting it.

This defense may be insufficient on demurrer for not stating the fact directly with the circumstance of time that the mortgage or debt secured thereby was duly assigned to the defendant, instead of the allegation, "of which the defendant is the assignee." But it is not frivolous on that account. The fact is stated that the defendant is the assignee of the mortgage, and if that is deemed insufficient or too uncertain, the objection must be made by demurrer or motion to make more definite and certain." Secs. 66, 84, Civ. Code. But, if it is necessary that it should appear that the defendant is in possession with the consent of the mortgagor or his assignee, I suppose this defense is frivolous. This is a question upon which this court follows the law of the state, as expounded by its supreme court.

§ 665. *The title of a mortgagee at common law. How modified by equity.*

At common law a mortgagee in fee of land is considered as absolutely entitled to the estate, subject to its being defeated by the grantor's performance of the condition in his deed — as the payment of a sum of money in a prescribed time and manner; and also, if so provided, to the grantor's right to occupy until a failure to perform the condition. But upon such failure the mortgagee at once becomes the absolute and unconditional owner of the estate. 1 Wash. St., 510; 4 Kent, 154. But this doctrine was long since modified by the courts of equity. In *Osborn v. Scarf*, 1 Atk., 603, Lord Hardwicke laid down the rule that the mortgagor in possession was the owner of the land; and in *King v. St. Michael's, Doug.*, 602, Lord Mansfield held that the mortgage was only a security, saying: "It is an affront to common sense to say the mortgagor is not the real owner." The doctrines of equity on this subject have been gradually recognized by courts of law, so that a half century ago Chancellor Kent could exultingly say: "The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." 4 Kent, 158. At this day, in some of the states, notably New York, Wisconsin and California, the equitable doctrine has been followed to its logical results, so that a mortgage is there considered a mere chose in action, a security for the debt, while the mortgagor is considered the owner of the premises, subject only to the lien of the mortgage until a foreclosure and sale. *Jackson v. Willard*, 4 Johns., 42; *Runyan v. Mersereau*, 11 Johns., 538; *Waring v. Smith*, 2 Barb. Ch., 135; *Jackson v. Bronson*, 19 Johns., 325; *Gardner v. Heartt*, 3 Denio, 234; *Kortright v. Cady*, 21 N. Y., 363; *Trim v. Marsh*, 54 N. Y., 603; 4 Kent, 157; *Russell v. Ely*, 2 Black, 576; *McMillan v. Richards*, 9 Cal., 409; *Fogarty v. Sawyer*, 17 Cal., 592; *Dutton v. Warschauer*, 21 Cal., 621; *Kidd v. Teeple*, 22 Cal., 262; *Bludworth v. Take*, 33 Cal., 264.

§ 666. *In Oregon a mortgage is a mere security for a debt.*

This result has been facilitated by the force of legislation, of which section 323 of the Oregon Civil Code is a substantial copy. It declares, "A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover the possession of the real property without a foreclosure and sale according to law." In *Kortright v. Cady*, *supra*, the court, in speaking of this statute, says "that the legislature in enacting it undoubtedly supposed they had swept away the only remaining vestige of the common law which regarded a mortgage as a conveyance of the freehold."

In *Anderson v. Baxter*, 4 Or., 110, the supreme court of this state held that "a suit to foreclose a mortgage is not for the determination of any right or claim to or interest in real property, but a proceeding to have the mortgaged property adjudged to be sold to satisfy the debt secured thereby. . . . It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it." This is equivalent to saying that the mortgage is a mere security for the debt, and that the mortgagee acquires no interest in the property by virtue of the mortgage, but only the right to subject it, according to a prescribed proceeding, to the satisfaction of his debt. In *Roberts v. Sutherlin*, id., 222, the same court, commenting upon the case of *Anderson v. Baxter*, said that it was therein determined "that the execution of a mortgage does not vest in the mortgagee any title to or interest in the mortgaged premises, but that it is only a security for a debt, similar to that created by a judgment." In effect, this squares with the celebrated *dictum* in *Gardner v. Heatt*, *supra*: "The mortgagee has neither a *jus in re* nor *ad rem*, but a specific lien, similar in character to a general lien created by a judgment upon the land of the judgment debtor." In *Roberts v. Sutherlin* the action was ejectment, and the defendant pleaded that the premises were mortgaged to secure the payment of a certain sum of money of which a certain portion was still due, and that the mortgage was duly assigned to the defendant, who "entered into the possession of the premises with the full assent of plaintiff."

On demurrer this was held a good defense, the court saying that while, by reason of section 323, *supra*, "a mortgagor cannot against his will be divested of his possession of the mortgaged premises, even after a default, without a foreclosure and sale, . . . we know of no law or of any good reason to prevent the mortgagor from placing his mortgagee in possession of mortgaged premises if he chooses to do so. . . . And when the duration of the possession of the mortgagee thus acquired is not limited by his agreement with the mortgagor, we think that the legal effect of the same is, that he may retain it until his mortgage debt is paid. And we do not think that this doctrine conflicts with the rule that a mortgage is simply a security for a debt, and vests in the mortgagee no legal title to or interest in the mortgaged premises." From these decisions it appears that the rights of parties to a mortgage in this state are governed by what is called the doctrine of equity, as distinguished from the original common law rules on the subject. As was said by Mr. Justice Field, in *McMillan v. Richards*, *supra*, "the original character of mortgages has undergone a change. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side and security for its repayment furnished on the other. They pass no estate in the land, but are mere securities, and default in payment of the money secured does not change their character."

Notwithstanding this change in the law of mortgages, the mortgagee is still so far favored that, if after default in the payment of the debt he acquires possession of the premises lawfully, he may hold them until the rents and profits satisfy the same. And this brings us to the real question in this case, what, under the circumstances, constitutes a lawful possession of or entry upon the mortgaged premises by the mortgagee? In *Roberts v. Sutherlin* the court said that possession obtained with the assent of the mortgagor is lawful, and no case has been found which expressly makes such possession or entry lawful without such assent. Indeed, it is impossible to conceive how a person like a mortgagee, who, in the language of *Roberts v. Sutherlin*, has "no legal title to or interest in the mortgaged premises," could lawfully enter upon and possess the same without the assent of the owner. It follows as a logical deduction from the premise that a mortgage passes no estate in the land, and a default in payment does not change its character, that a mortgagee cannot acquire lawful possession of the mortgaged premises by an entry thereon, even if peaceable, without the consent of the owner, the mortgagor. Otherwise the mortgagor might be divested of his possession against his will; and this the court, in *Roberts v. Sutherlin*, say cannot now be done.

In *Waring v. Smith*, *supra*, 135, the court say: "The only right the mortgagee now has in the land itself is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and retain such possession until the debt is paid." In *Fogarty v. Sawyer*, 17 Cal., 593, the court say that the statute preventing the mortgagee from maintaining ejectment against the mortgagor, "takes from the mortgagee all right to the possession, either before or after condition broken." In *Johnson v. Sherman*, 15 Cal., 286, the court, after stating that the possession of the mortgagee under the mortgage "does not change what was previously a security into a seizin of the freehold," says, "Possession taken by consent of the owner" — the mortgagor — "or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support." This language was quoted with approval in *Dutton v. Warschauer*, *supra*, 625; in which latter case the court say: "Although a mortgage, in this state, of itself confers no right of possession, yet, when possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be the understanding that the mortgagee is to receive the rents and profits and apply them to the payment of the debt secured." In *Russell v. Ely*, *supra*, 578, the supreme court, in commenting upon the Wisconsin statute, which prevents the mortgagee from recovering possession until the equity of redemption has expired, say: "If the mortgagee has no right to recover the possession by legal proceedings, it would seem that he should not be permitted in any other manner to obtain that possession against the consent of the mortgagor or the person holding under him." But in *Pell v. Ulmar*, 18 N. Y., 142, it is stated that if "the mortgagee obtains possession without force," he is entitled to hold against the mortgagor; citing *Van Duyne v. Thayer*, 14 Wend., 236; *Phyfe v. Riley*, 15 Wend., 254; *Watson v. Spence*, 20 Wend., 262, and *Fox v. Lipe*, 24 Wend. Now a possession obtained "without force" may also be obtained without the consent of the mortgagor, and if that is the sense in which this *dictum* is used in *Pell v. Ulmar*, it appears to stand alone, and is certainly not borne out by the authorities cited in its support. In *Van Duyne v. Thayer*, the court say: "If the mortgagee, after forfeiture, entered into

possession, either by the consent of the mortgagor or by means of legal proceedings, he may defend himself there, at least until his debt is paid." In *Phyfe v. Riley*, the language used is: "But if the mortgagee, after forfeiture, obtains possession in some legal mode other than by an action," why should the mortgagor recover the possession without paying the money secured by the mortgage?" In *Watson v. Spence*, the expression is: "If the mortgagee, as such, had obtained possession, he could still hold until payment," the court citing the last two cases, thereby indicating that the possession intended must be obtained with the consent of the mortgagor, or by legal proceedings. In *Fox v. Lipe*, it was held that a mortgagee who enters under a sale made by authority of a power in the mortgage, may defend his possession against the mortgagor, even if the authority be doubtful. And in the comparatively late case (1874) of *Trim v. Marsh*, *supra*, 604, it is said that since the statute has taken away the right of the mortgagee to recover the possession of the premises, "the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure."

Considered, then, either in the light of authority or reason, it seems that the possession of the mortgagee must be taken with the assent of the mortgagor. Upon the modern doctrine concerning the nature and effect of mortgages, which appears to prevail in this state, the mortgagee has no interest in the mortgaged premises. His lien is likened to that of a judgment lien creditor. His right is to have satisfaction of his debt, and his remedy, as mortgagee, is not a right to take possession of the premises, but to have them sold upon judicial proceedings. This being so, he cannot lawfully enter upon the mortgaged premises without the consent of the owner, any more than the judgment lien creditor can enter upon the lands of his debtor. Because the premises happen to be vacant, or the mortgagor's back turned, and the mortgagee is thereby entitled to get upon them without a breach of the peace, this does not make his entry lawful. A person cannot lawfully enter upon the lands of another without some right or authority for so doing. A peaceable entry is not *per se* lawful. An entry without right or authority, however peaceable, is tortious, and cannot avail the party making it anything. As the mere relation of mortgagor and mortgagee does not give the latter the right to enter and occupy for any purpose or time, the authority to do so, if any exists—apart from legal proceedings—must arise out of some contract, consent or agreement with the mortgagor by matter collateral to and independent of the mortgage.

It follows that, as this plea does not show any right or authority in the defendant to take possession of or occupy the premises as against the owner, the plaintiff, it is frivolous and worthless. The motion to strike out is allowed.

HUNTER v. HAYS.

(Circuit Court for Indiana: 7 Bissell, 362-364. 1877.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—The plaintiff brought suit in the Putnam circuit court against the bankrupt to foreclose a mortgage on a lot in Greencastle and a stock of goods. Subsequently Hunter and others brought other suits in the same court, which were consolidated with the suit to foreclose. On the 19th of February, 1873, Samuel Woodruff was appointed receiver in the cause and

took possession of the mortgaged property. Before the commencement of any of the suits in the state court, a petition was filed in this court to force Beauchamp into bankruptcy, and, on the 25th of August, 1873, while the case was pending in the state court, an order of adjudication was entered. On the 29th of October, 1873, Silas A. Hays, who had been appointed assignee, was admitted to answer in the state court, and on the same day, by agreement of all parties, the suit was transferred to this court. The receivership was not disturbed until the 5th day of January, 1874, when the receiver settled with the assignee and delivered to him all the assets, including the real estate.

Hunter rented the real estate from the receiver, shortly after his appointment, and continued in possession, paying rent to both the receiver and the assignee until some time in 1875, when the mortgaged premises were sold. The master held the mortgage void so far as it related to the goods; that the mortgage should be foreclosed on the real estate, and that the rents which accrued pending the proceedings to foreclose belonged to the assignee of Beauchamp, the mortgagor, and not to Hunter, the mortgagee. The exceptions to the master's report giving the assignee the rents seem to be the only real controversy in the case. It was conceded in argument that the real estate was at all times insufficient to pay Hunter's claims, and that the general assets were small compared with the debts proved.

§ 667. *According to the law of Indiana, possession of the mortgaged premises belongs to the mortgagor, unless otherwise agreed upon.*

Section 1 of an act of the legislature of the state concerning mortgages, approved May 4, 1852 (2 Davis' Indiana Statutes, 333), declares that, "unless a mortgage specially provides that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same." Under this statute the mortgagee cannot maintain an action against the mortgagor for possession, as he might at common law, nor can he compel the tenants in possession, on notice and demand, to account to him for rents.

§ 668. — *the mortgagor is therefore entitled to the rents of the property, though it be in the hands of a receiver. (a)*

Woodruff was appointed receiver, by agreement of all the parties, for the benefit of whomsoever it might concern. The mortgagee made no demand upon either the receiver or the assignee for the rents, nor did he take any steps to have the rents applied to his debt. The receiver was not appointed at the instance of the mortgagee, and for his individual benefit. I think, on the facts of this case, the mortgagee would have been entitled to an order applying the rents to the payment of his debt. In this state, in the absence of such an order, the mortgagor, being entitled to the possession, is entitled to the rent, and if he becomes a bankrupt his assignee succeeds to this right for the benefit of his unsecured creditors. Until the rents are intercepted and applied to the mortgage debt by an order of court they belong to the mortgagor or his representatives; until then the mortgagee has no right to them. *Foster v. Rhodes*, 10 N. B. R., 523; *In re Bennett*, 12 N. B. R., 257. Exceptions overruled.

(a) Until a mortgagee takes possession, either in person or by a receiver, the mortgagor is entitled to the income derived from the property. Especially is this true in case of a mortgage of property the income of which is derived by working or operating the property. Drafts made by the mortgagee on income, and assigned to a creditor before possession is taken by the mortgagee or a receiver, cannot be subjected by the receiver to the payment of the mortgage debt. *Young v. Northern Ill. Coal & Iron Co.*, 9 Bls., 300.

WALKER v. TEAL.

(Circuit Court for Oregon: 7 Sawyer, 33-48. 1881.)

Opinion by DEADY, J.

STATEMENT OF FACTS. — The facts stated in the complaint necessary to an understanding of the question, made in the argument upon the demurrer, are these:

On August 19, 1874, the defendant Joseph Teal and Bernard Goldsmith, being the joint owners and tenants in common of the farms in question, conveyed the same to Henry Hewett by a conveyance absolute in form, but, as set forth in a contemporaneous declaration and agreement, signed by the plaintiff and defendant and said Hewett and Goldsmith, to be held by him in trust as a security for the payment of a note then made by said Goldsmith for the sum of \$100,000, and made payable to the plaintiff or order two years after date, with interest at one per centum per month, payable monthly, with a stipulation that, if default was made in the payment of the interest for the period of twenty days, the whole sum of the note should, at the option of the holder thereof, become due and payable at once. By the declaration of trust it was stipulated and provided: 1. That Hewett held the legal title to the property, subject to the right of Teal and Goldsmith to retain possession of the same, and to take and have, without account, the issues and profits thereof — they paying all taxes and public charges imposed thereon — until said note should become due and remain unpaid thirty days. 2. That if such default is made in the payment of said note, Goldsmith and Teal "will and shall, on demand, peaceably surrender to said Hewett" the possession of said property, who "may and shall proceed and take possession" of the same, "and on thirty days' notice in writing to said Teal and Goldsmith . . . requiring them to pay said debt, . . . and on their failure so to pay shall sell the same at public auction on not more than thirty days' notice," or sufficient thereof to pay the debt and charges.

On August 18, 1876, there was due upon said note the sum of \$96,750, when, at the instance of said Goldsmith, it was agreed between the plaintiff and defendant and Hewett and Goldsmith that the time of payment thereof should be extended one year, but upon the stipulation, as aforesaid, that if default was made in the payment of the principal or interest, the whole sum should "become due and payable as provided in said agreement of August 19, 1874;" and the said Goldsmith, in consideration of such extension, then conveyed to said Hewett the lots in question by a conveyance absolute in form, but, as set forth in said agreement of August 18, 1876, to be held by him as an additional security for the payment of the note aforesaid, and in the manner and for the purposes mentioned in the agreement of August 19, 1874, which agreement was not to be thereby annulled or set aside except so far as the latter might conflict with the former, but the two agreements were "to be taken and construed together." In April, 1877, Goldsmith made a conveyance of all the property which he had conveyed to Hewett as aforesaid to the defendant Teal, and gave him possession thereof. On July 6, 1877, no part of said principal having been paid, nor any of the interest arising thereon after January 21, 1877, "Hewett demanded from the defendant the possession of all said lands in pursuance of the provisions of said contracts," but the latter refused to surrender "any part" of the same, and held possession thereof until November 30, 1878, and received the rents and profits therefrom during said period. All

the lands aforesaid have been sold either at private or judicial sale, and the proceeds applied upon the plaintiff's debt, but there is still due thereon from said Goldsmith over \$50,000; and since April, 1877, he has not had any other property out of which any part thereof could be made.

Upon the argument of the demurrer it was finally admitted by counsel for the defendant that the plaintiff was entitled to the possession of the property from and after the default was made in the payment of said note — January 21, 1877,— provided there was a sufficient demand therefor, and to recover in this action such damages as he may have sustained by reason of the defendant's refusal to surrender the same. But it is contended that the demand, being for the whole property, while the conveyance by Goldsmith to Hewett, except as to the south half of lots 2 and 7, in block 38 aforesaid, only included an undivided half thereof, was too large, and therefore insufficient; citing *Hodgeboom v. Hall*, 24 Wend., 148, and *Bradstreet v. Clark*, 21 Pick., 393. Admitting, for the present, that the demand made by Hewett was larger than his right, are the cases cited to show that it is insufficient parallel with the one at bar? In the case of *Hodgeboom v. Hall*, *supra*, there was a devise of an estate to a son, upon condition that he would support his two sisters. The latter, assuming that the condition had been broken and the estate forfeited, brought an action to recover possession of their interest in the property as heirs of the deviser, but the court held, upon the facts, that there was no satisfactory evidence of any demand and refusal of support, and therefore it did not appear that the condition was broken. Here, however, there was a formal demand and refusal, but it is objected that it included more than the party was entitled to. In *Bradstreet v. Clark*, *supra*, an estate was devised upon condition that the devisee pay the legacies given by the will to the children of the deviser. Afterwards the legatees brought an action to recover the possession of the property, upon the ground that the estate of the devisee was forfeited by a refusal on the part of his grantee to pay the legacy of \$10 due one of them. On the trial it appeared from the evidence that the demand was made for the three legacies, two of which had been paid by the devisee; and the court held that the demand, although sufficient to support an action to enforce the payment of the legacy, was not sufficient to avoid the estate, likening it to the case of a leasehold estate held upon the condition of paying rent, which is not forfeited by non-payment unless there is also a demand of the precise sum due — neither a penny more nor less.

§ 669. *Circumstances which constitute an estate upon conditional limitation.*

The legal title to this property was in Hewett, for the benefit of the plaintiff, and he was therefore entitled to the possession and the permanency of the profits, from the date of the conveyances to him, but for the stipulation in the declaration of trust that Goldsmith might have the possession and profits so long as he was not in default upon his note. In effect, the plaintiff having loaned Goldsmith \$100,000, and the latter having conveyed this property to Hewett to secure the payment of that sum with interest, the parties agreed that instead of the trustee taking possession of the property at once, and applying the rents in payment of the interest accruing upon the loan, Goldsmith might remain in possession while he paid the interest. The only interest or estate, then, which the defendant had in this property at the time of the demand, as the assignee of Goldsmith, was the possession — so long as the latter duly paid the interest accruing upon his note, and no longer. This, then, was not an estate upon condition, and therefore it was not necessary that there

should have been either an entry or claim (demand) to avoid the estate, upon the breach of the condition, but it was an estate upon a conditional limitation — an agreement for the possession so long as the interest was paid — a possession limited by that contingency, and as soon as it happened the estate terminated, and the right to the possession ceased without any entry or demand upon the part of the plaintiff or his trustee.

The illustration given by Blackstone is in point — “when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made five hundred pounds and the like. In such case, the estate determines (ceases) as soon as the contingency happens.” 2 Black. Com., 155; *The Fifty Associates v. Howland*, 11 Metc., 101; Wash. R. P., 319. The conveyance to Hewett and the stipulation concerning his right to the possession upon the failure to pay the note having been made for the benefit of the plaintiff, in consideration of and as a security for the repayment of the money advanced by him to Goldsmith, they ought to be construed, so far as they are open to construction, favorably to the former and with a view to effect the object for which they were made.

§ 670. *Circumstances under which a demand by a trustee of possession was not a demand for the purpose of avoiding an estate.*

Goldsmith's right to the possession terminated by his own act — his failure to pay the interest upon his note. Between that time and the demand by Hewett, he or his assignee was a mere tenant at will or by sufferance, and the demand of the possession was only necessary on account of the contract to that effect, and to enable the trustee to maintain an action for the same in case it was refused. In effect the demand required by the agreement was a mere notice to quit, to a tenant holding over after the expiration of his lease or without one. There is, therefore, no good reason for applying in this case the strict and sometimes absurdly nice rule of the common law touching the nature and effect of a demand which may have the effect to avoid — forfeit — an estate of great value for the non-payment of a comparatively trivial sum as rent or a legacy. There could be no forfeiture in this case — the defendant had nothing to forfeit. Having failed to comply with the terms upon which he was allowed to remain in possession of the property, his right thereto was already gone, and by the demand he was only required to surrender the possession to the party entitled, and even that only for the purpose of applying the profits upon his debt. On the contrary, the rule applicable to this demand is the one which governs in the case of an ordinary demand for the possession of property to which the party upon whom it is made has no longer any right; and if it happens that more is demanded than the party is entitled to, it is a good demand so far as he is entitled, if the refusal is absolute and goes to the whole demand.

§ 671. *A demand for possession which is not void by reason of being too large.*

Nor do I think that this demand was even too large. It is described in the complaint as a demand for “the possession of all said lands in pursuance of the provisions of said contracts,” and it is alleged that the defendant refused to “surrender the possession of any part” of them. The defendant, as to Goldsmith's interest in the property, stands in his shoes, and had no right, as against the trustee or the plaintiff, that Goldsmith did not have. He took his conveyance with knowledge that the legal title was in the trustee and that default had been made in the payment of interest, and therefore took nothing by it but Goldsmith's right to the possession, which was then reduced to the mini-

man — the will of the trustee. As to lots 2 and 7 aforesaid, there is no question about the sufficiency of the demand. Goldsmith was the owner of them in severalty, and the trustee had succeeded to his right, both of property and possession. As to the rest of the property, the trustee, as the successor in interest of Goldsmith, was seized as tenant in common with the defendant, and, after the default in payment of the note, was entitled, as such tenant, to the possession of the whole of it. Each tenant in common is entitled to the possession of the whole property in common with his co-tenants — “they all occupy promiscuously.” 2 Black. Com., 191. Therefore the demand by Hewett for the possession of all the property owned by him and the defendant jointly; in pursuance of the contracts between the parties to the transaction, was a demand for no more than he was entitled to, that is, for the possession of such property as tenant in common with the defendant.

The refusal of the defendant was absolute, and equivalent to a denial of any right of possession on the part of Hewett. Thereafter his possession of the property, so far as it belonged to the latter, was unlawful, and he is liable in damages to the plaintiff for any loss thereby sustained. This disposes of the demurrer. That the plaintiff sustained damages by this unlawful withholding of the possession by the defendant is alleged in the complaint, and that he did so in some measure is self-evident. If the trustee had been let into the possession as provided by the contracts, he would have received the rents and profits for the benefit of the plaintiff — to be applied upon the note. That possession would have continued until the property was sold or the note had been paid. And in such case, the plaintiff would either have received the money arising from the sale or been in the receipt of his share of the rents and profits, to have been applied upon the loan. The rents and profits, after deducting the ordinary expenses of keeping the property, are therefore a proper measure for damages which the plaintiff has sustained by the wrongful act of the defendant. The security which Goldsmith gave for the payment of the loan having proved largely insufficient, and a considerable part of that insufficiency having arisen from the fact that the plaintiff or his trustee was deprived by the defendant of the possession of the property from July 6, 1877, until November 30, 1879, it follows that the value of such wrongful use and occupation by the defendant is the measure of the plaintiff's damage. See Or. Laws, p. 589, sec. 38.

§ 672. *Construction of directions to trustee to sell.*

It was also suggested in the argument for the defendant that the damages, in any event, could be scarcely more than nominal, for the reason that the possession of the trustee could not have exceeded thirty days, as he was bound by the agreement to sell on that time after coming into possession. But this is altogether a mistaken view of the effect and purpose of the agreement. The power to take possession of the property and to sell it upon the default of Goldsmith was given to the trustee, primarily, for the benefit of the plaintiff. Thereafter Goldsmith's only interest in the property was the right to redeem it by the payment of the loan. He had received the plaintiff's money and in effect conveyed his property to the trustee in payment thereof, so far as it might suffice, subject to his right to redeem the same by the payment of the loan. The object of the trust was to enable the plaintiff to make his money out of the property in case Goldsmith should prove personally unable to pay, as the result was, and therefore its provisions are to be construed and applied with a view to that end. Now, while the trustee could not sell unless after

thirty days' notice to Goldsmith to pay and upon thirty other days' notice of such sale, yet he was not bound to sell until he thought best, or it may be until he was required to do so by the direction of a court of equity. It was his right and duty to take possession of the property, and keep, manage and dispose of it so as to best conserve and promote the interest of the plaintiff, and neither Goldsmith nor the defendant, as his assignee, had any right to impede or control him in the exercise of this power, so long as he kept within the terms of the trust.

For instance, it is admitted that the trustee had a right to take possession of this property and to sell it. But certainly it could not have been contemplated by the parties that he was absolutely bound to sell in sixty days after taking possession, without any reference to the state of the market or what it would bring. As, and when it was sold, the proceeds do not appear to have paid more than two-thirds of the debt, whereas, if the trustee had been admitted into possession, he might have applied the rents and profits on the interest, and ultimately paid the whole debt by a favorable disposition of the property. However this may be, the person directly and primarily interested in the matter was the plaintiff, and the agreement ought to be construed so as to allow him to exercise his judgment, whether to hold the property or sell it. The debtor could always protect himself against any abuse of this discretion, to his prejudice, by paying the debt and redeeming the property, or by the interference of a court of equity.

As to the claim for damages on account of the plaintiff's being compelled, by reason of the defendant's refusal to surrender the possession, to bring and maintain a suit in equity to procure a sale of the property, it was not argued by counsel, and need not now be considered. It, at least, appears from the complaint, that the plaintiff is entitled to recover damages for withholding the possession of the property during the period alleged, and therefore the complaint states a cause of action. The demurrer is overruled.

BUSH v. MARSHALL.

(6 Howard, 284-292. 1847.)

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—This suit originated in the district court for Dubuque county, in the territory of Iowa. It was a bill in chancery to foreclose a mortgage given by the appellant, Bush, to Whitesides. The property mortgaged consisted of two lots (numbered 7 and 194) in the town of Dubuque, which Whitesides (Marshall, having some interest, joined in the sale and was entitled to part of the purchase money, which is the reason for his being made a party to the bill) had sold and conveyed on the same day to the mortgagor for the sum of \$3,000; and the mortgage (dated 8th February, 1839) was given to secure the sum of \$1,500, the balance of the purchase money. At the time of this transaction, the United States had not yet offered the lands on which the town of Dubuque was situated for sale. But notwithstanding the occupants of lots were mere tenants at sufferance only, they proceeded to make valuable improvements, under the expectation of the grant of a right of pre-emption from the government, or at least that they could complete their title by purchase from it, when the lots should be offered for sale. These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subjects of contract and sale by conveyances in the

forms usual for passing a title in fee. On one of the lots which was the subject of the mortgage in question, a tavern house and other improvements were erected, for which the tenant paid a rent of \$70 per month at the time of this purchase. The deed from Whitesides to Bush was not put in evidence, but from the recitals of the mortgage and admissions of the answer, it appears to have been a deed in fee-simple, with a covenant of general warranty.

§ 673. *A mortgagor is estopped by his deed from denying seizin. His only defenses are payment, want of consideration or fraud.*

The mortgagor is estopped by his deed from denying seizin, and cannot make out a sufficient defense unless by proving payment of the money, want of consideration, or fraud, which will avoid the contract. Accordingly, the appellant in his answer has set up two grounds of defense by way of avoidance of his deed. First, fraudulent misrepresentation by the vendor to induce him to make the purchase; and secondly, want of consideration from failure of title.

§ 674. *Facts which do not constitute fraudulent representations.*

The fraudulent misrepresentation charged consists of three particulars. First, that the vendor represented "that he held a valid pre-emption right to the lots, by virtue of the laws of the United States in relation to town lots in the town of Dubuque;" secondly, that he represented that the fixtures in the tavern, to wit, the bar, shelves and counter, formed a part of the property sold, whereas they were claimed and taken away by Hale, the tenant, and the house much injured by the moving and tearing away of said fixtures; and thirdly, that by falsely representing Hale, the tenant, to be punctual in his payments, Bush was prevailed on to give his note to the complainants for the sum of \$290, for the rent of the unexpired term; whereas Hale was not punctual, and defendant was unable to collect the rent from him. The latter two of these charges may be summarily disposed of by the remark that there is no evidence in the case of any representations by the complainants on the subject; and as the matter alleged in the answer is not responsive to the bill, but set up by way of avoidance, the defendant was bound to prove it.

But the first is the one chiefly relied on in the argument, and deserves more particular notice. It is proved by Davis, the scrivener who drew the deed and mortgage, that Whitesides told Bush "that he, Whitesides, had a pre-emption to the property." Was this representation false? The only evidence on the subject is in the testimony of Petrikin, the register of the land office, who swears "that the commissioners, appointed under the act of congress laying off the towns of Dubuque, etc., filed in the land office certificates in favor of Whitesides' pre-emption to these lots, No. 7 and No. 194." He states, also, "that the land officers had instructions from the general land office to expose all lots to public sale where the claimants should relinquish their right of pre-emption to the United States." He states, moreover, "that the land officers were not satisfied with the regularity or sufficiency of Whitesides' certificate;" but whether these doubts or opinions were well founded or not does not appear from any testimony in the case. The facts, also, that Whitesides was permitted to relinquish the pre-emption right to the United States, and that no other person laid any claim to the possession and pre-emption of these lots except Whitesides and Bush, claiming under him, are conclusive, when taken in connection with evidence of a certificate in his favor by the commissioners, to show that the representation of Whitesides was not false or fraudulent, and that defendant has wholly failed to support this allegation, as set forth in his answer.

But it has been contended that this relinquishment, made by Whitesides to the United States against the consent of Bush, was fraudulent, and injurious to the interests of Bush. To this argument two answers may be given, either of which is conclusive. First, that there is no allegation in the pleadings on the subject; and, secondly, the evidence clearly shows that, although Whitesides did relinquish his pre-emption to the United States, and that, too, without the consent of Bush, yet the act was not fraudulent, as it was not intended, and did not tend, to do any injury to Bush. Whitesides, by his warranty, was bound, under penalty of \$3,000, to obtain a good title for Bush, cost what it may, while Bush was bound to pay only the minimum or pre-emption price. The relinquishment of his pre-emption right by Whitesides was not intended as an abandonment of his claim, but was a plan adopted by himself, in common with the other claimants of lots in Dubuque, as the most convenient method of obtaining a title. By thus suffering them to be exposed to auction, they ran the risk of being compelled to pay more than the minimum or pre-emption price for a title, but could not get it for less. The record admits that Bush knew "that Whitesides' object in having the lots put up to sale was expressly with a view that the title to them might be perfected in said Whitesides, in order that he could make a good title to Bush." It is not easy to apprehend how fraud can be predicated of the conduct of Whitesides, who, it is admitted, was using every endeavor to fulfil his contract, and obtain a good title for his vendee. As to the alleged fraud on the government by the conduct of the people in Dubuque on this occasion, it is sufficient to say that the question is not raised in the pleadings, nor the fact proved in the evidence.

We are of opinion, therefore, that the appellant has wholly failed to show any fraud or misrepresentation on the part of his vendors, which would justify a court of chancery in annulling an executed contract. Indeed, the facts of the case tend rather to show that the fraud, if any, in this transaction, may be more justly charged to the party who is so liberal in imputing it to others. If Bush could have thwarted Whitesides in his endeavors to procure the legal title for him, if he could hold the lot on which the tavern house and improvements were situated (and valued at \$2,200) for his bid of less than \$20, and then recover the \$2,200 from Whitesides on his warranty, he will have effected what is commonly called a speculation; but one in the perpetration of which he ought not to expect the aid of a court of equity. The anxious disavowal of an intention "to defraud or wrong the complainants," contained in the defendant's answer, was not called out by any charge in complainants' bill, but seems rather to have resulted from a consciousness that his conduct was justly liable to such an imputation.

§ 675. *A warranty deed carries with it any subsequent title acquired by the vendor.*

The other ground of avoidance is failure of consideration. The answer alleges that, at the public sale by the United States, lot No. 7 was purchased by defendant himself, and therefore the vendor is unable to comply with his contract by making him a title, and, moreover, that Whitesides has become the purchaser of lot No. 194, and therefore he, Bush, was without title to it. This defense seems founded on an entire mistake or ignorance of the law; as the facts alleged lead to a directly contrary conclusion, and show that the defendant has a complete legal title. If Whitesides sold to him with covenant of warranty, and afterwards purchased the legal title, as the answer asserts, with regard to lot No. 194, then is the title vested in Bush, the vendee, by estop-

pel, and no further conveyance is necessary. As to lot No. 7, Bush having obtained possession under Whitesides, cannot, by the purchase of an outstanding title, defeat the claim of his vendor. It is a well established rule of equity, "that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." "Equity treats the purchaser as a trustee for his vendor, because he holds under him; and acts done to perfect the title by the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title." See *Galloway v. Finley*, 12 Pet., 295, and cases there cited.

In the present case, the vendee has bought in, for \$20, the legal title to a property worth more than two thousand, the possession of which he received from his vendor; and not only so, but, contrary to good faith and fair dealing, he has interfered to overbid his vendor who was using every endeavor to purchase the title for the use of his vendee, in fulfillment of his own covenants. The appellant has paid no more (or, if more, so little as to be unworthy of notice) than he agreed to pay for the purpose of getting the legal title. He has got a good title to the property, and ought in justice and equity to pay for it the full consideration which he has covenanted to pay. The decree of the supreme court of Iowa must therefore be affirmed, with costs, with leave to the appellees to sell the mortgaged property in the mode prescribed by law, unless the appellant shall pay the amount of said decree, with interest thereon and the costs, within sixty days from the filing of the record in this case in the proper court of the state of Iowa.

BUSH v. PERSON.

(18 Howard, 82-86. 1855.)

ERROR to the High Court of Errors and Appeals of Mississippi.

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—A bill to foreclose a mortgage on a lot of land in Mississippi was filed by the administrator of the assignee of the mortgage, in the superior court of chancery in that state. The complainant obtained a decree of foreclosure, and the respondent appealed to the high court of errors and appeals, where the decree of the superior court of chancery was affirmed. The appellant then prosecuted the writ of error, which brings the case before this court. The case was, shortly, this: The appellant was one of two mortgagors. When the mortgage was executed the land was incumbered by a lien from a judgment previously recovered against the mortgagors. After executing the mortgage the appellant became a bankrupt, under the act of congress of August 19, 1841 (5 Stats. at Large, 440), and received his discharge. The land was exposed to sale to satisfy the judgment lien, and the appellant, after his discharge, purchased it.

§ 676. *The words "grant, bargain and sell," in Mississippi, amount to a covenant of warranty of title.*

The court of appeals of Mississippi decided: 1. That though the deed of mortgage contained no express covenant of warranty, the words "grant, bargain and sell," which were in the deed, under the law of that state, imported covenants of warranty of title, and against incumbrances, and for quiet enjoy-

ment, as effectually as though such covenants had been expressly set out in the deed. 2. That, under the law of Mississippi, if there had been no discharge in bankruptcy, the appellant would be estopped by his covenants from setting up his after-acquired title to defeat the mortgage. 3. That the discharge in bankruptcy did not enable him to do so.

This last position is the only one re-examinable here; the decision by the state court, of all matters depending exclusively upon the law of the state, being conclusive, on a writ of error, under the twenty-fifth section of the judiciary act of 1789.

§ 677. *Covenants of warranty run with the land at law, and are estoppels in equity.*

The question for our consideration is, what effect the discharge of a bankrupt has upon estoppels, arising by law from covenants of warranty contained in his deeds of conveyance of land. To determine this, it is necessary to have in view the different modes of operation of such covenants. They are contracts, and an action lies for recovery of the damages sustained by their breach. At law, they run with the land; and if the covenantor subsequently acquire an outstanding paramount title, it inures by force of the covenant to him who claims under the deed of the covenantor. This rule is now established in the law of this country, and has been affirmed in numerous decisions in this and other courts. Many of them may be found collected in a note to 2 Smith's Leading Cases, 545, etc. In equity, the covenantor is treated as estopped by his covenant to assert that any outstanding title existed inconsistent with what he undertook to sell and convey. The argument on the part of the appellant is, that, under the fourth section of the bankrupt act, he was discharged from all debts, contracts and other engagements provable under the act; that not only the debt secured by this mortgage, but the covenant of warranty itself, was provable under the act. And, consequently, the covenantor, being released from the covenant, it could no longer have the operation allowed to it by the courts of Mississippi.

It must be admitted, that, if the covenantee or his assignee had released the covenant, it would be difficult to maintain that it could continue in existence for any purpose. But it must be considered, that, whatever discharge has taken place in this case, is by force of a statute, which may have so qualified and limited its effect as still to leave the covenant in existence for one purpose, though not for others; and that the question, whether it has done so, can be determined only by examining the act, and ascertaining the will of the legislature in this particular. The second section of the act contains this proviso: "That nothing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." There does not appear to have been anything in this mortgage inconsistent with those sections; and it is not denied that the mortgage itself, considered simply as a conveyance of the land, remained unaffected by the act.

§ 678. *Discharge in bankruptcy does not release from estoppel arising from covenants of warranty in a mortgage.*

It is, therefore, obvious that though the bankrupt, personally, was released by the act, the debt due from the land continued undischarged. In this particular, beyond all doubt, the discharge by the act differs from a release by

the creditor; since, if the latter had released the debtor, the mortgage would thereby have been satisfied, and the charge on the land destroyed. The intention of the legislature to carry out this distinction between the personal liability of the debtor and the liability of the land, and to preserve the latter in full force, unaffected by the discharge of the debtor, is clearly declared by the act. The act says, in so many words, that a mortgage, valid by the law of the state, shall not be impaired by anything in the act. We think there is sufficient reason why this proviso should be so construed as completely to save the effect and operation of all estoppels running with the land and operating at law to pass the legal title, or in equity to conclude the grantor from asserting the existence of a title inconsistent with what he undertook to sell and convey. The purpose of the legislature to afford complete and effectual protection to mortgage titles, against anything which was to be done under the act, and the broad and strong terms in which this purpose is expressed, require us to say that the debtor cannot derive from the act an enabling power to do or assert anything which will impair a mortgage otherwise valid. Nor is there any incongruity with established principles in holding that the personal discharge of the debtor does not free him from the estoppel. If this obligation could rest solely upon a covenant, effectual in law to charge the grantor in a personal action, it would follow that, when such personal liability was released by the bankrupt act, the estoppel would naturally fall with it; and that an intention to preserve the estoppel ought to be clearly indicated to induce the court to say it was not destroyed; but such estoppels do not depend on personal liability for damages. This is apparent, when we remember that estoppels bind not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel. See *Carver v. Jackson*, 4 Pet., 85, 87; *White v. Patten*, 24 Pick., 324; *Mark v. Willard*, 13 N. H., 389; *Baxter v. Bradbury*, 20 Me., 260.

§ 679. *Personal liability is not necessary to an estoppel.*

Indeed, it is the settled doctrine of this court, not only that no existing personal liability is necessary to work an estoppel, but that none need have existed at any time. In *Van Renssalaer v. Kearney*, 11 How., 322, it was held, after great consideration, and a full examination of the authorities, that "if a deed bear on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding on the grantor, and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance." It is familiar law, also, which was applied in *Carver v. Jackson*, 4 Pet., 86, 88, that a mere recital of a fact in a deed is as effectual an estoppel as a covenant. There is no necessary connection, therefore, between the personal liability of the debtor on his covenant, and the estoppel which arises therefrom; and it is not an incongruity for the legislature to preserve the latter while they discharge the former. Estoppels which run with the land and work thereon are not mere conclusions; they pass estates, and constitute titles; they are muniments of title, assuring it to the purchaser. Their operation is highly beneficial, tending to produce security of titles; and if a discharge under the bankrupt law were

allowed to destroy this mode of assurance, it would, in an important particular, impair the operation of deeds containing it. This, by the express words of the bankrupt law, is prohibited. In *Stewart v. Anderson*, 10 Ala., 504, the supreme court of Alabama had this precise question before them, and held the bankrupt estopped. A similar decision was made by the court of appeals of Maryland in reference to the effect of a discharge under the insolvent law of that state. *Dorsey v. Gassaway*, 2 Harr. & J., 411.

Our opinion is that the decree of the high court of errors and appeals of Mississippi should be affirmed, with costs.

MORGAN v. GILBERT.

(Circuit Court for Michigan: 2 Flippin, 645-649. 1880.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—On the 2d of January, 1875, the members composing the firm of Colby & Co. owned and mortgaged lands to plaintiff to secure the payment of \$25,000; among other lands, lot No. 2, of section 10 north, of range 7 west, situated in Montcalm county, Michigan, on which was pine timber, constituting the principal value of the premises. Ten thousand dollars, with interest, were payable July 2, 1876, and \$15,000, with interest, January 2, 1877. In January, 1878, while the mortgage remained wholly unpaid, defendant entered upon said premises and cut and removed six hundred thousand feet, board measure, of pine timber, of the value of \$1,300, or \$2 per one thousand feet. It was without the knowledge of plaintiff, who alleges that thereby defendant "greatly injured and damaged said premises," etc., "whereby the plaintiff's security for the said sum of \$25,000 and interest was greatly lessened, impaired and destroyed, to plaintiff's damage," etc. Defendant pleaded the general issue.

It appears that defendant and the mortgagors, after the date of the mortgage, agreed to exchange the pine upon their respective lands, for convenience in hauling, defendant to pay \$1,000 as the difference in value; he to have the pine in question. Defendant paid part of the \$1,000 to the mortgagors, Colby & Co., and the balance was subsequently paid to their assignees in bankruptcy. When the mortgage was given there were over thirteen million feet of pine timber on the mortgaged land. At the time defendant took the timber in question from this particular lot the quantity remaining on the entire tract had been reduced to about six million five hundred thousand feet by Colby & Co., in their lumbering business, and with the knowledge and consent of plaintiff, but upon an understanding between them not necessary or material to be stated. It further appeared that, at the time of the agreement to exchange timber, defendant was informed by Colby & Co. that they had no right to permit the timber to be cut without the consent of the mortgagee. There was a prior mortgage upon the lands covered by plaintiff's mortgage of \$10,000, which plaintiff bought for \$6,000, subsequent to the alleged trespass, and caused to be discharged of record.

Pending a suit by the mortgagee to foreclose the \$25,000 mortgage, and prior to bringing this suit, but subsequent to the alleged trespass, he accepted a quitclaim deed of the mortgaged premises from the assignees in bankruptcy of the mortgagors, whereby the mortgage and the debt became merged in the fee thus acquired. At the time the timber was taken there was due on the mortgage, of principal and interest, about \$32,875; amount plaintiff paid for prior

incumbrance, \$6,000, making, as the total lien, \$38,875. The value of the security is shown to have been as follows:

On the mortgaged land was a steam mill worth.....	\$20,000
Six million five hundred thousand feet of pine timber, at \$3.....	18,000
Value of the land without the timber.....	1,964
	<hr/> \$34,964

From which it appears the value of the security did not equal the amount of the lien by nearly \$4,000.

§ 680. *If a mortgagor is insolvent the mortgagee may sue for an unauthorized injury to the mortgage security.*

The declaration counts upon damages to the premises and to plaintiff's security, and it is claimed that any reduction of the mortgagee's security gives the right of action. We are of the opinion that, if plaintiff can recover, it must be for an injury to his security, and on the ground that it was inadequate. In Massachusetts the legal title is in the mortgagee, who may sue for an injury affecting the mortgaged estate, though not in possession, and the owner of the equity of redemption has no more right than a stranger to impair the security of a mortgagee by permanent injury and depreciation of the mortgaged estate. It has there been held that the damages are measured by the extent of injury to the property, and do not depend upon proof of the insufficiency of the remaining security; that the mortgagee is not obliged to accept what remains, but is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt. *Gooding v. Shea*, 103 Mass., 360; *Byron v. Chapin*, 113 id., 308. See, also, *Sanders v. Reed*, 12 N. H., 558; *Smith v. Moore*, 11 N. H., 55; 5 N. H., 54; and *Hutchins v. King*, 1 Wall., 54 (§§ 427-429, *supra*). But in *Kings v. Bangs*, 120 Mass., 514, it was held, in an action by the mortgagee against one who had injured the mortgaged property by removal of fixtures, that evidence that the mortgagee, under the power in his mortgage, sold the premises for more than enough to pay his debt and all prior incumbrances, is admissible in mitigation of damages.

In Illinois the mortgagee is held to be the owner of the fee, as against the mortgagor or those claiming under him, and may have an injunction to stay waste upon the mortgaged lands. He is entitled to all the rights and remedies which the law gives to an owner. *Nelson v. Pinegar*, 30 Ill., 473. In New York a mortgage constitutes a lien upon and does not vest title to the land in the mortgagee. This is the law in Michigan, where the title remains in the mortgagor. Wherever such is the relation of mortgagor and mortgagee to the mortgaged property, the rule is that the mortgagee may maintain suit against one who impairs his security, and the damages are limited to the amount of injury to the mortgaged security, however great the injury to the land may be. *Van Pelt v. McGraw*, 4 Comst., 110. It has been, in some cases, held necessary to show that the mortgagor is insolvent or not personally responsible for the debt. See *Gardiner v. Heartt*, 3 Denio, 232; *Lane v. Hitchcock*, 14 Johns., 213; *Yates v. Joyce*, 11 Johns., 136; *Wilson v. Maltby*, 59 N. Y., 126; *Jones v. Costigan*, 12 Wis., 757; *Buckout v. Swift*, 27 Cal., 436.

Upon the general doctrine as stated, where title remains in the mortgagor, see *State v. Weston*, 17 Wis., 757; *Jones v. Costigan*, 12 Wis., 757. *Jackson v. Turrell*, 39 N. J., 329, is a well considered case. It is not necessary to say what the rule would be in Michigan in a suit by a mortgagee, when the mortgagor is personally liable and pecuniarily responsible. In the case at bar the mort-

gagors are insolvent. One case lays stress upon the intent with which the injury was committed (*Gardiner v. Heartt*, 3 Denio, 232), which we do not follow. We are not aware of any decision by the supreme court of Michigan, touching the right of a mortgagee to maintain an action for an injury either to the mortgaged premises or to his security. We entertain no doubt that the common law gives a remedy to a mortgagee against one who, by an unauthorized act, has so far injured his security as that damage results. The cases in New York, New Jersey and Wisconsin, where the rights of a mortgagee are the same as in Michigan, are authority for this view. The court, therefore, finds that the plaintiff is entitled to judgment against the defendant for the sum of \$1,300. It is also found that defendant had no valid license from the mortgagors, as against the mortgagee, to cut and remove timber from the mortgaged land. The plaintiff is entitled to judgment against the defendant for the sum of \$1,300. Judgment will be entered for that amount, with costs.

§ 681. Execution in favor of creditors of grantor.—Land conveyed by a deed absolute in form, but admitted to be in fact for the security of a debt, is subject to levy of execution in favor of a judgment creditor of the original grantor. *Chickering v. Hatch*, 3 Sumn., 474.

§ 682. Upon a bill to redeem a mortgage of a leasehold estate, it appeared that one Cocking, in 1818, leased a lot to Shields for a term of ten years from January 1, 1819, requiring, besides rent, that Shields should build a house, which he did, and giving him the privilege of purchasing the lot at a stated price. Shields mortgaged the house and lot in 1823 to Franks, and in 1825 the interest of Shields was sold by a constable on execution to Van Ness, and a deed was made by the officer to the purchaser. Franks assigned his mortgage to Hyatt, and Shields conveyed to him his equity of redemption. Cocking's heirs, in April, 1828, conveyed to Hyatt the reversion in fee-simple. The levying of the execution, and the sale under it, took place before the assignment of the equity of redemption. Van Ness therefore represented the title growing out of the execution sale and Hyatt all the other interests in the property. It was held that, by the laws of Maryland, the lease, though not recorded, was good for seven years; but that an equity of redemption of a leasehold estate could not be sold under a *feri facias*. The bill to redeem was, therefore, dismissed, with costs. (*MORSELL, J.*, dissented.) *Van Ness v. Hyatt*, * 5 Cr. C. C., 127.

§ 683. Waste—Use of mortgaged premises.—A state statute provided, in reference to mortgaged premises, that "it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used," etc. On the sale of mortgaged premises, the purchaser applied for an injunction to restrain the mortgagor from removing earth and sand, to be used in the manufacture of brick, a use to which the premises were subjected at the time the mortgage was made. The mortgage provided that the mortgagor should do nothing in and about the premises tending to diminish the security. *Held*, that the removal of the earth did diminish the security; that it was waste at common law; that the parties by their contract had waived the provision of the statute, and that the complainant was entitled to an injunction. *Edwards v. Woodbury*, * 1 McC., 429.

§ 684. Mortgagor's after-acquired title.—A title to the mortgaged land acquired by a mortgagor after making the mortgage inures to the benefit of the mortgagee. *Wright v. Shumway*, 1 Biss., 23 (§§ 435-439). Where a mortgagor purchases for his own benefit, though in the name of another person, an outstanding title to the mortgaged property, for the purpose of defrauding the mortgagee, equity will require him to hold such title upon the same uses and trusts as are declared in the deed of trust or mortgage. *Moore v. Jaeger*, * 2 Mac-Arth., 465.

§ 685. In the absence of a warranty of title, and of false representations on the part of the mortgagor, it is not his duty to perfect his title to the mortgaged land. Thus, if one in actual possession of land, under a contract with the state to buy it and pay for it in annual instalments, mortgages it in good faith, without warranty, he is not bound to make payments to the state after the conveyance of his interest. But his mortgagee would be entitled to make the payments and perfect the title. *McWilliams v. Withington*, 7 Saw., 203.

§ 686. Mortgagor estopped by representations.—If an owner of land represents to a creditor that it belongs to another, and induces such creditor to take a mortgage from that person, and to extend the time of payment of the debt, he is estopped to claim the land as against the lien of the mortgage. *Parlin v. Stone*, 1 McC., 443 (§§ 890-892).

§ 687. A mortgagee of land has a right to wood, timber and bark cut from the mortgaged premises, whether on them or not; and can maintain an action of trover for such property. Upon the bankruptcy of the mortgagor, such mortgagee, upon giving notice to the assignee or to the marshal, is entitled to the property, and the assignee holds it subject to his claim. *In re Bruce*,* 16 N. B. R., 318.

XIV. MORTGAGEE'S RIGHTS AND LIABILITIES.

SUMMARY — *Mortgagee in possession under a parol agreement*, § 688. — *Mortgagee cannot be dispossessed*, § 689. — *His entry upon part is entry upon whole*, §§ 690, 691. — *Equitable right of junior mortgagee as against prior mortgagee having other security; homestead*, § 692. — *In Texas mortgagee cannot recover possession of homestead*, § 693.

§ 688. Under a statute which provides that a mortgagee shall not be entitled to the possession of the mortgaged premises unless the mortgage specifically so provides, a mortgagee in possession under a parol agreement with the mortgagor is entitled to hold possession and collect the rents until his mortgage is paid. *Edwards v. Wray*, §§ 694-696.

§ 689. A mortgagee in possession under such a parol agreement is entitled to the rents after the premises have been sold on a junior judgment, although it is provided by statute that during the time allowed for redemption from such sale the owner is entitled to the possession. Such mortgagee has a prior right to rents as against the purchaser at the execution sale. *Ibid*.

§ 690. A mortgagee having entered after breach of the condition cannot be dispossessed by the mortgagor so long as the mortgage continues in force. Courts of equity, while relieving against the old doctrine of forfeiture, have, as fully as courts of law, always regarded the legal title to be in the mortgagee until redemption. *Brobst v. Brock*, §§ 697-705.

§ 691. A mortgagee's entry upon any part of a large tract conveyed in mortgage is deemed to be an entry upon the whole tract and a taking possession of the whole, if none of it be in adverse possession. *Ibid*.

§ 692. The equitable right of a junior mortgagee to compel a prior mortgagee to resort in the first place to property on which he has an exclusive claim before coming to a part covered by the junior mortgage, cannot be impaired by a subsequent declaration of homestead on the property exclusively covered by the prior mortgage. *Abbott v. Powell*, § 706.

§ 693. The provision of the constitution of Texas, prohibiting a forced sale of a homestead, is construed as not only prohibiting a sale of a homestead under a mortgage, but also as preventing the mortgagee's recovering possession of it by ejectment. *Lanahan v. Sears*, §§ 707, 708.

[NOTES. — See §§ 709-715.]

EDWARDS v. WRAY.

(Circuit Court for Indiana: 12 Federal Reporter, 42-45. 1882.)

Opinion by GRESHAM, D. J.

STATEMENT OF FACTS.— This is a suit to foreclose a mortgage. In addition to the usual averments the complainant alleges that in September, 1879, and some time before the filing of his bill, by an agreement between the mortgagor and himself, the possession of the mortgaged premises was turned over to him and has been ever since retained by him. He sets out an itemized statement of the rents collected which have been applied towards the payment of the interest on his mortgage debt. His right to so apply a part of these rents is denied by the defendant T. Wiley Hill, who, in his answer, claims that he is entitled to all the rents that have accrued since the 3d day of July, 1880, at which time he bought the mortgaged premises on an execution sale made on a judgment junior to complainant's mortgage. This claim is based upon the provisions of section 1 of an act which went into effect March 31, 1879, relative to the redemption of real estate sold on execution or decree of sale. That section is as follows:

"Section 1. Be it enacted by the general assembly of the state of Indiana, that, whenever real estate or any interest therein shall be sold on execution,

the sheriff or other officer making the sale shall issue to the purchaser a certificate of purchase. The certificate shall entitle the purchaser, his heirs or assigns, to a deed of conveyance, to be executed by the proper officer, at the expiration of the time allowed for redemption, unless the property sold shall have been previously redeemed. The owner of the property shall be entitled to the possession thereof during the time the same is subject to redemption; but if the same is not redeemed, he shall be liable to the purchaser, his heirs or assigns, for the reasonable rents, profits, or use thereof; provided, if such owner is not the actual occupant of the premises sold, but the same be occupied by a tenant or other person, such tenant or other person shall be liable to the purchaser for the reasonable rent or use and occupation of the premises, and may be treated in all respects as the tenant of the purchaser, who shall, in case the property is redeemed, allow, as a payment upon his judgment, the amount of the rent by him collected."

§ 694. *Mortgagee in possession entitled to collect rents until mortgage debt is paid. Construction of statute.*

Hill insists that under this section from the time he obtained his certificate of purchase the complainant became liable to him as the occupant of the property. In other words, his position is that the agreement between the mortgagor and the complainant, although made in good faith, must give way to the provisions of the statute. The question, then, is, does the section of the statute quoted apply to the complainant's possession? It is admitted that the complainant is a mortgagee in possession with the consent of the mortgagor, and that, aside from the statute under consideration, he has a right to hold that possession and collect the rents on the property until his mortgage is paid. This is the rule at common law, even where the lien theory of mortgages obtains. *Russell v. Ely*, 2 Black, 575; *Witherell v. Wiberg*, 4 Saw., 232 (§§ 664-666, *supra*); *Phyffe v. Riley*, 15 Wend., 248; *Hubbell v. Moulson*, 54 N. Y., 225; *Hennesy v. Farrell*, 20 Wis., 42; *Dutton v. Warschauer*, 21 Cal., 609; *Roberts v. Sutherlin*, 4 Or., 219.

§ 695. *Parol agreement for possession by mortgagee, valid.*

In this state there is a statutory provision that "unless a mortgage specifically provide that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same." The mortgage in suit did not contain such a provision. Notwithstanding this fact, the parties to this mortgage could enter into a parol agreement that the mortgagee should take possession of the mortgaged premises, and could carry out such an agreement by putting the mortgagee in possession. *Parker v. Hubble*, 75 Ind., 580. This was in fact done in this case, and when this parol agreement was so executed by the surrender of possession on the part of the mortgagor, the contract between the parties to the mortgage then stood as though it had been specifically provided in the mortgage that the mortgagee should be entitled to the possession of the mortgaged premises. The redemption statute of 1879 was not intended to defeat or abrogate rights acquired under such a contract. Its effect was meant to be limited to sales of property which should be sold independently of any contract pertaining to its use or possession. Its purpose was to furnish a rule which should be applicable to sales of real estate, the dominion over which the judgment debtor or his assigns still held. It does not contemplate an interference with senior rights or equities created prior to the attaching of the judgment lien that is to be enforced by the sale. It relates to a remedy for the enforcement of judgments, and it does not and could not inhibit a contract

relation that might curtail that remedy. It is true that this statute was in force when the agreement in question was made, but, no fraud being charged, the parties to that agreement had the right to enter into it, and the complainant is entitled to be protected in the rights thus secured notwithstanding the statute. *Edwards v. Woodbury*, 1 McC., 429; 3 Fed. R., 114. Whether this proposition would be true if the lien of the judgment had attached prior to the making of the arrangement between the mortgagor and the mortgagee, need not be decided. The pleadings show that the agreement under which the complainant went into possession of the mortgaged premises was made before the judgment under which Hill derives title became a lien on the real estate. When that lien came into existence it of necessity attached to real estate charged with the burden of the complainant's right of possession. It was a lien only on such an estate in the property in controversy as the judgment debtor at that time held, and the execution sale was made subject to any liens, pledges or rights that he had fastened upon the real estate in favor of any other party. *Monticello Hydraulic Co. v. Loughry*, 72 Ind., 562. The complainant was in possession by his tenants, and this was notice of his rights. *Bank v. Flagg*, 3 Barb. Ch., 317; *Wright v. Wood*, 23 Penn. St., 120; *Franz v. Orton*, 75 Ill., 100; *Dickey v. Lyon*, 19 Ia., 544; *O'Rourke v. O'Connor*, 39 Cal., 442.

§ 696. *Mortgagee in possession under parol agreement with mortgagor has prior right to rents over purchaser at execution sale.*

The rights of complainant in the mortgaged premises as mortgagee in possession were no more affected by the execution sale than were his rights under his mortgage. They alike remained intact. The same equitable principles that authorize the appointment of a receiver of mortgaged property may be invoked in this case to sustain the arrangement between the mortgagor and mortgagee by which the latter took possession of the premises. The mortgagor turned over the property to the mortgagee in order that the rents might be applied to the payment of interest, but it appears that the interest is greatly in default. It is to be presumed, therefore, that the mortgagor is insolvent or seriously embarrassed, and that the premises are not an adequate security for the debt, and that these facts were considered by the parties when the arrangement was made. This court has uniformly held that under these circumstances a receiver should be appointed to protect the interests of the mortgagee. The arrangement made secured to the mortgagee without the aid of a court just what the court would have given him as against not only the mortgagor but as against all junior lienholders. The purposes of the parties to this agreement were of so equitable a character that they should be effectuated and not defeated. The provisions of the redemption act of 1879 furnish no reason why the court should refuse the appointment of a receiver upon proper showing, and it is equally clear that an amicable arrangement between a mortgagor and mortgagee, which effected at once what a receivership would have indirectly accomplished, should be upheld, although it was made after the statute under consideration took effect.

BROBST v. BROCK.

(10 Wallace, 519-537. 1870.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

STATEMENT OF FACTS.—Michael Brobst owned an undivided one-fourth of a large tract in Pennsylvania, and mortgaged it to Wood, payable April 1, 1821,

the mortgage being duly recorded. Brobst, being in partnership with his brother John, failed in business and confessed judgment to Kutz and Levan. Michael afterwards conveyed his interest in the land to John and left the state, dying unmarried. John ~~also~~ left the state, and died in 1861. The assignee of the mortgage foreclosed it under the state law, but irregularly, and the tract ~~was~~ afterwards partitioned. The heirs of John Brobst then brought suit in ejectment.

§ 697. *Although errors may have been committed on the trial of a case, a new trial will not be granted if it be certain that the plaintiff in error cannot prevail in the action.*

Opinion by MR. JUSTICE STRONG.

Much of the very elaborate argument addressed to us on behalf of the plaintiff in error was directed to the consideration of questions not necessary to the decision of this case. Whether the judgment in the *scire facias* upon the mortgage was absolutely void, or only irregular, we are not called upon now to determine, for on the trial of the case in the court below no effect was allowed to it. The learned judge who presided at the trial did not rule that the judgment was valid, or that the sale made under it divested the equity of redemption of the mortgagor, or of John Brobst, to whom the equity had been conveyed. It is true the defendant set up that he had acquired title under that sale, and, had that been his only defense, it would be necessary to consider whether it was sufficient to extinguish the equity of redemption. But there were several other defenses, two of which the court below ruled sufficient to protect the defendant in his possession. If the ruling was correct, or if either of these defenses was perfect, it matters not what may have been the instruction given to the jury respecting other parts of the case. It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action. In *Greenleaf v. Birth*, 5 Pet., 135, it was stated to be "a general rule, that where there are various bills of exceptions filed according to the local practice, if, in the progress of the cause, the matters of any of those exceptions become wholly immaterial to the merits as they are finally made out at the trial, they are no longer assignable as error, however they may have been ruled in the court below. There must be some injury to the party to make the matter generally assignable as error." So in *Campbell v. Pratt*, 2 Pet., 354, the court refused to reverse a decree of the circuit court, although an error had been committed, as no benefit could result to the appellant from the reversal.

STATEMENT BY THE COURT.—Without noticing, therefore, for the present at least, the particular exceptions taken in the court below, we proceed to inquire whether the record exhibits any insuperable obstacle to the plaintiff's recovery in this action. Both parties claim under Michael Brobst, who, on the 27th day of September, 1816, became the owner of one undivided fourth part of twenty-five adjoining tracts of land, of which the tract now in controversy was a part. The whole body was then, and during many years thereafter, wild, uncultivated and uninhabited. While thus the owner, Michael Brobst, on the 6th day of March, 1817, mortgaged his interest in the entire body of lands to Samuel Wood to secure the payment of \$1,500, with interest, on the 1st day of April, 1821. This mortgage, by subsequent assignments made in the same year, became the property of Boyer. On the 15th of May, 1817, after the execution of the mortgage, Michael Brobst conveyed his remaining interest in the lands to John Brobst in fee, who does not appear ever to have made any entry upon

them, or to have claimed possession prior to his death, which occurred in 1861. It is as an heir and devisee of John Brobst that the lessor of the plaintiff claims. The defendants claim under Wood, the mortgagee, through Boyer, the assignee of the mortgage. They also set up several other titles, which it is not necessary now to notice. It thus appears that what John Brobst acquired by the deed of Michael Brobst to him was only an equity of redemption. As between his grantor and Wood, or Wood's assignees, the legal title was then in the latter, and so it continued notwithstanding the conveyance of ~~the equity of redemption~~ to John Brobst.

§ 698. *A mortgage, as between the mortgagor and all others than the mortgagee, is a security, and not an estate. But as between the parties or their privies, it is a grant.*

It is true that a mortgage is, in substance, but a security for a debt or an obligation to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Formerly, if the condition was not strictly performed, the estate of the mortgagee, at first conditional, became absolute, and the mortgagor's right to redeem was lost. The estate or interest, though defeasible at its inception, became unconditional on the failure of the mortgagor to pay the money secured, or fulfil the condition at the time appointed for performance. Powell on Mortgages, 9, 10; 2 Bl. Comm., 158; Littleton, 332.

§ 699. *Courts of equity regard the legal title to be in the mortgagee until redemption.*

Courts of equity have in modern times relieved against such forfeitures, and, in favor of a mortgagor, have extended the time for redemption. But such courts, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land. And having entered, he cannot be dispossessed by the mortgagor so long as the mortgage continues in force.

§ 700. *A mortgagee, having entered after breach of the condition, cannot be dispossessed by the mortgagor so long as the mortgage continues in force.*

Applying these principles to this case, it is plain that John Brobst, having acquired only an equity by the deed from Michael Brobst, neither he nor his heirs can recover in ejectment against those in possession under the mortgagee while the mortgage remains in existence, or until there has been a redemption. It is true that in the state courts of Pennsylvania ejectment may be maintained upon an equitable title, but such has never been the rule in the federal courts. It becomes, therefore, a material inquiry whether the legal title which was in Wood has ever been acquired by John Brobst or his heirs, and also whether the defendants are in possession under Wood, and in virtue of the mortgage. It has already been noticed that Boyer became the assignee of the mortgage in 1817. It was assigned by Wood to Dunn, and by Dunn to Boyer. The assignments were undoubtedly sufficient to transmit the rights and estate of the mortgagee. When the debt secured by the mortgage fell due in 1821, no effort was made to redeem, and none has been made to the present day. There is no evidence that any one was in actual possession of the lands before 1821,

or at any time before the condition of the mortgage was broken. But after that time Boyer had possession by his tenant, Roderberger, who occupied a house upon the body of lands mortgaged, certainly as early as 1825. In regard to this there is no dispute and no contradictory evidence. It is true, Roderberger was resident upon one of the twenty-five tracts which adjoins the tract now in dispute. But though, for the purpose of acquiring title from the commonwealth, several patents were taken, they described collectively but one tract. Several patents were required under the law of the state when there were, as in this case, several warrants. The warrants were each issued for four hundred acres and an allowance of six per cent., and the law required the patents to follow the surveys made on each warrant. The whole twenty-five tracts belonged to one person. They were all patented to George Grant on the 9th and 10th days of May, 1816, and they adjoined each other so as to constitute one tract or body. Grant sold them together, as a whole, to Smith, who in turn sold an undivided fourth part of the whole body to Michael Brobst by one deed. So Michael Brobst mortgaged his entire estate in the whole to Wood, and conveyed his equity of redemption by one deed to John Brobst. From the beginning the entire body of land was treated as one subject of grant or mortgage, though held under several conveyances. After Grant became the owner nothing in the title ever separated the tracts before Boyer took possession. Having been paid for originally by one person, and one warrant calling for another as an adjoiner, it is not probable the interior lines of the block were ever run. We have not the surveys before us, but when surveys in Pennsylvania are laid in a block (that is, so as together to constitute one tract), under warrants issued at the same time and calling for each other, it is not required, nor is it usual, that the surveyors run more than the exterior lines.

§ 701. *An entry under color of title by deed is deemed a possession of all the land conveyed, if it be not in any adverse possession.*

It is, then, to be presumed there was nothing upon the ground to distinguish one part of the entire body from any other part, and the mortgage treated it all as one hypothecation. The entry of Boyer, therefore, by his tenant, Roderberger, upon any part of this large tract must be held to have been an entry upon the whole, a taking possession of the whole. There is nothing in *Ellcott v. Pearl*, 10 Pet., 412, in conflict with this. On the contrary, it was there held, as had been frequently held before, that one entering under color of title by deed is deemed to have taken possession co-extensive with the bounds of the deed; that is, of all the land conveyed by the deed, if it is not in any adverse possession. Here Boyer entered under a deed. Having a right to enter only in virtue of the mortgage of which he was assignee, it is a legal presumption that his entry was in right of it, under color of his title, and that he intended to assert his claim to the entire subject of the grant. It follows that the entry transferred the possession of the whole body of the land from John Brobst to Boyer, and that, no matter where his "*pedis possessio*" was taken, he acquired possession to the extent of the mortgage deed. There is no distinct evidence how long he continued an actual occupation by his tenants. It is enough that Brobst never afterwards sought to regain possession, and the presumption of law, therefore, is that the possession remained in Boyer so long as his rights under the mortgage continued. On the 3d of November, 1825, he caused a *scire facias* to be issued under the statute law of the state against the mortgagor, with notice to *terre tenants*, requiring them to show cause why the lands should not be sold, and the proceeds of sale applied to the payment of the debt.

This writ was not served upon the mortgagor, or upon John Brobst, the owner of the equity of redemption. The sheriff's return was, "Served upon Jacob Roderberger, *terre tenant*." Nevertheless a judgment was entered on motion. That judgment was that the lands mortgaged be sold to satisfy the debt. Had the judgment been authorized, even though erroneously entered, a sale under it would have passed to the purchaser both the interest of the mortgagee in the lands and the equity of redemption then in John Brobst.

§ 702. *A judicial sale, although irregular or void, made at the instance of a mortgagee, passes to the purchaser all the rights of the mortgagee.*

But it is contended the judgment was void in law because no service of the *scire facias* was made upon the mortgagor, or the actual *terre tenant*, John Brobst (no one but the holder of the title being recognized as a *terre tenant*), and because there was no return of "*nihil*," in default of such service. We shall not discuss that. Assuming that the objection is well taken, and so it was assumed in the court below, it is still true that the record exhibited a formal judgment. Upon this a writ of *levari facias* was issued, and all the lands described in the mortgage were sold under it to Charles Frailey, on the 22d of March, 1828, to whom a sheriff's deed was duly made. Frailey purchased at Boyer's instance, with Boyer's money, and, of course, for Boyer. Subsequently, at Boyer's request, he conveyed the property to John Smull, whose title the defendant Brock has. In regard to all this there is no controversy. The evidence submitted by the plaintiff shows how Frailey purchased and conveyed. Now, the worst that can be said of the sheriff's sale under the judgment so obtained is that it did not pass the title to the equity of redemption; that it did not operate as a foreclosure of the mortgage. But did it not, in connection with Frailey's deed to Smull, made at Boyer's instance, and the subsequent conveyances by which Brock became invested with the title, operate to transmit to Brock the rights of the mortgagee? We think it did. It would be "passing strange" if Boyer, after having requested Frailey to buy at the sheriff's sale, and after having furnished him with the money to purchase, and directed him to convey to Smull, could have asserted his mortgage against Smull or Smull's grantee. Beyond question the conveyance by Frailey under the circumstances was a conveyance in effect by Boyer, and it passed all the right to the land which Boyer had. It is not necessary to this conclusion that we should hold the sale under the judgment cut off the equity of redemption. We express no opinion upon that subject. It is enough that an irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had. For this authority is hardly needed. We may, however, refer to *Gilbert v. Cooley*, Walk. Ch., 494, where it was held that though a statutory foreclosure of a mortgage be irregular, and no bar to the equity of redemption, yet the purchaser at the sale succeeds to all the interest of the mortgagee. In that case there was no evidence that the purchaser bought at the instance of the holder of the mortgage. *A fortiori*, must one who has bought from the mortgagee, or from a purchaser at such a sale for the mortgagee, as in this instance, obtain all the rights which the mortgagee held. To the same effect as *Gilbert v. Cooley* is the case of *Jackson v. Bowen*, 7 Cow., 13. If, therefore, it could be held that Boyer's possession, through his tenant, Roderberger, did not, of course, extend over the Deborah Grant tract (which is the tract in contest in this suit), it would still be established that the defendants are assignees of the mortgage in possession. The principal defendant, Brock, consequently, is clothed with the rights of the

mortgagee. He is protected by the legal title, even though it be conceded that the equity of redemption is still in existence. From 1821 to 1861, the date of John Brobst's death, and, indeed, until 1865, when this suit was brought, no claim for redemption was ever asserted.

§ 703. *Generally, a mortgagor, after his mortgagee has been in possession twenty years, cannot be heard in advancing a claim to redeem.*

As a general rule, a mortgagor, after his mortgagee has been in possession twenty years, cannot be heard in advancing a claim to redeem. As was said in the court below, it is presumed he has released his equity. A chancellor will not entertain stale claims. It is true that in most cases where this doctrine has been avowed the mortgagee had been in continued actual occupancy, having not merely a right, but a *pedis possessionem*.

§ 704. — *imperfect rights must be asserted with vigilance.*

But the cases are not rested upon that ground, nor is it easy to see how that can make any difference in the rule when the mortgagor is out of possession, and knows, or is bound to know, that a right is asserted against him. The refusal of a court of equity to interfere is because of the laches of the holder of the equitable right, and a sleep of forty years, such as there was in this case, may well raise every presumption against a claim merely equitable. All such rights are imperfect, and hence they must be asserted with vigilance.

§ 705. *Lapse of time raises no presumption that a mortgage has been paid as against a possessor under the mortgage.*

It was said in the argument, on behalf of the plaintiff in error, that the lapse of more than twenty years raised a presumption that the mortgage had been paid, and that the mortgagee's rights had been extinguished before this suit was brought. No such point appears to have been presented in the court below, and hence it ought not to be mooted here. But how any such presumption can arise against a mortgagee, or his alienee, when he has been in possession under the mortgage, we have not been shown. Even if it could, it was completely rebutted in this case by the evidence submitted by the plaintiff in error. It was proved, without contradiction, that Michael Brobst, the mortgagor, became insolvent, and died in 1820, before the mortgage debt became due, never having been married and leaving no personal representatives, and none but collateral heirs. John Brobst, his alienee, also became insolvent, removed to the western part of the state, and thence to Maryland in 1827, where he resided until his death in 1861, never having returned to Pennsylvania, so far as it appears, and having been supposed to be dead. These facts, shown by the plaintiff, were quite enough to repel any presumption of payment arising from the lapse of time. Had they been submitted to the jury it would have been their duty to find that the legal presumption, if any could arise under the circumstances, was rebutted. To this the authorities are numerous. *Filadong v. Winter*, 19 Ves. Jr., 196; *Blacket v. Wall*, 3 Mees. & R., 119, note; *Daggett v. Tallman*, 8 Conn., 176; *Newman v. Newman*, 1 Stark., 81; *Shields v. Pringle*, 2 Bibb, 387; *Boardman v. De Forrest*, 5 Conn., 1; *Bailey v. Jackson*, 16 Johns., 210; *Goldhawk v. Duane*, 2 Wash., 323.

The defendant Brock, then, if all his other titles are shut out of view, is, as has been said before, in the position of a mortgagee in possession, and the lessor of the plaintiff has at most only an equity of redemption—an equity more than commonly stale. From 1825, when Roderberger was certainly in possession under Boyer, until 1865, when this suit was brought, no attempt was made to assert the equity or to redeem the land. Meanwhile extensive im-

provements have been made upon the property, and it has been converted from a wilderness to a populous settlement. It is hardly probable that at this late day a bill to redeem would be entertained by any chancellor. But this we need not now decide. It is sufficient that there has been no redemption. It has been held that ejectment will not lie at the suit of a mortgagor against his mortgagee in possession, after breach of the condition, even if the money secured by the mortgage be paid or tendered. This was said by the supreme court of Massachusetts in *Hill v. Payson*, 3 Mass., 559, and solemnly decided by the same court in *Parsons v. Welles*, 17 id., 419, where may be found a thorough discussion of the subject. The doctrine of that case is, that the only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity. This was shown to be in accordance with the rules of the common law, as well as implied in the statutes of the state, and this seems to rest upon correct principles. If it were not so, a mortgagor might remain quiet until his mortgagee in possession (the property being unimproved, as in this case) had made improvements necessary for obtaining any income therefrom. He might then tender the debt and interest, and recover the possession without making any compensation for the improvements. The mortgagee in such a case would have no remedy for his disbursements. But if the mortgagor must file a bill to redeem, asking for equity, he may be compelled to do equity. Hence there is justness and fitness in holding that the legal title remains in the mortgagee until redemption, though the debt has been paid. It is observable that the statute of 7 Geo. II., ch. 20, enacted that a mortgagee shall not maintain ejectment, after payment or tender by the mortgagor of principal, interest and costs. There could have been no necessity for such an enactment if the legal title had not remained in the mortgagee. The point has never been decided by this court, but in *Gray v. Jenks*, 3 Mason, 520, Judge Story intimated at least that such was his opinion, though the case did not call for such a decision. It is true a different rule is said to prevail in New York from that held in Massachusetts, but it is not the rule of the common law, nor can it be so promotive of justice.

This is all that need be said of the case. Were it conceded that the circuit court was in error in instructing the jury that the sale under the Kutz and Levan judgment passed whatever title John Brobst had (which we do not assert), or that the rulings respecting the partition and the tax title were erroneous, it would not avail the plaintiff in error, because, for the reasons mentioned, there can be no recovery in this action.

Judgment affirmed.

ABBOTT v. POWELL.

(District Court for California: 6 Sawyer, 91-95. 1879.)

§ 706. *The right of a junior mortgagee of a single parcel of ground to compel the first mortgagee to resort, in the first instance, to the property on which he has an exclusive claim, cannot be impaired by a declaration of homestead on the property exclusively mortgaged to the first mortgagee.*

Opinion by HOFFMAN, J.

I have carefully examined all the authorities furnished me by the learned counsel for the defendant. I am unable to perceive that any of them are decisive of, or even discuss the principal point made in, the case at bar. It is not

disputed that, as a general rule, where a creditor has a claim on two funds, on one of which another person has also a claim, and such other person will be prejudiced by allowing the creditor to satisfy his debt out of the fund subject to both claims, equity will compel the creditor to resort, in the first instance, to the fund to which he alone has a claim, if it can be done without injustice to him or to the common debtor. Story Eq. Jur., secs. 560-633. But this equity, it has been held, exists only in favor of junior mortgagees and other incumbrancers, and the application of the rule has been refused when asked for by a mortgagor. Thus, in Massachusetts, where a mortgage embraced homestead property, and also property not impressed with that character, an application that the latter should be first sold, and the homestead exempted if the other property was sufficient to satisfy the mortgage, was refused by the judge, and the decision sustained by the supreme court. *Searle v. Chapman*, 121 Mass., 19. In this case Gray, C. J., observes: "The power of a court of chancery to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for the protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them, according to its terms, and is not obliged to elect between different remedies or securities."

In Wisconsin the rule of equity was applied in favor of judgment creditors of the mortgagor, as against the mortgagee of the homestead, and the latter was compelled to foreclose his mortgage on the homestead before being admitted to share with the other creditors in the proceeds of the remainder of the mortgagee's estate. *White v. Polleys*, 20 Wis., 503. But this rule was subsequently altered by statute. Laws of Wis., 1870, ch. 133, sec. 1. So, in another case in the same state, where a mortgage embraced a homestead and a business lot, and the homestead had been sold to satisfy the mortgage debt, the court refused to set aside the sale so that the business lot might be sold first, it appearing that there were creditors of the mortgagor who had judgment liens on the business lot which were not liens on the homestead. 18 Wis., 241. It is unnecessary, however, to cite from the authorities. I have mentioned these merely to show the diversity of opinion which has prevailed as to the rights of the owners of homesteads as against mortgagees. In this state it appears to be settled that a mortgagee of lands not included in a homestead cannot compel a prior mortgagee, whose mortgage includes those lands and also the homestead, to resort to the latter before selling the lands mortgaged to the junior mortgagee. *McLaughlin v. Hart*, 46 Cal., 639.

It has also been held that the wife may, after a judgment against her husband has become a lien on the home property, file a declaration of homestead upon it, and acquire such an interest in it that she can compel the sheriff to exhaust the husband's individual property before subjecting it to sale. *Bartholomew v. Hook*, 23 Cal., 277. But neither of these cases contains the slightest intimation that where a person has made a mortgage on two pieces of property, and afterwards makes a second mortgage on one of them, the equitable right of the junior mortgagee to compel the first mortgagee to resort, in the first instance, to the property on which he has an exclusive claim, can be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. I have been referred to no case which hints at so inequitable a rule. The junior mortgagee, when accepting the security of a second mortgage, had a right to repose upon the

protection afforded him by the familiar rule of equity, and to act upon the assurance that the first incumbrancer would be compelled to resort to the property on which he had an exclusive claim, before coming on the property covered by the second mortgage, and that no act of the mortgagor could deprive him of the right to compel him to do so.

If the mortgagor or his wife, by merely making a declaration of homestead, could thus impair or destroy the security of the junior mortgagee, why might he not effect the same result by making a grant of the property exclusively embraced in the first mortgage? The declaration of homestead may be likened to a grant to himself and wife, for it operates an exemption of the property from the claims of his general creditors; and yet it will not be disputed that where the whole of an estate is mortgaged, and the mortgagor makes subsequent mortgages or sales of specific parcels of it, the subsequent incumbrancers have the right to compel the general mortgagee to satisfy his debt by selling in the inverse order of the sales or mortgages by the owner. *Ram v. Reynolds*, 11 Cal., 20; *Cheevers v. Fair*, 5 id., 337. Any other rule would be injurious to the mortgagor himself. For after mortgaging his property for, it might be, an insignificant part of its value, he would be unable to sell or incumber any separate parcel of it. For the purchaser or incumbrancer would have no assurance that his parcel might not be first taken to satisfy the general mortgage.

The interests, then, of both owners and incumbrancers of land require that the equitable rule under consideration should be rigidly adhered to in all cases justly admitting of its application, and with such certainty as to permit reliance upon it as a vested right incidental to and inseparable from the rights created by the mortgage. I can conceive no reason, of justice or policy, why this right, which confessedly existed as between the first and second mortgagees, and which grew out of the contracts of the mortgagor himself, should be destroyed or impaired by the filing by the latter, or his wife, of a declaration of homestead.

It is urged that the mortgagee in this case has lost the right to demand the application of the rule, because he had other securities on which he has released his lien, and the proceeds of which, when sold by the mortgagor, have been applied in part only to the payment of the mortgage debt. And this result, it is urged, would ensue even if no homestead had been declared on the property. But this relinquishment by the mortgagee of a portion of the security, its sale, and the application of the proceeds, were done not only with the assent of the mortgagor, but must have been done by him, for he alone could make a title to the purchaser. The proceeds were applied no doubt in accordance with the agreement made when the mortgagee consented to waive his lien. The mortgagor cannot be now heard to object to a transaction assented to and effected by himself. There are no junior incumbrances on the property which it is now asked shall be first sold. These, if they existed, might very possibly invoke the equitable rule under consideration, and demand that the whole proceeds of the property on which the mortgagee had an exclusive lien should be applied in payment of his debt before he can compel the mortgagee prior to himself to sell first the property which is also mortgaged to them. The only subsequent incumbrance on the property covered by either mortgage is that created by the declaration of homestead. The rights acquired under that declaration have already been considered.

It is objected that the first security given was in the form of a deed of trust,

which vested the legal title in trustees, and which is, in some respects, distinguishable from a mortgage in the ordinary form. This is true; but I do not see what effect it can have on the rights of the second mortgagee. The trust deed was intended as a security; no right is claimed under it, except to sell the property and execute the trust by paying the debt. The trustees submit to the direction of the court as to the mode of selling. They do not deny that they are bound by the same equitable rules which would be enforced against an ordinary mortgagee. The fact that the legal estate is in them does not emancipate them from those rules, any more than an ordinary mortgagee would be released from their operation in those states where a mortgage is held, as at common law, to pass the legal title. For these reasons I am of opinion that the application of the assignee should be granted.

LANAHAN v. SEARS.

(12 Otto, 818-822. 1880.)

APPEAL from U. S. Circuit Court, District of Texas.

STATEMENT OF FACTS.—Sears and wife executed a deed absolute on its face, to Robertson, agent of a firm to which Sears was indebted. There was executed by Robertson at the same time an instrument declaring the deed to be security for Sears' debts to the firm. The property so conveyed was the homestead of Sears, in Waco, Texas. By mesne conveyances Robertson's title passed to Lanahan, a member of the creditor firm, he holding for the benefit of the firm. The notes remaining unpaid, Lanahan brought ejectment for the land, and Sears and wife filed this bill to enjoin him. The defendant demurred, and his demurrer being overruled he appealed.

§ 707. *An absolute deed with a separate defeasance.*

Opinion by MR. JUSTICE FIELD.

The premises described in the complaint are in the city of Waco, in the state of Texas. They have been the homestead of the complainants from the time of their purchase, in May, 1870. The conveyance to Robertson in 1873 was accompanied by a defeasance from him, stating that the deed was executed as security for certain promissory notes of the husband. The two documents—the deed, which was absolute in form, and the defeasance—are, therefore, to be taken together as if forming one instrument. They together constitute a mortgage, and as such would be treated in the courts of Texas.

§ 708. *Under the constitution of Texas of 1868, a homestead is not to be subjected to "forced sale," and a mortgage of it cannot be enforced, nor can the mortgagee maintain ejectment.*

By the constitution of that state of 1868, which was in force when the notes were given and the mortgage executed, the homestead of a family was not subject to forced sale for debts, except for the purchase money, or for taxes, and for labor and materials expended thereon. The premises in question, therefore, could not be sold under any decree in a suit for the foreclosure of the mortgage. The prohibition of the constitution extended to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise. A similar prohibition in the constitution of 1845 was so construed by the supreme court of the state in *Sampson v. Williamson*, contained in 6 Tex., 102. In that case Chief Justice Hemphill said that "the constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or from any forced disposition of the property, whether partial or

total, which would disturb the family in the quiet and uninterrupted possession of their home with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from any extents or deliveries of the property, or from any forcible appropriation of its rents, issues and profits. It protects the domestic sanctuary from every species of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts."

The appellant is the owner of the mortgage in this case, and aware—so states his counsel—that he could not enforce it against the homestead in the state courts, as there mortgages can only be enforced by a decree of sale, commenced an action of ejectment for the premises in the circuit court of the United States, contending that the mortgage passed the legal title as against the mortgagors, and that, as its owner, he had a right to recover the possession of the premises for default in the payment of the notes secured. He sought, in other words, to get around the state constitution by the form of his procedure in the federal court. We do not think that its wise and beneficent purpose of securing a home to the family against the vicissitudes of fortune can be thus easily evaded. A forced dispossession in ejectment is as much within the prohibition as a forced sale under judicial process. We think, therefore, that the decree in the suit, enjoining the action of ejectment, was properly rendered upon the undisputed facts stated in the complaint; and it is accordingly affirmed.

§ 709. A mortgagee in possession may purchase the mortgagor's equity of redemption, but the transaction will be closely scrutinized, so as to prevent any oppression of the debtor. *Russell v. Southard*, 12 How., 139 (§§ 491-509).

§ 710. Though a mortgagee may purchase the mortgagor's equity of redemption, the transaction will be closely scrutinized so as to prevent any oppression of the debtor. It is sufficient to avoid the sale that the consideration is wholly inadequate. *Oliver v. Cunningham*, * 7 Fed. R., 689.

§ 711. The mortgagee may purchase the mortgagor's equity of redemption, but it must be shown that his conduct was in all respects fair, and that he paid for the property all it was worth. *Peugh v. Davis*, * 2 MacArth., 14.

§ 712. In Wisconsin the fee of mortgaged lands does not vest in the mortgagee upon condition broken. Possession obtained by a mortgagee, through collusion with the mortgagor's tenant, is unlawful and confers no rights. *Russell v. Ely*, * 2 Black, 575.

§ 713. Mortgagee in possession cannot be ousted.—Whether a mortgage be regarded as transferring the legal estate to the mortgagee, enabling him to take possession of the property at any time, or whether the interest or equity of redemption of the mortgagor be regarded as the legal estate, it is generally true that a mortgagee in possession after the debt is due cannot be ousted by the mortgagor without redemption of the property by paying the debt. *King v. Young Men's Association*, 1 Woods, 386.

§ 714. Surety's mortgage inures to principal creditor.—A mortgage given to indemnify a surety inures to the protection of the principal creditor, and a court of equity will see that it is applied for that purpose. *Burroughs v. United States*, 2 Paine, 569.

§ 715. Homestead—Priority as between judgment and mortgage.—In Virginia, a judgment was obtained against a bankrupt on an obligation which contained no waiver of homestead, and part of the land of the debtor was also conveyed by a deed of trust junior to the judgment. The deed of trust waived the homestead right. It was held that the judgment lien was entitled to satisfaction in preference to the deed of trust; also, that the deed of trust was not entitled, by subrogation, to satisfaction out of the land not covered by it. *In re Cogbill*, 2 Hughes, 313.

XV. PURCHASER'S RIGHTS AND LIABILITIES.

SUMMARY — *Purchaser agreeing to pay mortgage — Novation, § 716. — Court of equity in foreclosure suit may adjudicate liability of purchaser, § 717. — Clause of assumption improperly inserted, § 718. — Mortgagee's right of action against purchaser who has assumed mortgage, § 719.*

§ 716. The mere assignment by the mortgagor of his interest in the mortgaged premises to a third person, who agrees to pay off the mortgage, does not release the mortgagor. There is no novation unless there be something to show that the mortgagee has released the mortgagor and has agreed to look solely to the purchaser for payment of the mortgage debt. The acceptance by the mortgagee of a second mortgage upon the property from the purchaser would not release the first mortgagor. *Connecticut Mut. L. Ins. Co. v. Tyler, § 720.*

§ 717. A court of equity, having acquired jurisdiction of a cause to foreclose a mortgage, can proceed and adjudicate the question of the personal liability of one who has purchased the equity of redemption and assumed the debt. *Hayden v. Drury, §§ 721, 723.*

§ 718. Although the clause whereby a purchaser assumes an existing mortgage be improperly inserted in the deed, yet such mistake cannot be set up against one who has purchased the mortgage notes, while negotiable and not overdue, and may have relied upon the contract of assumption as it appears of record. *Ibid.*

§ 719. The purchaser of an equity of redemption who undertakes the payment of an existing mortgage as part of the consideration of the purchase impliedly undertakes to pay the mortgage, and the mortgagee may recover of him in *assumpsit*. *Twichell v. Mears, § 723.*

[NOTES. — See §§ 724-727.]

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. TYLER,

(Circuit Court for Illinois: 8 Bissell, 369-371. 1878.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS. — This is an application made for a decree, payable in money, for the balance that has been found due to the plaintiff, over and above the proceeds of the sales on mortgage foreclosures, in pursuance of the ninety-second rule in equity. This motion is opposed by the owner of one of the lots mortgaged, and which has been sold. The facts are substantially as follows: There were four lots on Monroe street, in Chicago, and which for distinction we will call numbers 1, 2, 3 and 4. No. 1 was on the corner of Dearborn street and owned by Mr. Shepard. The estate of Albee owned No. 2, and Prickett & Drysdale 3 and 4. Shepard made a mortgage of his lot to the plaintiff. Prickett & Drysdale also made a mortgage of No. 3 to the plaintiff.

After these mortgages were made, Tyler purchased the whole of the four lots, of course subject to the mortgages made by Shepard, and by Prickett & Drysdale. He then mortgaged the whole of the four lots to the plaintiff. The plaintiff thus became the owner of three mortgages on the property, — from Shepard, lot No. 1; from Prickett & Drysdale, lot No. 3, and from Tyler of all the lots, 1, 2, 3 and 4. The plaintiff filed a bill of foreclosure on all the mortgages in one suit, and obtained a decree, and the lots were sold separately. Lot No. 1 was sold and bid in by the plaintiff for about \$3,000 less than the amount due on the Shepard mortgage. Lot No. 3 was bid in for a sum greater than was due on the Prickett & Drysdale mortgage; and the other lots were bid in at prices which caused a large deficiency on the Tyler mortgage. And the principal question is whether the plaintiff is entitled to a personal decree against Shepard for the full amount of the balance due on his mortgage.

§ 720. *A mortgagor who has assigned his interest to a third party who assumed the mortgage debt is nevertheless liable to a deficiency decree. What is not a novation and what is not a release of the mortgagor.*

It seems to me clear that the plaintiff is entitled to this money decree. It is said that there was a novation made by the parties, because Tyler purchased the property subject to the two prior mortgages, and agreed to pay them off, and that when the mortgage was made by Tyler to the plaintiff, there was a ratification and recognition of the two mortgages already made. But there is nothing upon the face of the papers, or in the proofs, to show that the plaintiff ever released Mr. Shepard from the obligation of his mortgage, and, of course, there could not be a novation unless there was a release of his obligation, and some other person substituted for the payment of what was due by him, for instance, Mr. Tyler; but there is nothing to show that the plaintiff agreed to look to Mr. Tyler for the payment of the Shepard mortgage, and to release the latter. Consequently, one of the main elements of a novation was wanting in the case. The property having been sold for less than the amount of the debts due, the plaintiff is clearly entitled to a personal decree against Mr. Shepard, and also against Mr. Tyler for the balance due. The ninety-second rule in equity, under which this motion is made, authorizes a personal decree against the mortgagor for the balance due above the price paid on the sale of the property in a foreclosure case; and consequently, under the facts in this case, the plaintiff is entitled to the decree which he asks against Mr. Shepard and Mr. Tyler respectively.

HAYDEN v. DRURY.

(Circuit Court for Illinois: 3 Federal Reporter, 732-739. 1890.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—The bill in this case was filed to foreclose a mortgage dated July 28, 1875, given by Solomon Snow and wife to secure the payment of two notes, of even date with the mortgage, for \$6,000 each, payable in two and three years, respectively, to the order of the maker, and by him indorsed to J. E. Lockwood, said mortgage being subject to a prior incumbrance by trust deed to E. C. Larned, as trustee, to secure the payment of \$28,000. The bill alleged that Solomon Snow, after the making of the mortgage in question, on the 14th of December, 1875, sold and conveyed the mortgaged premises to William C. Snow, subject to the said two incumbrances, and that William C. Snow, on the 28th day of January, 1876, conveyed the premises to Isaac M. Daggett, subject to the same incumbrances, and that Daggett, on the 12th day of April, 1876, conveyed the premises to the defendant William Drury, subject to the said two incumbrances, and by the deed from Daggett to Drury the latter agreed to assume and pay the said incumbrances, and that the said incumbrances formed a part of the consideration or the purchase price for the said premises, which agreement was in the following words: "Subject to a certain trust deed executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure the payment of \$28,000, dated July 28, 1875, due in five years from date, with interest at ten per cent. per annum, payable semi-annually, and also subject to another trust deed executed by Solomon Snow and wife to R. B. Bacon, to secure the payment of \$12,000, dated July 23, 1875, due two and three years from date, with interest at eight per cent. per annum,

payable semi-annually, both of which said incumbrances the party of the second part herein agreed to assume and pay."

The bill further alleges a default in the payment of the interest due on the notes, which fell due April 28, 1877, which default, by the terms of said mortgage, allowed the holder of said notes to elect to declare the whole principal sum thereby secured, and the interest thereon, due and payable at once, and that such election has been made. The bill further charged that the said Joseph E. Lockwood, to whom Solomon Snow indorsed said notes, on the 1st of November, 1876, for a valuable consideration to him in hand paid, assigned and transferred said two notes to the complainant, who is now the legal owner and holder thereof. In the original bill the complainant prayed for a foreclosure of the mortgage and sale of the mortgaged premises, and in case the proceeds should not be sufficient to satisfy the amount due them, for a personal decree for the deficiency against the said defendant Drury.

Drury answered, admitting the making of the notes and the mortgage, the conveyance of the mortgaged premises from the mortgagor to William C. Snow, and from Snow to Daggett, and from Daggett to himself; and that the deed from Daggett to himself contained the clause of assumption as set out in the bill, but averred that there was no agreement between himself and Daggett that he should assume and pay the said incumbrances; and that it was not the intention of the parties to the deed that he should assume said incumbrances; and that the clause in said deed expressing such agreement was inserted therein by the mistake of the scriveners who drew the same; and that he (Drury) accepted said deed without the knowledge that it contained said clause, and did not become aware of the fact that it did contain said clause until some time in July, 1877, when Daggett, for the purpose of correcting the mistakes of the scrivener, and effectuating the intention of the parties to the deed, executed and delivered an instrument, under seal, releasing the defendant Drury from the obligations to pay the said incumbrances.

On February 17, 1880, complainant filed a supplemental bill, stating, in substance, that since the filing of the original bill a bill had been filed in this court against the said Drury and others by Robert E. Kelly, the holder of the indebtedness secured by the first mortgage for \$28,000, and that such proceedings had been had in said cause, that on the 27th day of June, 1878, a decree of foreclosure had been entered upon the said mortgage; and that upon the 26th day of July, 1878, the mortgaged premises were sold for the satisfaction thereof, and that no redemption had been had from said sale; and that a deed had been made to the purchaser, by the master in chancery, on the 30th day of October, A. D. 1879; and prayed that the amount found due by the master in this cause be entered by this court against the defendant William Drury in accordance with the assumption of the said indebtedness.

Drury's answer to the supplemental bill admits the exhaustion of the proceeds of the mortgaged premises by the foreclosure of the first mortgage, and refers to his answer to the original bill, which, he prays, may be taken as a part of his answer to the supplemental bill. The proof in this cause is mainly applicable to the questions of the fact whether or not the defendant Drury, in the purchase of the equity of redemption of the mortgaged premises, agreed, as part of the transaction, to assume and pay these two mortgage debts, and whether or not the clause of assumption in the deed from Daggett to Drury truly expressed the contract between the parties as to the payment of the said indebtedness.

From a careful consideration of the testimony I have come to the conclusion that it was not the agreement or intention of Daggett and Drury that Drury should assume and agree to pay the indebtedness secured by these two mortgages, and that the clause in the deed to him, whereby he was made to assume and pay them, was inserted without his knowledge, and by mistake of the attorney who prepared the deed. My reasons for this conclusion are: *First*, that the preponderance of evidence on the question is largely in favor of the defendant. The testimony of Daggett, Whipple and the defendant Drury on this point is so full and circumstantial as to leave almost no room for doubt on the question. They all testify unequivocally that it was expressly understood that Drury was not to assume the incumbrances, or either of them, and Drury said that he had no knowledge of the assumption clause in the deed to him until his attention was called to it by Mr. E. C. Larned, in April, 1877. *Second*, there was no motive or inducement for Daggett to exact such terms from Drury, his grantee, as Daggett had not assumed or agreed to pay the indebtedness. There was, therefore, no reason why he should gratuitously interest himself in securing a contract from Drury for the benefit of the mortgagee. *Third*, the nature of the transaction weighs heavily against the probability that any sane business man would have assumed such a liability. The proof shows that Drury exchanged a farm in Mercer county, this state, for this and two other pieces of heavily-incumbered Chicago real estate; that the transaction took place in 1876, and that on the 25th of July, 1878, only a little over two years after, the property in question was sold under the decree of foreclosure on the first mortgage for \$28,000, and that no surplus was obtained by such sale to apply on this mortgage. This circumstance, in my mind, tends strongly to corroborate the testimony of Daggett, Whipple and Drury, that Drury only intended to purchase the equity, but did not intend to assume the prior indebtedness. He might have been willing to give his farm for the chance that all these three pieces of property would realize something over and above incumbrances, but it is hardly reasonable to believe, in view of what must have been its then value, that he would have assumed so grave a responsibility as to make himself personally liable for this heavy prior indebtedness. It is true that Mr. Hutchinson, who drew the deed from Daggett to Drury, testifies that he must, from the course of business, have drawn the deed according to instructions, and would not have inserted this assumption clause unless directed to do so; but his directions may have come from some one who had no authority in the premises, or who was acting under a mistake or misunderstanding as to the terms of the contract.

Two questions of law arise upon the facts in this case as I now find them: *First*, can the complainant maintain this bill solely for the purpose of obtaining a personal decree against the defendant Drury, assuming that he did agree to pay the mortgage debt held by the complainant? *Second*. It appearing as an admitted fact in the case, as it is alleged in the bill and not denied in the answer, that the complainant purchased the notes secured by this mortgage in November, 1876, for value, before any default or maturity thereof, and after the defendant Drury had, by the deed to him which then appeared of record, apparently assumed to pay this mortgage debt, can he now be heard to say, as against this complainant, that he did not assume such payment? In other words, must the court presume that the complainant purchased these notes upon the faith of Drury's assumption and agreement to pay the same?

§ 721. *Jurisdiction to adjudicate the liability of a purchaser who has assumed the mortgage.*

As to the first question, it is an established rule that when a court of equity has once obtained jurisdiction of the parties and subject-matter, it will retain it for the purpose of doing complete justice between the parties. The bill in this cause was filed for a foreclosure of the mortgage in question. The citizenship of the parties brought the subject-matter within the jurisdiction of the court. The relief prayed was such as the court was adequate to give. It could not only award a decree of foreclosure and sell the mortgaged property, but could, under the ninety-second rule in equity, award a personal judgment against whoever was liable for any deficiency after the application of the proceeds of the sale; and, it seems quite clear to me, it does not lose that jurisdiction by the fact that the subject-matter of the mortgage has been sold by another decree to satisfy a prior incumbrance. The court can now, if it were deemed necessary, enter a decree of foreclosure and direct a sale of the mortgaged premises, and, after a sale for a nominal amount, could give a personal judgment for the deficiency; but, for my part, I do not deem it necessary to go through an empty form of foreclosure and sale to ascertain what the court knows judicially already, that the mortgaged property will furnish no fund to satisfy this mortgage debt.

There is, however, another aspect of this cause upon which the jurisdiction of the court to enter a decree on the merits of this cause may be retained. The complainant seeks by his bill to make a remote grantee of the mortgagor personally liable for this indebtedness. In a number of cases like this, where the assumption and agreement to pay the mortgage debt were declared to be a part of the purchase money or consideration for the deed of the mortgaged premises, the courts have held the grantee in the deed liable, on the ground that he, by his deed, acknowledged himself to hold so much money for the use of the mortgagees. And in those cases, it has been said, a suit at law could be maintained by the mortgagee against the grantee of the mortgagor. *Burr v. Beers*, 24 N. Y., 187; *Ross v. Kenneson*, 33 Mo., 396; *Comstock v. Hitt*, 37 N. Y., 456; *Thompson v. Thompson*, 4 Ohio St., 333; *Sanford v. Hays*, 19 Comst., 594. But in this case there is no admission that the assumption of the mortgage debt is a part of the consideration. The recital of the deed to Drury is to the effect that he assumes and agrees to pay this incumbrance. He does not admit nor declare that a part of the purchase money was to be paid by him (Drury) in payment of this mortgage indebtedness, as was the contract in many of the cases I have cited, so that this case is brought by its facts more directly within the rule of the cases adjudicated in New Jersey and Massachusetts, which hold that the liability of the grantee of the mortgagor, who has assumed the mortgage debt, can be enforced in equity by an application of the principle of equitable subrogation. From these various considerations I have, therefore, no difficulty in reaching the conclusion that the court still has jurisdiction to pass upon the question of Drury's liability, and to render a personal decree against him if justified by the law and facts.

As to the second question, it appears from allegations in the bill which are not denied by the answer, and are admitted, that the complainant purchased the notes secured by this mortgage for a valuable consideration, before due, and after the deed from Daggett to Drury had been made; and, in November, 1876, when this transaction, by the well-settled law of this state, where this transac-

tion took place, and all the parties resided, the assumption of this indebtedness by Drury inured to the benefit of the mortgagee, and could be enforced by him either at law or in equity. The mortgagor in this case was the holder of these notes; that is, these notes were given to be negotiable, made payable to the order of the mortgagor, and the mortgage passed with the notes as an incident then free of the equities between the original parties.

§ 722. *Mistake cannot be set up against a bona fide holder of negotiable paper.*

The case of *Carpenter v. Longan*, 16 Wall., 271, sustains fully the doctrine which I have laid down here, that the parties to a mortgage cannot set up a mistake as against the purchaser of the notes and the holder of the mortgage debt. The same doctrine was affirmed in the case of the *New Orleans Canal and Banking Co. v. Montgomery*, 95 U. S., 16. The court must therefore presume that when the complainant purchased these notes she took them with knowledge of the fact that the defendant Drury had assumed and agreed to pay them, and that the obligation could be enforced by the holder of the notes. The defendant Drury had by this deed made himself, apparently at least, a *quasi* party to the notes. He had agreed to assume and pay these notes, and thereby had given them, the court must presume, currency in the market. The mortgagee—that is, the *bona fide* holder of these notes—is, to the extent of this mortgage, a purchaser of the mortgaged premises. *Jones on Mortgages*, § 710 (1st ed.). In *Pierce v. Faunce*, 47 Me., 507, the court says: “A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage without notice is on the same footing with a *bona fide* mortgagee in all cases. The reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects. In this case the defendant Drury seeks to avoid the effect of the assumption of the debt on the ground of mistake, and the case seems to me to stand on precisely the same ground that it would occupy if he had filed a bill in equity to reform the deed, upon the ground that the assumption clause was inserted in it by mistake. And the rule is well settled that such a mistake cannot be rectified to the prejudice of an innocent purchaser for value. *Story's Eq. Jur.*, § 165; *Luckman v. Wood*, 69 Ill., 329. And if Drury could not be allowed to reform the deed by direct proceedings for that purpose, as against the *bona fide* holder of this mortgage and notes who has purchased them on the faith of this assumption appearing on the record, it is equally clear that he cannot be allowed to set up that defense in this cause. I therefore conclude that while, as between Drury and Daggett, this clause of assumption was wrongfully inserted, or at least improperly inserted, in the deed, yet such mistake cannot be set up against the complainant, who has purchased these notes on the faith of Drury's apparent assumption of them, which then appeared of record; and I also hold that the release deed made by Daggett to Drury from this assumption must be deemed inoperative as against complainant, and the decree will be for the complainant against Drury for the amount of the mortgage debt. The case shows that there has been a reference to the master, and a report made on it, some time in November last, of the amount due as stated by the master, and I give a personal judgment for the amount, and interest from the date of the master's report.

TWICHELL v. MEARS.

(Circuit Court for Illinois: 8 Bissell, 211-213. 1878.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.— This is an action brought on an alleged promise by defendant to pay the amount of a trust deed, in the nature of a mortgage, made by Austin H. Stowell to the plaintiff on a certain lot in Highland Park. The proof shows that Stowell was the owner of the lot in question, and had borrowed of the plaintiff \$1,500, which was secured by a mortgage on the lot; that he sold the lot to the defendant on the 15th day of April, 1875, for the sum of \$3,025, of which sum the mortgage in question was a part. The deed from Stowell to the defendant was for the express consideration of \$3,025, and contained the following clause:

"This deed is given subject to an incumbrance of \$1,575, secured by a deed of trust, dated October 1, 1874, of which \$75 is payable in one year, and \$1,500 payable in two years, respectively, from the date hereof; said \$1,500 bearing interest at the rate of ten per cent. per annum, payable at the office of Kirk Hawes, in the city of Chicago; which said \$1,575, with the accrued interest thereon from February 1, 1875, to April 15, 1875, is part of the consideration above named." It also appears from the evidence that the defendant has paid one year's interest on this incumbrance.

§ 723. *Circumstances under which the purchaser of an equity of redemption becomes personally liable for the mortgage debt to the mortgagee.*

The defendant insists that there is no privity of contract between the parties; that the mere purchase of the equity of redemption, or the purchase of the property subject to the mortgage, did not create such a privity of contract between him and the mortgagee as authorizes the mortgagee to maintain this action against him; that the law will imply no promise from such circumstances. The rule is probably as contended for by the defendant's counsel, that the purchase of an equity of redemption from a mortgagor of real estate does not make the purchaser personally liable to the mortgagee. But where the payment of an outstanding incumbrance, created by the grantor, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in *assumpsit*. The legal effect of the transaction is, to leave the portion of the purchase money represented by the incumbrance in the hands of the purchaser for the purpose of paying the incumbrance, and the promise being made for the benefit of the holder of the incumbrance, he may maintain an action to enforce it. This is amply sustained, I think, by *Burr v. Beers*, 24 N. Y., 178; *Comstock v. Hitt*, 37 Ill., 542; *Garnsey v. Rogers*, 47 N. Y., 234; *Thompson v. Thompson*, 4 Ohio St., 333; *Cum-berland v. Codrington*, 3 Johns. Ch., 229. There is also a series of cases in the Pennsylvania state courts to the same effect; but perhaps they would not be considered so much in point as the cases I have quoted, from the fact that they make no distinction between law and equity in that state, and many of the English cases proceed upon the assumption that while there may not be a remedy at law, there would be one in equity. But the cases I have cited are those where the principle is broadly laid down as I have assumed it — that an action at law may be maintained where the mortgage forms part of the consideration. The rule in this state is stated by Justice Breese, in *Comstock v. Hitt*, *supra*, and I think very happily and tersely stated: "Taking a deed subject to an outstanding mortgage creates no personal liability of the grantee to

pay off the mortgage, unless he has especially agreed to do so, or the amount of the mortgage has been deducted from the purchase price. When the payment of an outstanding mortgage is a part of the purchase price of the land, the law will imply an agreement to pay it."

The parol evidence and the deed, in this case, both show that the payment of the mortgage was a part of the consideration which the defendant agreed to pay for the land sold him by Stowell, which facts bring this case clearly within the rule laid down by the supreme court of this state, which I have just quoted. So, too, Chancellor Kent, in *Cumberland v. Codrington*, *supra*, says: "The leaving of so much money in the hands of the purchaser for the use of the mortgagee would seem to be a sufficient ground for a suit at law by the mortgagee." Other authorities to the same point undoubtedly exist, but it seems to me that these are sufficient to dispose of this case. There will be a finding for the plaintiff.

§ 724. *Purchase not subject to mortgage.*—Where A., the owner of land, was under obligations to convey a certain proportion of it to actual settlers, and granted a part of it to M., "subject, however, to the condition that the said M., the grantee, shall perform his part of the settling duties in proportion to the land conveyed," and M. mortgaged "the same this day conveyed to me by A. as by his deed, reference thereto being had," and subsequently conveyed the necessary lots to the settlers, the lots so conveyed were held not to be subject to the mortgage. *Foxcroft v. Mallett*, * 4 How., 355.

§ 725. *A mortgagee has a right in equity to recover the amount of his mortgage debt against a subsequent grantee who has assumed the payment of it.* *Hayden v. Snow*, 9 Biss., 511 (§§ 1095-1097).

§ 726. *Recital that purchaser assumes the mortgage.*—An innocent purchaser for value of mortgage notes has a right to rely upon recitals in a deed from the mortgagor to his subsequent grantee by which the latter assumes the mortgage debt. *Ibid.*

§ 727. *A mortgagee of a term of years who has not taken possession is not to be considered as a complete assignee, and is not chargeable with the real covenants of the assignor.* *Calvert v. Bradley*, 16 How., 580, 598.

XVI. ASSIGNMENT OF MORTGAGES.

SUMMARY — *Assignment of legal estate*, §§ 728, 729. — *Who can complain of separation of note and mortgage*, § 730. — *Assignee of mortgage securing a negotiable note*, § 731. — *Subject to existing equities*, § 732.

§ 728. *An assignee of a mortgage cannot recover in ejectment unless he is assignee of the legal estate, and not a mere equitable assignee.* *Cottrell v. Adams*, §§ 733, 734.

§ 729. *An assignment which merely gives the assignee power to foreclose is not an assignment of the legal estate and consequently does not enable him to maintain ejectment.* *Ibid.*

§ 730. *No one but the holder of the mortgage note can complain that the note has been separated from the mortgage, or the mortgage from the note. The mortgagor is not entitled to any relief in equity on this account.* *Matthews v. Warner*, §§ 735-737.

§ 731. *The assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities existing between the original parties. Duress is not available as a defense on the foreclosure of such a mortgage.* *Beals v. Neddo*, § 738.

§ 732. *The rule that the assignee of a bond and mortgage, which are merely choses in action, takes them subject to existing equities, is limited in its application to such equities only as existed between the mortgagor and mortgagee, and is not extended to those existing between the mortgagee and third persons. A secret assignment of a mortgage is not good against a subsequent assignee of the same mortgage for full value and without notice.* *Porter v. King*, § 739.

[NOTES.— See §§ 740-750.]

COTTRELL v. ADAMS.

(Circuit Court for Illinois: 2 Bissell, 351-353. 1870.)

STATEMENT OF FACTS.— Adams executed a note to a railroad company, and secured it by a mortgage upon the property which is the subject of this suit. The note and mortgage were assigned to plaintiff, and he brought this action of ejectment upon the mortgage. The question was whether the suit could be sustained on the assignment.

§ 733. *An assignee of a mortgage cannot maintain ejectment upon his assignment unless it conveys to him the legal title.*

Opinion by BLODGETT, J.

The only question to be decided is, whether this assignment is such a grant of the fee of the mortgaged premises as authorizes the assignee to maintain an action of ejectment for the recovery of the premises conveyed.

The rule is well settled that a mortgagee can maintain ejectment, after condition broken, for the recovery of the mortgaged premises; but when an assignee attempts to exercise the rights of the mortgagee, it seems to me he must if he would attempt to recover the possession of the premises by ejectment, show a conveyance or grant to himself of the estate which he seeks to recover. And I do not think that this assignment is a grant of the fee in the land — the mortgaged premises. It authorizes the holder or assignee to proceed and foreclose the mortgage, or to take any other remedy at law or equity. Now there is no grant of the fee, and it is well settled that no person can recover possession in ejectment unless he shows that he is entitled to the estate which he describes in his declaration. He has an equitable interest in the mortgage as assignee of the debt thereby secured.

§ 734. *Assignment not sufficient to convey legal title.*

But does the legal estate pass by the terms of the assignment? It seems to me not. There are no words of grant. There are no words by which it would appear that the assignor intended to convey the mortgaged premises themselves to the assignee. He simply authorizes and empowers the holder of this bond, "at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or to take such other legal remedy on said note and mortgage against said mortgagee or against said company, on its bond or on both, as shall seem proper and expedient to said holder thereof." Before ejectment can be maintained for the possession of the property, there must be an investiture of the legal estate in the plaintiff. I shall, therefore, be compelled to find for the defendant.

MATTHEWS v. WARNER.

(Circuit Court for Massachusetts: 6 Federal Reporter, 461-466. 1881.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.— This bill, filed in December, 1877, alleges that the plaintiff, Virginia B. Matthews, of New York, was, on the 1st of January, 1877, and for a long time before and after, the owner of one hundred and fifty bonds of the Memphis & Little Rock Railroad, and of fifty bonds of the Carolina Central Railroad, of \$1,000 each, giving the numbers; that they were her separate property; that some person to her unknown, and without her consent, authority or knowledge, placed these bonds in the hands of Warner

& Smith, of Boston, the defendants; that Warner & Smith, as the plaintiff is informed and believes, claim to hold the bonds as lawfully pledged to them to secure some debt or demand to her unknown, and intend to sell them at auction; that the defendants sometimes claim that the bonds were pledged to them by the plaintiff's husband, Edward Matthews; but, if so, he had no authority so to pledge them, and that the defendants, when they received the bonds, knew that they were her property; and that if these bonds were so received by the defendants it was without consideration, or upon a contract void in law; that the defendants have refused to surrender the bonds to the plaintiff.

The defendants answered that they held a bond of Edward Matthews for \$250,000, secured by mortgage upon real estate in the city of New York, as security for the notes of Nathan Matthews, a brother of Edward, exceeding \$200,000; that Edward was desirous of obtaining a surrender of this bond and mortgage, and delivered to them the railroad bonds March 6, 1877, in consideration of such surrender. They state fully the circumstances of this transaction, and annex to their answer a written agreement between them and Nathan and Edward Matthews concerning the same. They allege that Edward Matthews is the real party plaintiff, and that the title of Virginia B. Matthews is nominal and colorable.

The plaintiff amended her bill, and set up the same facts in respect to the exchange of the railroad bonds for the bond and mortgage which had been stated in the defendants' answer, and averred that the bond and mortgage were given as security for certain notes of Edward Matthews which were void for usury by the laws of New York, where they were delivered and negotiated; that the defendants held the bond and mortgage as trustees for one Thomas Upham and his creditors; that before the agreement for the exchange was made, Nathan Matthews falsely represented to Edward that Thomas Upham, or the defendants, held \$200,000 of the notes of Edward, for which the bond and mortgage were given as collateral, that, when the exchange was made, the defendants and their attorney falsely made a similar statement; whereas, in fact, Upham and the defendants, as his trustees, held the bond and mortgage as security for the notes of Nathan, only excepting one note, of \$5,000, which had been indorsed by Edward for the accommodation of Nathan, which was not one of the notes intended to be secured by said bond and mortgage; that Edward was induced by these false representations to assent to the transfer of the bond and mortgage to Upham, and to the exchange of the railroad bonds for this original security. It repeats that the whole transaction was void for usury, and adds that the mortgage had become of no value (meaning by the depreciation of real estate) before the exchange was made. To the amended bill an appropriate answer was filed, denying fraud and knowledge, and insisting on the validity of the transaction.

The evidence tends to show that the bonds in controversy were, at one time, the property of Edward Matthews, and, excepting fifty per cent. of the Memphis & Little Rock bonds, the title to which is not traced, were a part of a larger number by him assigned to his brother, Watson Matthews, in trust for Mrs. Matthews, his wife, the now plaintiff, as security for an indebtedness, the amount of which is not stated, of the husband to the wife, and that they were afterwards sold at auction by the trustee, and bought in by J. Brandon Matthews, the plaintiff's son, for her account. All this time the bonds were in the hands of pledgees, and there was no delivery of them to Mrs. Matthews, and no notice to the holders, but the transfers were on paper only. Afterwards, by

some person unknown, a part of the Carolina Central bonds were redeemed, and were put in the safe of a deposit company which was hired by Mrs. Matthews, and of which she and her son had keys, but her husband had none. Other bonds were placed in the same safe from time to time. Whenever Edward Matthews wished to sell or pledge any of these bonds he did so, his son furnishing them on demand. Others were afterwards substituted, and then again used as Edward's occasions might require, and so on.

Where the money came from that Edward had borrowed of his wife does not appear, and there is no evidence that the bonds were her separate property, except as that is to be inferred from the general statement that they were hers. Mrs. Matthews was not examined as a witness. Books which were kept for her by the clerk of Mr. Matthews are not produced. The witnesses, except to the paper title, are Edward Matthews and his son, who, having given these bonds to the defendants, testify that they had no authority to do so. It was not seriously denied, in the argument of the counsel who closed the case, that the facts show full authority for Edward Matthews to deal with all the bonds in his wife's safe as he chose; nor could it be denied with any hope of success. It seems, then, that the witnesses who testified to the want of authority must have intended to say merely that there was no express authority. There was as much right to take the bonds out of the safe as there ever was to put them in.

§ 735. *Circumstances under which a mortgagor is not entitled to relief on account of a perversion of the securities to other purposes.*

To my mind the evidence proves more than a right by Edward to use the bonds. It proves that they were his for all purposes for which he chose to use them. The case, therefore, must be decided upon the amended bill, which alleges that, considered as a contract and dealing with Edward Matthews himself, the defendants have no title. The contention from this point of view is that Edward Matthews was induced by the fraud of his brother to consent, as he did consent, in writing, to the assignment of the bond and mortgage to Upham, and that Upham had knowledge of the fraud; or that the mortgage was void because it was given to secure notes tainted with usury; or that, being given to secure certain notes, it was of no value when separated from them. It is clear that Upham had lent a great deal of money to Nathan Matthews, and that he held valuable securities for its repayment, which he surrendered in exchange for the bond and mortgage of Edward Matthews; and that he had no notice or knowledge of any dealings between the brothers which would injuriously affect his title. Upon the preponderance of evidence I find that Edward made the mortgage with knowledge that it was to be used to secure whatever debts Nathan owed Upham; or that it was so made and assigned that Upham had, as against Edward, the right to believe so.

The alleged fraud does not attack the mortgage itself, but only the assignment of it to Upham. It was given, according to this theory, to secure certain notes, and the fraud consisted in a false statement that Nathan would assign with it a corresponding amount of the notes; whereas he, in fact, negotiated those notes to other persons, thus creating a double liability. But the mortgage itself, having been lawfully given for the notes, unless avoided by usury, stands as their security. Edward Matthews is in bankruptcy, and the notes are still outstanding, unpaid, to a greater amount than \$200,000. Therefore, the only persons who can at present complain that the mortgage has been separated from the notes are the holders of them. Neither Edward Matthews nor

his wife have an equity apart from these holders; and, if they can maintain a bill, can only do so by making these persons parties, and by asking for a wholly different relief from that which the plaintiff now asks.

§ 736. *Rule in equity as to relief on the ground of usury. Party setting it up must repay the money actually lent.*

Were the bond and mortgage wholly void, from the beginning, for usury? If they were, I should incline to think Edward Matthews estopped to show it; but, at all events, one who asks relief in equity on this ground must first offer to repay the money actually lent. As a general proposition this is admitted; but there is a statute in New York which authorizes the borrower to obtain such a surrender, in equity, without payment. This statute is so strictly construed that it has been held not to apply to an assignee in bankruptcy of the borrower (*Wheelock v. Lee*, 15 Abb. Pr. (N. S.), 64; S. C., 64 N. Y., 242), nor to a purchaser of an equity of redemption of land upon which there is an usurious mortgage. *Bissell v. Kellogg*, 65 N. Y., 432. It seems to me, however, that if a borrower pledges the property of a third person for his debt, that person must be so far identified with the borrower as to have all his rights at law and in equity. If I say that Mrs. Matthews is only a nominal holder for her husband, bound by his obligations in respect to the property, how can I refuse her the same rights which he would have to the same property?

§ 737. — *statute of a state does not bind a court of equity out of the state.*

However this may be, the statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, cannot bind a court of equity out of the state, and does not undertake to do so. When a borrower comes into equity in Massachusetts, or in the circuit court, he must do equity, as understood by the court in which he sues. If, then, the defendants held the notes for which the bond and mortgage are said to have been given, and if they were so given, there could be no redemption without payment. For these reasons the complainant is not entitled to the relief which she seeks. Bill dismissed, with costs.

BEALS v. NEDDO.

(Circuit Court for Kansas: 1 McCrary, 206-208. 1880.)

Opinion by FOSTER, D. J.

STATEMENT OF FACTS.—The plaintiff, Charles L. Beals, filed his bill in equity against the defendants, A. P. Neddo and Louisa Neddo, his wife, for a decree of foreclosure of a certain mortgage made by said defendants, on February 1, 1876, on one hundred and sixty acres of land in Shawnee county, the same then and now being the homestead of defendants, which mortgage was made to J. H. Fairbanks to secure a negotiable promissory note, for the sum of \$1,500, bearing even date therewith, and payable three years after date. Before the maturity of said note, and on March 27, 1877, the said Fairbanks indorsed said note and assigned said mortgage for a valuable consideration to this plaintiff, who had no notice of any infirmities in said papers, or of any equities against the same.

Louisa Neddo sets up in her answer to plaintiff's bill that she was induced to sign said mortgage, as also the note, under threats of personal violence from her husband, said A. P. Neddo; and that by reason of said duress she never gave her voluntary consent to said contract, and that the said mortgage is null and void. The evidence tends to show that on the day of the execution of the paper by Mrs. Neddo, her husband threatened that if she did not sign said

mortgage he would cut her throat; that at the same time he made the threat he had in his hand a large pocket-knife, and the threats were made in the presence of a grown son and daughter of Mrs. Neddo; that shortly afterwards, in a few minutes, the notary came into the room with the papers, and Mrs. Neddo signed and acknowledged the same in his presence; that there was nothing in her appearance or manner to excite the suspicion of the notary, or cause him to think she was acting under duress or excitement; that the money was borrowed and used mainly to pay off a prior mortgage on said homestead given by defendants.

The constitution of the state (section 9, article 15) and statute (Gen. St., 473, § 1) provide that the homestead shall not be alienated without the joint consent of husband and wife. The constitutional and statutory provision makes the consent of both husband and wife necessary to the validity of the conveyance, and if the consent of either is wanting, the deed or mortgage is illegal *in toto*, and gives no title or lien whatever on the premises. In this respect it seems to change the common law rule, which would only invalidate the instrument so far as the party signing under duress was concerned, and it results that the husband is equally benefited with the wife under this defense, if it prevails, although he is the only party in fault. If the constitution and statute are susceptible of construction permitting such defense, and the supreme court of this state appear to so hold in *Anderson v. Anderson*, 9 Kan., 112, and *Helm v. Helm*, 11 Kan., 19, it is probably predicated upon the ground that the husband is the agent of the grantee in procuring the signature of the wife to the conveyance, and is bound by his acts. *Bank v. Copeland*, 18 Md., 305. In any event, it is a defense which defendants, for the purpose of saving their homestead, have a great inducement to make, and once made, a grantee, however innocent and however *bona fide* he has acted, is very much at a disadvantage.

The wife has, and in justice ought to have, the right to protect her home against an improvident husband; but she should assert her right, so far as possible, in a manner not to deceive and defraud parties purchasing or loaning money on the homestead in good faith. Of what occurs in the privacy of the family circle he can know but little or nothing. The wife signs the paper in the presence of the notary, and acknowledges the execution to be her voluntary act, and makes no sign of dissatisfaction. The grantee pays the purchase money or makes the loan, entirely unconscious of any defect in the conveyance, and after the lapse of years the wife asserts her rights to annul the contract. It is a defense which, under many circumstances, does not present equities superior to those of the grantee. It opens wide the door for collusion between husband and wife to defraud the unsuspecting purchasers; and courts of equity in any case, before declaring such a conveyance void, ought to require the wife to make a clear and plain showing of fraud or duress, and that she is not guilty of collusion, laches, or fault on her part.

§ 738. *Duress is not available as a defense on the foreclosure of a mortgage, when. A mortgage securing a negotiable note, if assigned before maturity, is free of equities as well as the note.*

Whether the evidence for the defendants in this case makes such a showing I need not discuss, for it is settled by the supreme court of the United States that this defense is not available against the purchaser of the note and mortgage before maturity, for value, and without notice. The doctrine is old and indisputable that the holder of negotiable paper, before maturity and without notice, takes it clear of equities between the original parties, and neither fraud

nor duress would invalidate it in his hands. See *Clarke v. Pease*, 41 N. H., 425, where this matter is fully discussed and authorities cited; also, *Hogan v. Moore*, 48 Ga., 162. So, also, is the doctrine that a purchaser by deed of real estate without notice, may rely upon the record, and will take the title free of equities between the original parties. *Boone v. Chiles*, 10 Pet., 210; *Deputy v. Stapleford*, 19 Cal., 305; 1 Story's Eq. Jur., 64, 434, 436. The question whether the purchaser in good faith of a promissory note before maturity, who takes an assignment of a mortgage securing the same, takes the security as the note free of equities, is one upon which there is some conflict among the decided cases, but the great weight of authority is to the affirmative. It is sufficient for this court that the supreme court of the United States has so held. The security is but an accessory to the debt and follows the note, and takes the same character. *Carpenter v. Longan*, 16 Wall., 271, 275; *Sawyer v. Prickett*, 19 Wall., 147; 1 Jones on Mort., § 834 and cases cited. It follows that the plaintiff is entitled to his decree as prayed for in his bill.

PORTER v. KING.

(District Court for Pennsylvania: 1 Federal Reporter, 755-761. 1880.)

Opinion by ACHESON, J.

STATEMENT OF FACTS.—This controversy concerns a bond, and mortgage securing the same, bearing date March 3, 1877, from Hamilton Lacock and wife to S. B. W. Gill, who was adjudicated a bankrupt, November 28, 1877. The bond is conditioned for the payment of the sum of \$5,200 in two years from date with interest payable semi-annually. The mortgage is upon real estate in Allegheny City, and was recorded April 3, 1877, in Mortgage Book, vol. 225, p. 485. These securities were found by W. D. Porter, the assignee in bankruptcy of Gill, among the papers of the latter, and were taken possession of by the assignee. Rev. Matthew M. Pollock, one of the defendants, claims to be the assignee for value of \$1,000 of said mortgage by an assignment from Gill dated April 9, 1877, and to enforce his claim instituted legal proceedings against the assignee in bankruptcy. The other defendant, William C. King, claims to be the purchaser and assignee for value of the whole of said bond and mortgage by assignment from Gill, dated April 12, 1877, and to enforce his claim filed a bill in this court against the assignee in bankruptcy. The latter thereupon filed his bill in this case, praying *inter alia* that the defendants might interplead in respect to said bond and mortgage and settle their conflicting claims. The defendants having severally answered the bill, there was a decree of interpleader and an issue was formed between them. The case was eventually heard upon a master's report, and exceptions thereto, and the testimony taken by him.

The material facts are as follows: The bond and mortgage in question were given by Hamilton Lacock and wife to Gill, for money borrowed to pay off another mortgage against the Lacocks, held by Mrs. Eliza Lewis. Prior to making the mortgage, Gill told Hamilton Lacock he was getting the money from King, and he informed him he had got it from King. Gill paid off the Lewis mortgage, and therefore there is no question as to the liability of Lacock and wife upon the mortgage, the subject of this controversy. This mortgage bears date March 3d, and was acknowledged March 8th, and was left for record April 3, 1877. About March 13, 1877, the Rev. Matthew M. Pollock gave to Gill \$1,000 to be invested in a mortgage. No particular mortgage was

then mentioned, but in a few days thereafter Pollock called on Gill for an assignment, when Gill said he would send it by mail, and mentioned the property the mortgage was on and its amount, which statements corresponded with the assignment afterwards sent to Pollock. On April 9, 1877, Gill mailed to Pollock, whose postoffice address was Jolly, Ohio, a written assignment bearing that date and executed under the hand and seal of Gill. This paper, after reciting a mortgage from Hamilton Lacock and wife to S. B. W. Gill, dated March 3, 1877, recorded in Mortgage Book, vol. 227, p. 151, for \$5,200, with a brief but correct description of the premises, assigns to Pollock "\$1,000 of the money secured by the above stated mortgage with interest thereon from March 30, 1877." This assignment reached Pollock in due course of mail, to wit, in about four days. He did not procure his assignment to be entered of record, nor did he give notice of it to the mortgagors. It was not until some considerable time after Gill had absconded (which he did about September 17, 1877), that the Lacocks first heard of the assignment to Pollock.

On the 12th day of April, 1877, Wm. C. King purchased from Gill the said bond and mortgage. The bond was then in Gill's hands. The mortgage he had left in the recorder's office for record on April 3, 1877. King paid Gill for the bond and mortgage \$4,800 or \$4,900 in cash, and upon the back of the bond Gill executed, under his hand and seal, an assignment to King, bearing date April 12, 1877, of "the within bond and all money secured thereby." There was nothing on the bond or mortgage to show any prior assignment, and King purchased the securities and paid the consideration therefor in good faith, and in entire ignorance of the assignment to Pollock. Shortly after his purchase King had the actual possession of both bond and mortgage, but, upon Gill's suggestion that he had a good safe in his office, and that it was convenient for him to collect the interest, King left the papers with him, taking the following receipt:

"Received from Mr. Wm. C. King, April 25, 1877, the bond and mortgage of H. Lacock and Martha, his wife, dated March 3, 1877, for \$5,200, for two years, interest payable semi-annually, which said mortgage and bond has been assigned to him. I am to hold the same for safe-keeping and collection of interest.
S. B. W. GILL."

Gill also gave King (and he thinks at the same time he received the above receipt) the recorder's receipt, which then read as follows:

"RECORDER'S OFFICE, ALLEGHENY COUNTY,
"PITTSBURGH, April 3, 1877.

"Received the following for record: One mortgage from Hamilton Lacock to S. B. W. Gill. Assigned to W. C. King, April 12, 1877. \$2.50 paid.

"R. J. RICHARDSON, Recorder."

From the statements in these receipts King supposed that Gill had made an assignment to him of the mortgage on the margin of the record; but, in fact, Gill did not assign the mortgage of record. This, however, was not discovered by King until after Gill had absconded. Within three days after Gill had left, King gave formal notice of his claim to Hamilton Lacock.

§ 739. *A secret assignment of a mortgage is not good against a subsequent assignee of the same mortgage for full value and without notice.*

On September 11, 1877, Lacock paid Gill, for King, the first instalment of interest, for which Gill gave Lacock a receipt which states that the mortgage is "now held by Mr. Wm. C. King." This interest Gill paid over to King. S. B. W. Gill was a member of the Pittsburgh bar, and until he left, in Sep-

tember, 1877, his professional standing was good, and he possessed the confidence of the community. I have been thus particular, in stating every fact which I regard as material, because I am constrained to dissent from the conclusion of the learned master in respect to the conflicting assignments to Pollock and King, which he thus states: "Neither of them being entered of record in the recorder's office, on the margin of the recorded mortgage, it is simply a question as to whose assignment was first delivered." And, treating the assignment to Pollock as delivered when it was deposited in the postoffice on April 9, 1877, he reports a decree in his favor for the portion of the mortgage assigned to him. But the case, it seems to me, is not one for the application of the maxim, *qui prior est tempore potior est jure*. There are here other considerations besides that of time, which cannot be ignored if we would reach a just conclusion. Matthew M. Pollock, it must be observed, parted with no money or other valuable thing upon the faith of the Lacock bond and mortgage. He had left in Gill's hands \$1,000, to be by him invested in a mortgage at his discretion; and not in this particular mortgage, which was not then so much as mentioned.

In confiding his money to Gill, Pollock, in the first instance, trusted exclusively to his personal responsibility and integrity. His subsequent arrangement with Gill, which the latter carried out, was for an assignment which was entirely inadequate for his protection, as it left Gill in possession of the bond and mortgage, and in a position to deal as lawful owner of the same with innocent third persons. *Jeffers v. Gill*, for use, 8 W. N. C., 19; *Kellogg v. Smith*, 26 N. Y., 18. It is said in *Jones on Mortgages* (vol. 1, § 476), that, except under peculiar circumstances, a person acting in good faith would not take a mere written transfer of the mortgage title without a delivery of the mortgage itself, and the note or bond secured thereby. Now, the actual good faith of Mr. Pollock is not open to question. But, unfortunately for him, he accepted such an assignment as no ordinarily prudent man would have taken; and it must be remembered that in his previous interview with Gill this manifestly was the kind of assignment which Gill proposed to mail to Pollock, and which the latter then impliedly agreed to accept.

After receiving his assignment he did absolutely nothing to make it efficient. He took no steps to have it made matter of record, or noted upon the original papers, and he did not even give the mortgagors notice. Had he given seasonable notice to Hamilton Lacock, it is highly probable that the double assignment would have been discovered in time to frustrate Gill's fraud and prevent this loss; for Lacock had contemporaneous information from Gill that King had advanced the money on the bond and mortgage. William C. King, as we have seen, found the bond in Gill's hands, and the mortgage, if not in his actual possession, in the recorder's office, under his control, with nothing appearing upon either instrument to indicate any prior assignment. On the faith of the securities, without notice or means of knowledge of the assignment to Pollock, he made the purchase in perfect good faith, paying a full consideration. He immediately took the wise precaution of having the assignment to him put upon the back of the bond. He supposed, and from the receipts which Gill delivered to him he had good right to believe, that a proper assignment of the mortgage had been made on the margin of the record, in the customary way. But without such assignment the title to the mortgage passed to and vested in him; for it is firmly settled that the debt is the principal and the mortgage a mere security, appurtenant and secondary; and that the as-

signment of the bond, secured by a mortgage, carries with it the mortgage. *Kellogg v. Smith, supra*; *Carpenter v. Longan*, 16 Wall., 275.

Did King take subject to the secret claim of Pollock? This question, in my judgment, must be answered in the negative, both upon authority and principle. It has more than once been held in Pennsylvania that while the assignee of a mortgage takes it subject to the equities of the mortgagor, he takes it free and discharged of the secret equities of third persons. *Mott v. Clark*, 9 Barr, 399; *Prior v. Wood*, 7 Casey, 142; *Wetherill's Appeal*, 3 Grant, 281; *Jeffers v. Gill*, for use, *supra*. The same doctrine has been applied to the assignees of choses in action generally. *Fisher v. Knox*, 1 Harr., 622; *Hendrickson's Appeal*, 12 Harr., 363; *Radfearn v. Ferrier*, 1 Dow. (H. of L. Cas.), 50. In this latter case Lord Eldon, treating of secret equities of third persons, and speaking of the assignment of back-bonds, said: "He had looked very anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignments [assignments with notice to the debtors], and he had found none." *Id.*, 72. Again, he said: "If latent equities were permitted to prevail against assignments, the effect would be that nothing could ever be assigned." *Id.*, 72.

Several of the above cases are cited with approbation in *Wetherill's Appeal, supra*, by Mr. Justice Strong, who, after a review of the authorities, says: "This is sufficient to indicate, if it does not fully determine, that the rule is that the purchaser for value of a chose in action is not to be affected by the latent equities of third persons. He is only bound to inquire of the debtor; and there is much reason for such rule. Secret equities in third persons are clogs upon alienation, and cannot, therefore, be favorites in law. The holder of them virtually empowers the creditor to practice a fraud upon the innocent—a fraud against which no vigilance can guard." 3 Grant, 287. As already observed, the previous arrangement between Gill and Pollock, in respect to the assignment of the latter, contemplated that it should be a separate written transfer, and that the securities themselves should be retained by Gill; and this arrangement was carried out. Thus was Gill allowed by Pollock to remain the apparent owner of the entire securities. It seems to me, therefore, that the case falls clearly within the principle that when one of two innocent persons must suffer, he must bear the burden or loss whose act or neglect has been the occasion of the suffering. *Wetherill's Appeal, supra*; *Jeffers v. Gill*, for use, *supra*; *Penn. R. Co.'s Appeal*, 5 Norris, 80.

Let a decree be drawn in favor of William C. King in the issue between him and Matthew M. Pollock, and directing that W. D. Porter, the assignee in bankruptcy of S. W. B. Gill, deliver to said William C. King the said bond and mortgage, and duly assign to him of record the said mortgage.

§ 740. **Payment to mortgagee without notice of assignment.**—Upon the assignment of a mortgage securing a bond or other non-negotiable instrument, the mortgagor without notice of the assignment has the same rights against the assignee that he had against the mortgagee. If the mortgagor makes a payment upon such a mortgage to the mortgagee, without notice of a previous assignment, he is protected in such payment as against the assignee. *Hubbard v. Turner*,* 2 McL., 519.

§ 741. A statute of Illinois of January 3, 1827, places bonds and mortgages and instruments of every description for the payment of money or property on the same footing as bills of exchange; and under that statute the assignee of a mortgage before it is due takes it free from all equities of the mortgagor. *Ibid.*

§ 742. **One trustee cannot assign.**—One of several trustees holding an equitable mortgage cannot sell or assign it. All must join. *Wilbur v. Almy*,* 12 How., 180.

§ 748. An irregular sale under a decree of foreclosure operates as an assignment of the mortgage to the purchaser, if he has paid the purchase money and it has been applied to the payment of the mortgage debt. *Brobst v. Brock*, 10 Wall., 519 (§§ 697-705).

§ 744. Assignment of debt carries mortgage.—An assignment of a debt carries with it an assignment of the lien by which it is secured. *Batesville Institute v. Kauffman*,* 18 Wall., 151.

§ 745. Assignment as collateral security.—Where a mortgage has been assigned as collateral security for a debt of a less amount, as where a legatee has taken from the executor an assignment of a mortgage greater than the amount of his legacy, the assignee does not guarantee the sufficiency of the mortgage but merely undertakes to use diligence in collecting it. *Hammond v. Washington*,* 1 How., 14.

§ 746. The assignee of a mortgage not securing a negotiable note takes it subject to the same equities which affect it in the hands of the assignor. Thus, where Butler and Sturges became sureties for others upon a bond for the payment of duties to a large amount, and the former gave to the latter a mortgage purporting to secure the payment of \$27,000, but it was in fact given to indemnify him against this bond, it was held that an assignee of the mortgage stood in no better position than the mortgagee. The mortgagor, or a judgment creditor standing in his place, may redeem from the assignee in the same way that he might have redeemed from the mortgagee. The assignee in such case is, moreover, chargeable with notice of the mortgagor's equities. *United States v. Sturges*,* 1 Paine, 525. An assignee of a negotiable note secured by mortgage, taking it in good faith before maturity from the mortgage trustee who had been intrusted with it for collection, has a lien prior to that of a purchaser from the mortgage trustee, who had acquired title through mesne conveyances reciting the trust deed and made subject to it, although there was on record a release of the mortgage purporting to be made by the trustee before he took title. There was on the face of the title and the record enough to rouse suspicion and to show that it was the duty of any person who advanced money upon the title to ascertain whether or not the deed of trust had been in fact discharged. *Smith v. Perkins*,* 8 Biss., 73; *S. C.*, *Swift v. Smith*, 12 Otto, 442 (BILLS AND NOTES, §§ 416-419).

§ 747. When a negotiable note secured by a mortgage is assigned for value before maturity to a person having no notice of any equities between the parties thereto, the assignee takes the mortgage, as he does the note, free from any objection to which it was liable in the hands of the mortgagee. *Carpenter v. Longan*, 16 Wall., 271, 278.

§ 748. *Bona fide* assignee for value.—A farmer and his wife, on the line of a proposed railroad in Wisconsin, subscribed to stock in the road, and mortgaged their farm to secure a negotiable note given in payment of the subscription, upon representations made by agents of the road and others that the road would prove a very lucrative investment, and a very profitable thing to the neighborhood. After a good deal of money had been laid out in grading and other work upon the road, the further building of it was stopped for want of funds, and it remained unfinished. The mortgage having been assigned before maturity to a director of the road, who was also a large creditor of it at the time the mortgage was made, upon a bill filed by him to foreclose it, he was held to be a *bona fide* holder for value, and entitled to a decree. *Sawyer v. Prickett*, 19 Wall., 146.

§ 749. The assignee of a mortgage of indemnity clearly expressing the trust is bound by the trust. The assignee becomes a trustee in place of the original mortgagor. *In re Pierce*, 2 Low., 344.

§ 750. In Oregon a mortgage is a chose in action, and passes to an assignee subject to all the equities between the mortgagor and mortgagee. *Corbett v. Woodward*, 5 Saw., 408 (§§ 641-647). See § 629.

XVII. MERGER AND SUBROGATION.

SUMMARY — *Merger takes place or not according to intention*, § 751.

§ 751. A purchaser cannot rely upon the record as showing merger, inasmuch as merger generally takes place or not according to the actual or presumed intention of the mortgagee. He must go beyond this and ascertain whether there has been a merger in fact; and he acts at his own peril if he does not require his grantor to produce the mortgage and note supposed to be merged, and discharge the mortgage of record, or show that it constitutes a part of the title of the estate. A purchaser of property on which the record shows there is an unsatisfied mortgage takes it with notice that there is an existing lien in the hands of somebody. His interest is liable to that lien, if it is not in the hands of the mortgagor. *Oregon Trust Co. v. Fhaw*, §§ 752-756.

[NOTES.—See §§ 757-761.]

OREGON TRUST COMPANY v. SHAW.

(Circuit Court for Oregon: 5 Sawyer, 336-344. 1878.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The cause was heard on the bill and answer of Charles Swegle. The facts appearing therefrom are as follows: On April 28, 1877, Shaw borrowed \$3,000 of the complainant, for which he gave his note, payable on June 1, 1882, with interest thereon at the rate of ten per centum per annum, payable semi-annually; and on the same day, as a security for the payment thereof, executed, together with his wife, a mortgage upon the premises aforesaid, which was duly recorded on May 9, 1877. This mortgage contained a clause to the effect that if default was made in the payment of any of said instalments of interest, the complainant might then declare the whole debt due; and such default was made on December 1, 1877, and the debt declared due on account thereof. On February 12, 1877, one W. Q. Adams, being indebted to said Shaw & Co. in the sum of \$1,500, gave his note for said amount, payable to them or bearer, on November 1, 1877, with interest at the rate of one per centum per month, and upon the same day executed a mortgage to Shaw & Co. upon the premises to secure the payment of said note, which mortgage was duly recorded on February 13, 1877; and that on said last-mentioned day said note and mortgage was, for a valuable consideration, transferred by said Shaw & Co. to the defendant Charles Swegle; and that he is now the *bona fide* owner and holder of the same. At and from February 12 to April 1, 1877, said Adams was the owner in fee of said premises, as appeared by the records of said county; but thereafter, and at the date of the note and mortgage given by said Shaw to complainant, the former, as appeared by said records, was such owner thereof. The transfer or assignment of the note and mortgage to Swegle was not recorded, but complainant had notice of the existence of the same, and might, with reasonable diligence, have ascertained the fact of the transfer to the defendant Swegle.

It does not appear directly in the bill and answer, as it should, that after the mortgage to Shaw & Co., and after April 1, but before the mortgage to the complainant, Adams conveyed the premises in fee-simple to Shaw, but in this way, according to the admissions on the argument, it came to pass, as stated in the pleadings, that Adams was the owner of the premises at the date of the mortgage to Shaw & Co., and Shaw the owner of the same at the date of the mortgage to the complainant. The complainant contends that it was entitled to deal with Shaw as the absolute owner of the premises free of charge or lien, if it so appeared upon the record of conveyances in Polk county; and that upon the facts stated, at the date of Shaw's mortgage to it there was, as appeared by such record, a union of the lien of the Adams mortgage and the fee in Shaw, whereby it appeared therefrom that there was a merger of the former in the latter and the mortgage was thereby extinguished — satisfied. In the consideration of this case the interest of the mortgage will be spoken of as a mere lien — the equitable doctrine on the subject prevailing in this state — and the interest of the mortgagor as the fee. *Witherell v. Wiberg*, 4 Saw., 232 (§§ 664-666, *supra*). When two estates or interests in the same land become united in the same person, the less estate or interest is annihilated, and in law phrase said to be merged or drowned in the greater, unless there be some purpose beneficial to such person or contrary intent declared by him, to prevent it, in which case they remain separate. 2 Black, 177; *Forbes v. Moffatt*, 18 Ves. Jr., 384; *Starr v. Ellis*, 6 John. Ch., 396; *James v. Morey*, id., 422; S. C., 2 Cow., 303.

§ 752. *The record of deeds is of no authority on the question of merger of estates.*

But in this case there never was any merger of the Adams mortgage and fee in Shaw, because they were never united in his person — Shaw having transferred the former to the defendant Swegle before he became the owner of the latter. Neither did the record show that there was any such merger, but only that there might have been. Because Shaw owned the mortgage on February 12, 1877, it did not follow that he owned it on April 28, when he received the conveyance of the fee — and upon this material point the record was silent. Indeed, it does not appear that the conveyance of the fee to Shaw even purported to be in satisfaction of the mortgage debt, or that there was otherwise any relation or connection between them. But it matters not what was the state of the record on this question. The record of deeds is not made for the purpose of giving notice of when the merger of estates takes place, and is therefore of no authority upon the subject. If a party examines the record and concludes there has been a merger of estates in certain premises, and acts upon that conclusion, he does so at his own risk, and if mistaken must bear the consequences. *Purdy v. Huntington*, 42 N. Y., 350.

As is said in a late work, Jones on Mortgages, sec. 872, "Inasmuch, therefore, as merger takes place or not, according to the actual or presumed intention of the mortgagee, subsequent purchasers cannot rely upon the record as showing merger. They must go beyond this, and ascertain whether there has been a merger in fact; and they act at their own peril if they do not require their grantor to produce the mortgage and note supposed to be merged, and discharge the mortgage of record, or show that it constitutes a part of the title to the estate." The question of priority, then, between these two mortgages must depend upon the proper construction of the statute regulating the recording of deeds and mortgages. Upon this point the argument for the complainant is, that as the record stood at the date of its mortgage, Shaw, as the mortgagee of the Adams mortgage, had an apparent right to acknowledge satisfaction thereof before the clerk, and thereby discharge the same; and that if he had done so, any one would be protected in dealing with him as the absolute owner of the property as against the prior assignee of such mortgage — the assignment thereof not being recorded; and that as the effect of the conveyance to Shaw by Adams was to satisfy the mortgage of the latter, therefore the complainant had the same right to deal with Shaw as the owner of the property, discharged from the lien of the mortgage, as if satisfaction thereof had been directly acknowledged by him on the record. In this argument there are several erroneous assumptions: First, that the record of deeds and mortgages is but one record, and that an entry upon either of them may be qualified or affected by an entry in the other. But the statute (Or. Laws, p. 518, sec. 23) provides that there shall be separate books for the record of deeds and mortgages, and the satisfaction of a mortgage must be entered in the book of such records. Therefore, a satisfaction of a mortgage entered in the record of deeds would be without effect for any purpose. It is well settled that a deed recorded in the book of mortgages, and *vice versa*, is no record, and gives notice of nothing. *James v. Morey*, *supra*, 316. Second, that a mortgagee who has assigned his mortgage has still authority to acknowledge satisfaction thereof on the record; or that if he does so, his prior assignee is bound by it as against a subsequent *bona fide* purchaser for a valuable consideration.

The statute (Or. Laws, p. 519, secs. 30, 39) provides that a mortgage may be

discharged upon the record thereof "by the mortgagee, or his personal representative or assignee" acknowledging satisfaction thereof before the clerk, or executing a certificate to that effect with the formalities of a deed, and presenting the same to the clerk. Probably the statute is defective in not requiring the party making such acknowledgment or certificate to produce evidence that he is at the time such mortgagee or assignee, and is entitled to discharge the mortgage. The production of the note and mortgage, or the latter only, where there is no personal obligation, ought at least to be provided for, and an indorsement made upon them to the effect that they are no longer in force. But certainly it cannot be maintained that an acknowledgment of satisfaction of a mortgage by a person without interest in the subject—as a mortgagee after assignment, or an assignee who has assigned—can in any degree affect the right of the assignee, who was then the *bona fide* owner and holder of the debt and security. Such an acknowledgment is simply a fraud, and if any person must suffer by it, it ought to be the person who, by ignorance or carelessness or otherwise, was deceived by it, and acted upon it, and not the assignee, who acquired the mortgage without fault, and is a stranger to the fraudulent transaction. As well say that a purchaser in good faith from the grantee in a forged deed that has been admitted to record is thereby protected at the expense of the true owner, who is without error or fault in the premises. Besides, the assertion that Shaw appeared to have the right to satisfy the mortgage is based, not upon the record, but an inference therefrom, that there was a merger of the fee and lien of the mortgage in Shaw, which is now shown to have been erroneous. These assumptions being unfounded, the argument based upon them falls to the ground.

§ 753. *A party purchasing premises on which the record shows there is an unsatisfied mortgage takes it with notice that there is an existing lien in the hands of somebody.*

But a sufficient answer to this argument lies in the fact that Swegle's mortgage was not satisfied on the record, and did not appear to be. *Prima facie* it was still due to some one, and therefore not extinguished. As it is well said in Jones on Mortgages, sec. 474: "If the premises are conveyed to the mortgagee after he has assigned the mortgage, there is no merger of the mortgage title. It makes no difference that the assignment is not recorded. . . . Of course, the purchaser is charged with constructive notice of the existence of a mortgage, and the continuance of its lien, by its record. Having this information, he is chargeable in law with the further notice that the mortgage is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself, or the bond or debt secured by it; but rather that one purchasing the premises would take them subject to the lien of the mortgage irrespective of the ownership of it, unless the mortgagee was the owner. That knowledge and notice made it his duty, in the exercise of proper diligence, to inquire whether his vendor, the mortgagee, was still the owner and holder of the mortgage; and his omission to make that inquiry deprives him of the protection of a *bona fide* purchaser."

§ 754. *The priorities of assignees of mortgages.*

A mortgagee is a purchaser and comes within this rule. But it is further contended that it was the duty of Swegle to have recorded his assignment, and not having done so, and the complainant having been thereby led to believe

that the mortgage was still the property of Shaw, equity will, as between the two *bona fide* creditors, impose the loss arising therefrom upon the one whose negligence made such loss possible. This argument also rests upon the assumptions which are disputed. First, that it was the duty of Swegle to have the assignment to him recorded; and, second, that the record of mortgages in some way showed that the Adams mortgage was satisfied or extinguished.

As to the second assumption there can be no doubt of its incorrectness. From the record of mortgages, it appeared on April 28, 1877, that the Adams mortgage was then a valid subsisting lien on the premises as security for the payment of a negotiable note not yet due, and nothing more. What else appeared on the record of deeds, if anything, was immaterial. But as to the first assumption, the question is not so clear; and being one which arises simply upon the construction of a local statute, it is to be regretted that it has not been considered by the supreme court of the state. The general utility and convenience of recording the assignment of a mortgage, or in default thereof of postponing it to the conveyance of a subsequent purchaser or mortgagor in good faith, and for a valuable consideration, which shall be first recorded, may be admitted. But it must not be forgotten that at common law a conveyance or other instrument relating to real property was effective without being recorded, and that the registration of such instruments is purely a creature of statute. Unless, then, the statute required Swegle to record the transfer or assignment of the Adams mortgage, he is not in fault for omitting to do so. It is admitted that there is no specific direction in the statute upon the subject. The only mention of an assignment, as such, is found in section 27 of the chapter on conveyances (Or. Laws, 519), which provides that "the recording of the assignment of a mortgage shall not in itself" be notice to the mortgagor, so as to invalidate a payment made by him to the mortgagee. This is merely the assertion of a rule that had long been established by the courts. *Murray v. Lylburn*, 2 John. Ch., 443; *Livingston v. Dean*, id., 479; *Livingston v. Hubbs*, id., 512; *Hubbard v. Turner*, 2 McL., 533.

The most that can be said for this provision is that it impliedly authorizes an assignment to be recorded, or rather contemplates that it may be recorded by virtue of some other provision or statute. And yet by a still stronger implication arising out of sections 22 and 34 of said chapter, and the very nature of the case, it is provided that no instrument affecting the realty, which includes an assignment, shall be admitted to record, unless acknowledged and certified as a conveyance. An assignment of a mortgage may be made by an instrument in the form of a conveyance, and in such case may be admitted to record. But an assignment of a mortgage may be a mere writing under the hand of the assignor, declaring that he thereby assigns the mortgage to a person therein named. Such a writing is effectual to pass the lien of the mortgage, but it would not be entitled to record unless acknowledged and certified. But in the case of a mortgage given as security for a negotiable note, the debt being the principal and the security the incident, the same may be assigned by the simple indorsement or delivery of the note. In such case there is no assignment to record.

§ 755. *An assignee of a mortgage is not bound to record his assignment to protect himself against subsequent purchasers.*

In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee. As between

different assignees of the same mortgage, the question of priority could not well arise, because an assignment without the delivery of the note and mortgage, except under peculiar circumstances, could hardly be considered as made or accepted in good faith; yet if such question should arise between assignees acting in good faith, I suppose that under section 34 of the recording act, the assignment first recorded, would prevail, because it is considered a conveyance of the interest assigned. But the question here is an altogether different one. Shaw was not the owner of the Adams mortgage when he made the mortgage to the complainant, and his conveyance could not affect what he did not own. On the record the mortgage appeared unsatisfied, and the complainant must be held to have taken its mortgage with knowledge of that fact. The equity of the defendant Swegle being prior in point of time is the stronger in law. If the complainant has made a mistake it must take the consequences, and if a fraud has been practiced upon it by Shaw it ought not be allowed to shift the burden to the defendant Swegle.

A decree will be entered directing a sale of the premises, and a distribution of the proceeds among the parties hereto according to the priority of their liens in point of time.

OREGON & WASHINGTON TRUST INVESTMENT COMPANY v. SHAW.

(Circuit Court for Oregon: 6 Sawyer, 52, 53. 1879.)

§ 756. *Merger of mortgage in the fee; when accomplished.*

Opinion by DEADY, J.

After hearing this cause on bill and the answer of the defendant Swegle, the court decided that the lien of Swegle's mortgage was never merged in the fee, and was prior to that of the complainant's. Upon the petition of the complainant a rehearing was granted. After a careful study of the learned and voluminous brief of counsel for complainant, my conclusion is that:

1. There never was any merger of the mortgage and fee in Shaw, because the two interests never were united in him, Shaw having transferred the Adams mortgage to Swegle some weeks before he received the conveyance of the fee from the former.

2. The transfer of the mortgage to Swegle by Shaw was valid as against Shaw, even if it was necessary to record it as against a subsequent *bona fide* purchaser of the same property, and therefore the mortgage remained the property of Swegle and could not be merged in the fee afterwards acquired by Shaw from Adams.

3. Even if the mortgage and fee had been united in Shaw, there was no merger, because Shaw, having transferred the former to Swegle, thereby plainly manifested his intent to keep the mortgage and fee separate, and therefore the mortgage to the complainant was at most only a conveyance or pledge of the premises, subject to the lien of the prior mortgage before then transferred to Swegle.

4. The statute of this state does not require a transfer or assignment of a mortgage to be recorded, particularly when such transfer occurs by operation of law upon the indorsement or delivery of a promissory note for the payment of which it is only a security.

5. If the statute did require the transfer or assignment of a mortgage to be made after the manner of a conveyance, and recorded, still the failure to record such assignment would not render it void as against the complainant, because

it is not a purchaser of the same property—the mortgage from Adams to Shaw—but only of the fee, subject to said mortgage, or rather of a mortgage thereon subsequent to said mortgage.

6. The complainant having taken a mortgage with notice upon the record that there was a prior unsatisfied mortgage upon the same property, to secure the payment of a negotiable note, not then due, has no right to complain if the lien of said mortgage is now preferred to its lien. Upon the record it took a second mortgage without inquiry as to the ownership or condition of the first one, and if it did so upon an impression that the prior mortgage was merged in the estate of its mortgagor, it acted, as appears, upon insufficient reasons, and must bear the consequences of its own mistake.

§ 757. *Merger of equitable and legal title.*—When the mortgagor's assignee becomes virtually the holder of the debt meant to be secured thereby, the equitable or legal titles merge in him, and he becomes the sole owner. *Upham v. Brooks*,* 2 Woodb. & M., 407, 416.

§ 758. *The purchase of the equity of redemption by a mortgagee merges the equitable in the legal title.* *Hill v. Smith*,* 2 McL., 446.

§ 759. *Release of equity of redemption to mortgagee.*—At law a mortgage conveys the legal title to the property, and a subsequent release of the equity of redemption to the mortgagee does not operate to merge the legal and equitable titles, but merely to extinguish the equity of redemption. *Dexter v. Harris*, 2 Mason, 581, 589.

§ 760. *Subrogation of junior mortgagee paying prior lien.*—A junior incumbrancer, upon paying a prior lien covering the same property and other property also, is subrogated to the position of the prior incumbrancer, and may enforce the prior lien upon such other property to the relief of that covered by the junior incumbrance. *Peter v. Smith*, 5 Cr. C. C., 388.

§ 761. It is a well settled principle in equity that a junior mortgagee who is compelled to pay off a prior incumbrance upon the land is subrogated to the rights of the prior incumbrancer and may claim all the benefits of his lien. *Bank of the United States v. Peter*,* 13 Pet., 123. Where one of three joint mortgagors pays the debt, the mortgage, after notice to the mortgagee, will stand as security for two-thirds of the debt in favor of such mortgagor. *Pratt v. Law*, 9 Cr., 456; *Campbell v. Pratt*,* 5 Wheat., 429.

XVIII. PAYMENT AND DISCHARGE.

SUMMARY—*Appropriation of payments*, § 762.—*Change in the form of the debt*, § 763.—*Foreclosure does not constitute payment*, § 764.

§ 762. In the absence of directions for the application of payments made by a mortgage debtor, it is competent for a court of equity, in its discretion, to apply them to the unsecured debts. *Schuelenburg v. Martin*, §§ 765-767.

§ 763. A change in the form of the debt secured by a mortgage, such, for instance, as taking a note for the amount of a debt on account, does not discharge the mortgage. *Osborne v. Benson*, § 768.

§ 764. After a foreclosure by entry and possession, the mortgagee may recover, in a suit at law upon the mortgage note, the amount of the deficiency of the mortgaged property to pay the debt. In such case the value of the property is calculated at the time of the actual foreclosure of the equity of redemption. *Hatch v. White*, §§ 769, 770.

[NOTES.—See §§ 771-786.]

SCHUELENBURG v. MARTIN.

(Circuit Court for Kansas: 1 McCrary, 348-352. 1880.)

Opinion by McCRAEY, J.

STATEMENT OF FACTS.—This is a bill to foreclose a mortgage executed by Hugo Kullak to the plaintiffs. The defendants are the heirs at law of the mortgagor, who, since the execution of the mortgage, has deceased. The evidence shows that plaintiffs and the said Kullak, about the 1st day of April, 1869, entered into a contract as follows: The plaintiffs, who were dealers in lumber at St. Louis, Missouri, agreed to furnish to said Kullak, who was en-

gaged in the same business at Topeka, Kansas, such quantities of lumber as he might order for a period of one year, on a credit of sixty days, provided no order for more than \$5,000 worth of lumber should be made at any one time, and the indebtedness at no time during said year to exceed said sum of \$5,000. To secure the payment of all bills or accounts for lumber ordered and delivered under this arrangement, the mortgage sued on was executed. Numerous lots of lumber were ordered and furnished during the year covered by the mortgage, and payments were made on account, from time to time, but at the end of the year there was a balance due the plaintiffs of considerably more than \$5,000. No settlement was made at the end of the year, but the account was continued through three additional years, and up to July 13, 1873, when the mortgagor died, being then indebted to plaintiffs, on the account, in the sum of \$17,832.62. During the period covered by these transactions lumber was ordered by said Kullak, and furnished by plaintiffs, amounting in the aggregate to over \$190,000, and payments thereon were made, from time to time, by Kullak, aggregating over \$172,000. The parties frequently discussed the state of the account after the expiration of the year covered by the mortgage, and Kullak often said he considered the mortgage as security for \$5,000 of his indebtedness, but no formal settlement was ever made, nor was any specific application of the payments to any particular portion of the account ever directed by Kullak or made by plaintiffs.

The plaintiffs have proved their whole claim against the estate of Kullak in the probate court of Shawnee county, Kansas, and the same has been allowed; no proof that the same, or any part thereof, was secured by mortgage, being made in that court. It appears, from the agreement of parties on file, that the whole amount of the plaintiffs' claim against said estate, as proved and allowed in the probate court, was \$19,700.44, including the account in controversy here, and that the plaintiffs have received from the administrator two dividends upon the whole sum, amounting to \$5,319.11. My conclusions are as follows:

§ 765. *A mortgage to secure future advances is valid.*

1. It is no objection to the validity of the mortgage that it was given to secure future advances, no present indebtedness subsisting at the time of its execution. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386. This doctrine is now well settled, and it is not necessary to cite the numerous authorities in its support. It is not disputed by counsel for defendants.

§ 766. *Application of payments to the unsecured debts.*

2. The payments made after the expiration of the year, covered by the mortgage, should, under the circumstances, be applied to the liquidation of the unsecured portion of the account. There is some conflict of authority upon the question of the appropriation of payments in such a case. It is clear that the debtor may direct the application of money paid by him to a creditor having several claims against him; and it is also clear that if the debtor gives no direction he is presumed to leave the question to the discretion of the creditor, who may make the application. But there are cases which hold that where the debtor has given no direction, and the creditor has made no particular application, the court should presume, in favor of the debtor, that he intended to extinguish that debt which would bear most heavily upon him; as, for example, a mortgage or judgment. *Patterson v. Hull*, 9 Conn., 747; *The Antarctic*, 1 Spr., 206. But a different rule has been adopted by the supreme court of the United States. In *Field v. Holland*, 6 Cranch, 8, Chief Justice Marshall, in

delivering the opinion of the court, said: "It is contended by the plaintiffs that if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves upon the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves upon the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." And see *Mayor, etc., v. Patton*, 4 Cranch, 317; *United States v. January*, 7 Cranch, 572. This rule has been applied by the supreme court of Kansas. *Shellabarger v. Bings*, 18 Kan., 345.

3. It is insisted by counsel for defendants that this rule is only applicable to a case where there are several separate and distinct debts, and that it is, therefore, not a proper guide for the determination of the present case, which is one of a continuous or running account. In such a case it is insisted that the payments must be applied to the extinguishment of the first or oldest items of the account. The general rule, that payments made on an open running account are presumably to be applied to the extinguishment of the items thereof in the order of their dates, is well settled. *Postmaster-General v. Furber*, 4 Mason, 323; *United States v. Wardwell*, 5 Mason, 85; *United States v. Kirkpatrick*, 9 Wheat., 738; *Jones v. United States*, 7 How., 681. But a different rule must prevail, under the authority of *Field v. Holland*, in a case where the earlier items of the account are secured, and the later items unsecured. Besides, the question of the application of the payments, in such a case, rests largely in the discretion of the chancellor, and in this case the proof shows, as already suggested, that the parties intended to preserve the security of the plaintiffs' mortgage to the extent of \$5,000 of the indebtedness, and it is clearly equitable to apply the payments so as to carry out that intention. It may be added that we have here two separate contracts: first, the mortgage and the indebtedness secured thereby; and, secondly, the open account not connected with, or secured by, the mortgage. Viewed in this light, we may, for the purpose of applying the payments, separate the secured from the unsecured portion of the account, and treat them as separate debts.

§ 767. *Proof of a mortgagee's whole debt against the estate of a deceased mortgagor does not extinguish the mortgage.*

4. The fact that plaintiffs proved their entire debt as against the estate of Kullak, and received two dividends thereon from the assets of said estate, does not extinguish their rights under the mortgage. The sum collected from the estate upon that portion of the debt which is secured by the mortgage must, however, be credited thereon. It appears from the stipulation of the parties that the plaintiffs have received from the assets of the estate twenty-seven per cent. of the entire claim, including the \$5,000 covered by the mortgage sued on, or \$1,350 on account of said mortgage debt. This must be credited, and the plaintiffs are entitled to a decree for the balance, to wit, \$3,650, and interest from April 1, 1870. The plaintiffs have offered to take a decree for \$5,000, which, being less than the sum thus found due, including interest, the decree will be for that sum, with costs.

OSBORNE v. BENSON.

(Circuit Court for Massachusetts: 5 Mason, 157-161. 1828.)

STATEMENT OF FACTS.—Proceeding to acquire possession by writ of entry sur intrusion, brought by Osborne as administrator of Osborne, deceased, counting upon the seizin of the deceased in fee and in mortgage, and an intrusion by the tenants after his death. Both parties claimed under one Dean, plaintiff claiming under a mortgage made in January, 1823, and defendants under a deed of subsequent date. The defense was that nothing was due under the mortgage, the same having been fully extinguished or satisfied. The facts which defendants claimed to have amounted to an extinguishment were these: A mortgage was given for \$500 by Dean to Osborne & Co. upon his real estate, upon a contract that Osborne & Co. should deliver to him \$500 worth of marketable goods, Osborne & Co. giving their note to that effect. A like arrangement was entered into by one Weeks with Osborne & Co. Upon the next day Osborne & Co. took up the two notes, and gave to Dean one note for the whole amount; that is, goods of the value of \$1,000. On the same day Dean indorsed the note over to Weeks, specifying that the goods were to be charged in his account. The goods to the amount of \$903 were so delivered, and upon a settlement with Dean some time after, it appeared that he owed Osborne & Co. \$1,009. Osborne & Co. failed, and the account against Dean was assigned, among other property, to their assignees, but the mortgage and notes accompanying the same, though meant to be, were not assigned with the other property. Dean's account with Osborne & Co. was settled by the former's giving two negotiable notes, one for \$509 and the other for \$500, Osborne receipting for the same in the name of the firm; this whole arrangement was unknown to the assignees. Nothing was said at the time about giving up the mortgages or notes accompanying the same. Defendants contended that by the taking of the two negotiable notes the original mortgages were extinguished, whereas plaintiff insisted upon their still being in full force and effect.

§ 768. *The giving of notes for a debt on account secured by mortgage does not discharge the mortgage.*

Opinion by STORY, J.

My opinion is, that upon the facts, as argued, there has been no extinguishment or satisfaction of the mortgage sued on. If the goods delivered were in compliance with the original contract, entered into between Dean and J. B. Osborne, and on account of the mortgage (which as a matter of fact must be left to the jury), then the mortgage is a valid security upon an executed consideration. If the goods were not so delivered, then J. B. Osborne is still liable on his contract, and the mortgage is valid, as founded upon an executory contract still subsisting and binding between the parties. In the latter view, the giving of the new notes would be wholly immaterial, since they would be in payment for other goods. But the presumption is so strong that the goods were furnished under the original contract, that it seems difficult to resist it. Taking the fact to be so, how can the new negotiable notes operate as an extinguishment of the debt on account? That debt, at the time when these notes were given, had been assigned to assignees by the partners, to whom it was due. The assignees were ignorant of and not parties to the arrangement by which they were received. Dean knew of the failure and assignment, and consequently knew that J. B. Osborne had no longer any authority to extinguish or receive payment of the debt, or to receive negotiable notes for it. These

notes were, therefore, given without consideration. The mortgage given to J. B. Osborne was undoubtedly given in trust for the benefit of the partners, and not for J. B. Osborne alone. Indeed, it does not appear that it was the intention of the parties to the arrangement itself, that the mortgage should be extinguished; or that it should no longer be a security for the debt. The inference from the acts of the parties is the other way; for it was not canceled or surrendered. They may have intended only to substitute a definite time for the payment of the debts for an indefinite time; a certain for an uncertain credit; a protection of Dean from suit for nine and twelve months; and that the mortgage should still stand security for the debt. I will leave the facts to the jury if the counsel wishes it; but supposing the facts to be as I have assumed them to be, I am of opinion that there was no extinguishment of the mortgage in point of law. (Tenants defaulted by consent.)

HATCH v. WHITE.

(Circuit Court for New Hampshire: 2 Gallison, 158-163. 1814.)

STATEMENT OF FACTS.—Action of debt brought upon a judgment rendered by the supreme court of Massachusetts in 1810. The plea was that the judgment was rendered on a note, on which was given as collateral security a mortgage on a farm in Rutledge, Massachusetts, and that the plaintiff, by actual, open and peaceable entry, took possession of the farm on account of the breach of condition of the mortgage, and held it ever since. To this plea there was a demurrer and joinder in demurrer.

Opinion by STORY, J.

There is no averment in the plea of the value of the mortgaged estate; nor that it was taken in full satisfaction of the debt; nor that the equity of redemption of the mortgagor was foreclosed. The case therefore stands drily upon the legal operation of the allegations in the plea, unaided by collateral facts. Oyer of the record is prayed, and has been allowed by the parties without objection. But, as this judgment is a record of another court, in strictness no such oyer is demandable. It is, therefore, an irregularity, which, though not affecting the merits, might well attract the attention of the parties.

Waiving, however, all exceptions to the regularity of the pleadings, I proceed to the consideration of the only question argued at bar by the parties; whether, after a foreclosure of a mortgage (as the entry and continued possession for three years pleaded in this case are, by the statute of Massachusetts, admitted to be), the mortgagee can, in a suit upon the attendant note or bond, recover the deficiency in value of the mortgaged estate to satisfy the debt due to him. It is contended by the defendant that the foreclosure is either an absolute purchase of or an election to take the land in full satisfaction of the debt; and by the plaintiff, that it amounts to a satisfaction of so much only of the debt as equals the value of the land.

§ 769. *A mortgage is a mere security for a debt, and collateral to it.*

If the doctrine asserted by the defendant be true, it will be found in many instances to work great injustice. Where the value of the property mortgaged, whether real or personal, is less than the debt, no foreclosure of the equity of redemption, and no absolute ownership of such property, can ever be acquired, but upon the absolute extinguishment of the whole debt. Under such circumstances the value of the pledge in the hands of the mortgagee would be materially diminished, and it would frequently prove, in literal exactness of language,

mortuum vadium, a dead and worthless security. If the mortgagee be compellable to make an election, the pursuit of a personal remedy on the attendant bond is as much an abandonment of the pledge as the appropriation of the latter is an abandonment of the debt. In a case, therefore, of suspected insolvency he would be encircled with perils on every side; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck. The argument which would lead to such consequences is not easily admissible, and if it stand at all, it must be upon technical principles, or authorities, which cannot now be questioned. A mortgage is but a mere security for the debt, and collateral to it. The debt has an independent existence, and remains with all its original validity notwithstanding a release of the mortgage. The former is the principal, and the latter an incident, though not an indispensable incident. An assignment of the debt will, in equity, if not at law, carry the mortgaged property along with it; and a release of the debt will relieve the property from all farther claims of the mortgagee. *Weston v. Moulin*, 2 Burr., 969; *Green v. Hart*, 1 Johns., 580. Where the contract executed between the parties is, strictly speaking, a mortgage, that is, a conditional conveyance of the property subject to be divested by a performance of the condition, by non-performance the conveyance becomes absolute, according to the express stipulations of the parties. Where the contract amounts but to a pledge, that is, a mere deposit as security, redeemable on payment of the debt, the creditor acquires a lien or qualified property to that extent; but the stipulations of the parties in no event import a conveyance of the absolute property to the creditor. If he can acquire it, it can only be by an appropriation recognized and enforced by law, in aid of his right, upon the default of the debtor; as seems to have been the case by the ancient writ transmitted to us by Glanville. Lib. 10, cap. 6; *Mores v. Conham*, Owen, 123. But an absolute property in the pledge acquired either way, by the stipulations of the party or by the course of the law, upon the default of the debtor, would not seem of itself to operate an extinguishment of the debt secured by a covenant or agreement independent of such pledge. The parties have not agreed to an extinguishment of the debt in such an event, and it is difficult to perceive how the law should found a peremptory bar upon the default of the very party who pleads it, against another to whom no laches can be imputed. If, indeed, during the time of redemption, the pledge be injured or lost, or wrongfully detained, there seems reason to hold, as in the ancient law, that a proportionate value should be deducted from the debt, unless a restoration or satisfaction were otherwise made. Glanville, lib. 10, cap. 8. But where there is no such ingredient in the case, the debt ought to retain its original validity; and if equity should interfere to enlarge the time of redemption, or to prevent a double satisfaction, it is the utmost exercise of its authority, which justice or good conscience would seem to require. To deprive the creditor even of a single satisfaction of his debt, in favor of a negligent or fraudulent debtor, would not comport with the maxims which usually govern courts acting *ex aequo et bono*.

§ 770. *After a foreclosure of a mortgage, the creditor may recover at law all of the debt left unpaid by the foreclosure.*

Upon principle, then, there would seem no reason to restrain the mortgagee from every remedy *in rem* and *in personam*, until he has obtained a full satisfaction of his debt. Let us now examine the point with a view to authorities. No case has been cited from the English reports, and as far as a diligent search could enable us to pronounce, no case exists at law, in which the point has been

solemnly presented for adjudication. This universal silence in a case of so frequent occurrence affords a pretty strong argument that at law such a plea has never been held a sound defense. Yet, even at law, the incidental expressions of learned judges show the general understanding of the profession on the subject; and the frequent applications to chancery for injunctions to restrain the creditor from pursuing his personal remedy have drawn from that court explicit avowals. In *Smart v. Wolfe*, 3 Term R., 342, Lord Kenyon, comparing it with the case before him, says: "As in case of a pawn, the right to detain which is not divested by the pawnee's also taking a covenant as farther security, on which he may sue the person of the covenantor. The covenant is only considered as an additional remedy, and the party may proceed on both." In *Schoole v. Sall*, 1 Sch. & Lef., 176, Lord Redesdale declared that a mortgagee had a right to proceed on his mortgage in equity and on his bond at law at the same time. In *Aylet v. Hill*, 2 Dick., 551, in 1779, and again in *Tooke v. Hartley*, 2 Bro. Ch. Cas., 125, in 1786, and *Tooke v. ———*, 2 Dick., 785, Lord Thurlow, upon an application for an injunction, held that, notwithstanding a foreclosure, the mortgagee had a right to proceed at law on his bond, and might recover on such suit the deficiency of the mortgaged estate to cover his debt; and he declared the law to be now so established. The same may be inferred from the early case of *Dashwood v. Blythway*, 1 Eq. Cas. Abr., 317, the only effect there attributed to such suit being that it opened the foreclosure and let in the equity of redemption of the mortgagor. It is true that Lord Thurlow, in *Tooke v. ———*, 2 Dick., 785 (which, notwithstanding some discrepancy in dates, is probably the same case as in 2 Bro. Ch. Cas., 125), is said to have declared that, after a foreclosure, so long as the mortgagee kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say anything was done; but if he sold the estate fairly and without collusion for the best price, and it produced less than the debt, he would be entitled to recover on the bond for the deficiency.

The reason given for this distinction does not seem satisfactory. The actual value of the estate may as well be ascertained while it is in the hands of the mortgagee as after a sale; and, indeed, must be so ascertained in order to see if it was sold at the best price. At least the fact is not more difficult to settle than many which ordinarily engage the attention of courts and juries; and if the deficiency be once found, the same equity to have it paid exists in both cases. Besides, if the debt be deemed satisfied while the estate is in the mortgagee's hands, it is not easy to conceive how, by his own act of transfer, he can defeat the legal effect of that satisfaction. And if the doctrine in *Dashwood v. Blythway* be correct, there would still be less reason to allow the mortgagee to recover after a sale, because, as it would be inequitable to open the foreclosure against the purchaser, it would enable the mortgagee to defeat the revival of the equity of redemption resulting from his personal suit.

It was this last consideration that inclined Lord Eldon, in *Perry v. Barker*, 8 Ves. Jr., 527, to hold that, after a foreclosure and sale of the mortgaged estate, the mortgagee had no right to proceed at law upon the attendant bond, because by the sale he had incapacitated himself to reconvey the estate to the mortgagor; and upon this ground, in the case before him, he granted an injunction until the hearing. In this case, however, Lord Eldon stated that in *Took v. Hartley* Lord Thurlow had held (and so was a MS. report of the case taken by Sir Samuel Romilly) that, whether the estate was sold to a stranger,

or remained in the mortgagee, there was no distinction, but an action might be brought for the difference. There seems, therefore, some reason to doubt the accuracy of the report in 2 Dick., 735. The case of *Perry v. Barker* afterwards came to a hearing before Lord Erskine (13 Ves. Jr., 197), who, after a full argument, decided that, notwithstanding a foreclosure, the mortgagee had a right to proceed on his bond; but that such a proceeding entitled the mortgagor to redeem, and if the mortgagee had previously sold the estate and could get it back, equity ought to allow him time for the purpose. It seems, however, to have been his lordship's opinion, that, if this could not be done, the mortgagee ought to be restrained from proceeding, and, under the peculiar circumstances of the case before him, he decreed a perpetual injunction.

We profess ourselves unable to comprehend the particular principles upon which in either case a court of equity proceeds to restrain a creditor from pursuing his remedy at law, when by the foreclosure he has not obtained a satisfaction of his debt. We should have thought that natural justice, as well as the stipulations of the parties, would have been better subserved by allowing the creditor every remedy *in rem* and *in personam*, until his debt should be completely satisfied. If afterwards he should make an oppressive use of his power by attempting to obtain a double satisfaction, then, and not till then, the interposition of chancery by way of injunction would seem conscientious and salutary.

As little can we comprehend the ground on which, as in *Dashwood v. Blythway*, courts of equity have held that a suit on the attendant bond opens the foreclosure and lets in the equity of redemption. By such foreclosure the mortgagee obtains an absolute estate which, perhaps, may well be deemed a purchase at the full value of the land, if less than the debt, and if greater, at the amount of the debt. But why a personal suit to recover the deficiency of the land to pay the debt should change the nature or effect of a foreclosure has not yet been satisfactorily explained. It is rarely that a foreclosure can take place where the estate much exceeds the debt in value. Another purchaser is usually found, and a non-redemption, therefore, affords a pretty strong evidence of an inferiority in value. Besides, is it no inconvenience to the creditor to take land instead of his money? If, after the foreclosure, the estate should become materially lessened in value, the loss has never been deemed to be the mortgagor's. Why, then, should he derive benefit from an accidental rise in value, when he has been altogether in default? If, indeed, after a foreclosure, the mortgagee should come into equity to seek relief against the mortgagor, there might be some room to apply the maxim, that he who seeks equity must do equity. But in fact he only claims the exercise of his legal rights, secured to him by contract; and is then told that he must submit to retrace all his steps, or an injunction will bar his proceedings. And even if such a hard measure of justice were dealt out to the mortgagee while the property was in his own hands, it would seem not inequitable, when he had rightfully passed it to a purchaser, to hold him entitled to his personal remedy for all the pledge had failed to pay. That a sale after a foreclosure should be deemed so far a wrongful act as to draw after it the penalty of a perpetual injunction is a doctrine not easily reconcilable with the sound principles which govern contracts of this nature. We are happy to add that the opinions imputed by the better authorities to Lord Thurlow sanction the doctrines for which we contend. But whatever may be the effects attributed to a suit *in personam* after

a foreclosure, as to reviving the equity of redemption, such effects can be allowed in chancery only when it acts upon its own peculiar principles, unaffected by statutory provisions. In Massachusetts, where this mortgage was executed and enforced, and, of course, by whose laws it is to be regulated, the equity of redemption is limited to three years after possession obtained, and negatived afterwards by the express provisions of the statute. Stat. 1 March, 1799, ch. 77. The foreclosure, therefore, once complete, fixes the absolute rights of the parties, and no subsequent event can control or alter their legal efficacy.

To return: whatever may be the differences of opinion among the learned chancellors on other points, the foregoing examination abundantly shows that they all proceed upon the supposition that at law a foreclosure of the mortgage is no bar to an action on the attendant bond; and that equity alone can afford relief by acting on the conscience of the creditor, and decreeing a perpetual injunction. Sitting, then, in a court of law, we should have no difficulty, even if this were a case *prima impressionis*, in holding that the plea is bad, and that the demurrer must be sustained. Our judgment would be, that upon principle the mortgagee must be entitled to recover on the note, in damages, the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption; and that, even admitting the foreclosure to be a purchase of the property, in no event could the purchase money be deemed to exceed the debt.

But this question has been solemnly adjudged in the state where this contract of mortgage was made and to be executed. In *Amory v. Fairbanks*, in 1793, the supreme court of Massachusetts decided, upon a special plea like the present; that the bar was bad, and the mortgagee entitled to recover the deficiency of his debt, notwithstanding the foreclosure. 3 Mass., 562. At the distance of fourteen years, this decision was cited and approved by the same court, and may now be considered as the settled law of that state. 3 Mass., 154. Such an authority, even if not binding on this court, is so conformable with principle and so highly respectable in itself, that it is not easy to shake its force.

It has been argued that the creditor might in Massachusetts have first sued his note, and levied his execution on the mortgaged estate at its appraised value, and thereby have avoided the ill effects of a foreclosure, if the estate was of less value than the debt, and that therefore there is less reason to hold him entitled to recover when he elects a foreclosure in the first instance. But is it quite certain that the mortgagee would *in equity* be allowed in this way to avoid the mortgage? And even if he might, still it might well admit of doubt how far such a proceeding extinguished his mortgage so as to let in other intermediate incumbrances and attachments on the estate. If the defendant's argument be correct, the election of a personal suit would amount to a waiver of the mortgage, whether the execution were levied on the mortgaged property or remained unsatisfied. Yet authority does not seem to countenance such a principle. See *Bantleon v. Smith*, 2 Binn., 146.

There are some other views of this case which, if the principal point admitted of doubt, might deserve consideration. The suit is upon a judgment of another state, and must have all the validity and conclusiveness here that it has there. See 8 Cranch, 29. If the plaintiff was bound by his election to foreclose the mortgage, that election had been made previous to the original suit and might have been pleaded in bar to it, and the neglect so to do cannot now be helped. If, on the other hand, the bar did not arise until after the election so made and an actual extinguishment of the equity of redemption, then,

by the law of Massachusetts, it was no defense against a suit on the judgment. On the whole we are of opinion that the demurrer is well taken, and that judgment on this plea must pass for the plaintiff. Plea adjudged bad.

§ 771. Application of payment upon judgment including mortgage debt.—Where a creditor obtains one judgment on several debts, some of which are secured by mortgage, and the execution is satisfied only in part, a court of equity will apply the moneys in the first place to the unsecured portion of the debt. *Williams v. Reed*, 8 Mason, 405, 417.

§ 772. Who may appropriate payments.—A mortgage debtor owing other debts to his mortgagee, aside from the mortgage debt, in making a payment may appropriate it to whatever account he pleases. But if he makes no appropriation, his creditor may apply it either to the secured or unsecured debt. If, however, neither the debtor nor the creditor makes any appropriation the court will apply it according to the equity of the case. *Gordon v. Hobart*, 2 Story, 248.

§ 773. A mortgagor, by charging himself as executor of the mortgagee with the amount of the mortgage note as part of the assets of the estate and settling his account on that basis, shows that he supposed the debt to be a valid one, and is a substantial admission of it in a suit by an administrator with the will annexed to foreclose the mortgage. But the inventory and the order of distribution in the probate court are not conclusive evidence that the note has been paid. *Butterfield v. Smith*, 11 Otto, 571.

§ 774. Change of debt does not affect the security.—A mortgage or other conveyance made as security for a debt evinced by a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. But if the security itself has been changed, and not the evidence of the debt, and a new mortgage has been executed in substitution for the first, the first thereupon ceases to have any validity or effect. *In re Wynne*, Chase's Dec., 327, 249.

§ 775. A mortgage or other like deed given as security for a debt will operate as a security for a continuing debt though its evidence be changed by renewal, etc. *Ibid*.

§ 776. If one deed of trust be substituted for another the older deed becomes invalid. *Ibid*.

§ 777. A mortgage is not extinguished by a decree in which it was recognized, the rate of interest increased, and the time of payment extended, that decree declaring that it was not to operate as a novation of the original mortgage or to "affect the validity of the same." *Hunt v. Innis*,* 2 Woods, 108.

§ 778. Proof of a mortgagee's whole debt against the estate of a deceased mortgagor does not extinguish the mortgage. Mortgagee may receive his dividend and enforce his mortgage lien for any portion of the debt remaining unpaid. *Schuelenburg v. Martin*, 1 McC., 348 (§§ 765-767).

§ 779. The title remaining in the mortgagee after payment of the debt is not sufficient to enable him to maintain a writ of entry or other suit at law against the mortgagor to recover possession of the mortgaged premises. *Gray v. Jenks*,* 3 Mason, 520.

§ 780. Payment of the debt extinguishes the mortgage.—Where the debt secured by the mortgage is extinguished, no matter how, the assignee of the mortgagor is entitled to the possession of the premises; and the mortgagee or his assigns, if in possession at the time, hold in trust for the benefit of the mortgagor and his assigns. *Upham v. Brooks*,* 2 Woods, & M., 407, 416.

§ 781. A court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor. Yet the legal title is not technically released by receiving the money. This rule must then be founded on an equitable control exercised by courts of law over parties in ejectment. It would be contrary to the plainest principles of equity and justice, to permit a stranger who had no interest in the mortgage to set it up, when it had been satisfied by the mortgagor himself, to defeat his title. But if this stranger had himself paid it off, he would be considered as an assignee, and might use it for his protection. *Peltz v. Clarke*, 5 Pet., 491, 488.

§ 782. In Louisiana a mortgage may be erased in a proceeding by rule in the nature of a petition. *New Orleans National Bank v. Adams*, 3 Woods, 21, 25.

§ 783. Recovery of deficiency.—A mortgagee is entitled to recover in an action at law upon the mortgage debt the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption. *Hatch v. White*, 2 Gall., 152, 160 (§§ 769-770).

§ 784. Release of mortgage without surrender of note.—Where a note secured by mortgage has been passed to a third party, a subsequent release of the mortgage without the surrender of the note is void, upon the principle that the assignee of the note is entitled to

the security given for its payment, and that the assignment of the debt operates as an assignment of the mortgage. *Dickinson v. Worthington*, 4 Hughes, 430, 433.

§ 785. The release of a deed of trust to secure a note, which was executed by the trustee without authority from the holder of the note and without its payment, is not good in favor of a subsequent purchaser with notice. *Insurance Co. v. Eldredge*, 12 Otto, 547.

§ 786. Discharge obtained by fraud.—A cancellation of a mortgage by a trustee, obtained through the fraudulent representations of interested persons, cannot operate to abridge the rights of beneficiaries. *McLean v. Lafayette Bank*, 8 McL., 587, 625.

XIX. REDEMPTION.

SUMMARY—*A rule of property; time allowed after foreclosure, § 787.—Rule of circuit court to allow commission to clerk, § 788.—Sheriff's certificate of redemption, § 789.—No redemption after expiration of time allowed, § 790.—Appeal within time allowed for redemption, § 791.—Redemption of homestead by assignee in bankruptcy, § 792.—Amount payable to redeem from mortgagee who has paid prior incumbrances, § 793.—Redemption by junior pending foreclosure of prior mortgage, § 794.—Parties to bills to redeem, §§ 795-799.*

§ 787. A right of redemption after foreclosure, given by statute in any state, becomes a rule of property binding upon the courts of the United States sitting in such states; and the rules of practice of such courts must be made to conform to the law of the state so far as may be necessary to give full effect to the right. Therefore, a court of the United States sitting in Illinois and decreeing a foreclosure sale of land in that state should provide for a redemption according to the statute of that state. *Brine v. Insurance Co.*, §§ 800-804. Followed in *Orvis v. Powell*, §§ 1070-1072.

§ 788. The circuit court of the United States has power, by rule or otherwise, to require a party exercising the right of redemption given by statute, to pay to the clerk of the court one per cent. on the money received and paid out by him as redemption money. *Blair v. Chicago & Pacific R. Co.*, § 805.

§ 789. A sheriff's certificate of redemption is not so far conclusive as to bar the redeemer from showing that all the money had been paid and the whole property redeemed. *Paige v. Smith*, § 806.

§ 790. After the expiration of the time allowed by law to redeem land sold under a foreclosure decree, a bill of review to open the decree and reverse the decision will not be entertained. *Burley v. Flint*, § 807.

§ 791. If a party appeals within the time allowed for the redemption of land sold by judicial sale, he loses no right by not having paid or tendered the redemption money within the time limited. *Mason v. Northwestern Ins. Co.*, § 808.

§ 792. The redemption of a homestead by an assignee in bankruptcy does not inure to the benefit of the bankrupt. *Swenson v. Halberg*, §§ 809-811.

§ 793. If a junior mortgagee has paid incumbrances for the protection of the estate, the person redeeming is required to add the amounts so paid to the mortgage debt, both because the estate is benefited to that amount and because the holder of the mortgage, by paying such incumbrance, is subrogated to the claim. *McCormick v. Knox*, § 812.

§ 794. A subsequent mortgagee, redeeming after a sale upon foreclosure, but before this is completed by the expiration of the time for redemption, becomes assignee of the mortgage and is entitled to interest at the rate it bore. *Dodge v. Fuller*, § 813.

§ 795. All persons having a legal interest in the mortgaged property, or in the mortgage, should be made parties to a suit to redeem. *Dexter v. Arnold*, §§ 814-820.

§ 796. Trustees invested with the legal estate, rather than the *cestuis que trust*, are the proper parties to redeem land held under a mortgage. *Ibid.*

§ 797. All the heirs of the mortgagor should be before the court in case of a redemption of a mortgage. *Ibid.*

§ 798. Heirs of the mortgagee are generally indispensable parties to a redemption of a mortgage. *Ibid.*

§ 799. In Rhode Island, where the mortgagee has never taken possession, the mortgage belongs to his personal representative, and in such case the presence of the heir may be dispensed with. *Ibid.*

[Norm.—See §§ 821-836.]

BRINE v. INSURANCE COMPANY.

(6 Otto, 627-640. 1877.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—The insurance company filed a bill to foreclose a mortgage on land in Chicago. The grantors in the mortgage afterwards conveyed to Walker, who sold, but did not convey, to Ida R. Brine, who died, leaving as her heir Ida W. Brine. After selling to Mrs. Brine, Walker conveyed to Pearce, in order that \$6,000 which Mrs. Brine owed him might be held by Pearce as security for a debt of Walker's to a bank. All the persons interested were made defendants. The final decree allowed the defendants one hundred days to pay the mortgage debt, and if not paid the master was instructed to sell the lot for cash. From this decree Ida W. Brine appealed.

§ 800. *Interest coupons are distinct contracts, and when due and unpaid bear interest.*

Opinion by MR. JUSTICE MILLER.

We will notice the errors assigned in their order. 1. The money borrowed of the insurance company was evidenced by a bond for the principal sum of \$7,000, and the semi-annual interest by coupons attached to said bond; and the court allowed interest on such of ~~these~~ coupons as were due and unpaid; and this is asserted to be error. We have decided more than once in this court that such instruments are so far distinct contracts for the payment of money, that when they become due they bear interest, and may be sued on separately from the bond. *Cromwell v. County of Sac*, 96 U. S., 51. 2. It is objected that complainant was allowed in the decree premiums paid for insurance of the house covered by the mortgage. The deed of trust required the grantors to keep the property insured for the benefit of complainant; and, when they failed to do this, we think the sum paid by the trustee for such insurance is a proper charge, and a lien under the trust deed.

3. By reason of the conveyance of the lot to Pearce, after Walker had sold to Mrs. Brine, and received \$5,000 of the purchase money, the appellant, her heir, insisted that, before final decree in favor of the complainant, the right to the equity of redemption under the trust deed should be ascertained and settled by the court, as between her and Pearce, in order that, if she paid the insurance company's debt, she might know what she was getting for it. For this purpose she made application to be permitted to file a cross-bill; but she did not pay, or offer to bring into court, for the use of the company, the money which was due on the mortgage. The court refused to delay the decree in favor of the complainant for this purpose, but by the decree allowed any of the defendants to pay the money found due within a hundred days, and thus prevent the sale; and it also ordered that, if the lot sold for more than the debt, interest and costs, the excess should be paid into court. The rights of these parties to the surplus could then be litigated.

In this we are of the opinion the court did precisely what equity and equity practice required. The complainant's debt was due and was undisputed as a lien on the lot paramount to all others; and the complainant had no interest in the controversy between appellant and Pearce, and should not have been delayed until the end of a long suit for a specific performance, which could not affect the right of the complainant to have its money out of the lot. While these errors are pointed out by the counsel for the appellant in his brief, but little is said about them; and in the full and able arguments, oral and printed,

by counsel on both sides, these questions are ignored or passed over in favor of one which they deem of very great importance; and in this they have the concurrence of the court.

4. It is said by counsel for the appellant that the statutes of Illinois allow one year after sale, in such a case as the present, for redemption by the debtor, and three months after that by any judgment creditor of the debtor; making fifteen months before the purchaser has a right to his deed and to possession. It is assigned for error that this decree not only makes no provision for such redemption, but by its terms cuts off and defeats that right.

If the point had been raised or insisted on by the appellee, it would admit of doubt whether this question is fairly raised by the decree; for while it orders the sale of the lot, and a report to the court, it says nothing about barring the equity of redemption, nor of the making of a deed; and, but for a single phrase in the decree, it would seem that the appropriate time to raise this question would be on the confirmation of the report of sale and the order for a deed to the purchaser, which has not yet been done. But it is conceded by counsel here on both sides, that it is according to the course and practice of the court that the master makes to the purchaser at the sale a deed for the land; which deed, by the uniform practice of the court, gives him the right to immediate possession, and cuts off all right of redemption, whether statutory or otherwise. If this be true, which we have no reason to doubt, then the decree which ordered the sale to be made in accordance with the course and practice of the court does deny and defeat the right which the appellant asserts, to redeem by paying the amount of the bid, with interest, twelve months after the sale. As it is important to the holder of the equity of redemption to know whether it is essential to the exercise of her right to redeem, that it be exercised before the sale, or can be with equal safety exercised a year later, and as the question is one of importance and frequent recurrence on the circuits, it is eminently proper that it be decided now.

The statutes of Illinois in force on this subject when this mortgage was made, and for a great many years before, are found in the Revised Statutes of 1845, pages 302-305, as follows: "It shall be lawful for any defendant, his heirs, executors or grantees, whose lands shall have been sold by virtue of any execution, within twelve months from such sale, to redeem such land, by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same, for the benefit of such purchaser, the sum of money paid on the purchase thereof, together with interest thereon at the rate of ten per cent. per annum from the time of such sale; and on such sum being paid as aforesaid, the sale and certificate shall be null and void." "In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity, for the sale of mortgage lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same, in the manner provided in this chapter for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree, in the same manner as is prescribed for the redemption of lands sold on execution issued upon judgments at common law."

It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English chancery court, as they existed prior to the declaration of independ-

ence, and by such rules of practice as have been established by the supreme court of the United States, or adopted by the circuit courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned. On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to and may be governed by the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract. And that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form.

Let us see if the statutes of Illinois on this subject do confer positive and substantial rights in this matter. It is not denied that in suits for foreclosure in the courts of that state the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts. Nor is it pretended that this court, or any other federal court, can in such case review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the state of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right. *Olcott v. Bynum*, 17 Wall., 44; *Ex parte McNiel*, 18 id., 236.

§ 891. *The title to real estate is exclusively subject to the laws of the country where it is situated.*

Of the soundness of the first proposition of the appellant it would seem there

can, under the decisions of this court, be little doubt. The earliest utterance of the court on the subject is found in the case of the *United States v. Crosby*, 7 Cranch, 115, in which this explicit language is used: "The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." And in *Clark v. Graham*, 6 Wheat., 577, it said: "It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the state in which they are situated." In the case of *McCormick v. Sullivan*, 10 id., 192, the court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the devisor resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that state, as the law of Ohio required. "It is an acknowledged principle of law," said the court, "that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another."

In the case of *Watts v. Waddle*, 6 Pet., 389, a question very much like the one before us arose. Watts was seeking to compel Waddle to accept a deed and pay for land which he had sold him many years before, the relief sought being in the nature of specific performance. It was objected that Watts could not convey a good title to a part of the land which he claimed to receive from the heirs of Powell by a decree rendered in the circuit court for the district of Kentucky. And although the proper parties were before that court, and a conveyance had been made to Watts by a commissioner appointed by the court, it was held that, as no statute of Ohio recognized such a mode of transferring title, the deed of the commissioner was wholly ineffectual. It will be seen that here was a court of equity, proceeding according to its usual forms, transferring title from one party to another, both of whom were before the court, yet its decree held wholly ineffectual under the principle we are considering. We will close these citations by using the language which had the unanimous assent of the court in the recent case of *McGoon v. Scales*, 9 Wall., 23: "It is a principle too firmly established to admit of dispute at this day, that to the law of the state in which land is situated must we look for the rules which govern its descent, alienation and transfer, and for the effect and construction of conveyances."

§ 802. *The right of redemption of lands sold under decrees of foreclosure in Illinois is as obligatory on federal as on state courts.*

The decree in this case, the sale made under it, and the deed made on that sale will constitute a transfer of the title within the meaning of the principle thus laid down. Neither the purchaser at that sale nor any one holding under him can show title in any other way than through the judicial proceeding in this suit. These proceedings are a necessary part of the transfer of title. The legislature of Illinois has prescribed as an essential element of the transfer by the courts in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and to judgment creditors a similar right for fifteen months, after the sale, before the right of the purchaser to the title becomes vested. This right, as a condition on which the title passes, is as obligatory on the federal courts as on the state courts, because in both cases it is made a rule of property by the legislature, which had the power to prescribe such a rule. See *United States v. Fox*, 94 U. S., 315.

§ 803. *All contracts are made with reference to the laws of the place where they are to be performed.*

But there is another view of the question which is equally forcible, and which leads to the same result. All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their construction, validity and effect are governed by the place where they are made and are to be performed, if that be the same as it is in this case. It is, therefore, said that these laws enter into and become a part of the contract. There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of *Tennessee v. Sneed*, 96 U. S., 69, we held that, so long as there remained a sufficient remedy on the contract, an act of the legislature, changing the form of the remedy, did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was complete, and which secured all the substantial rights of the party.

§ 804. *How far the right of redemption is controlled by the provision of the constitution against laws impairing the obligation of contracts.*

At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States. *Edwards v. Kearzey*, 96 U. S., 595. That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of *Bronson v. Kinzie*, 1 How., 311 (Constr., §§ 1650-55). That case was one which turned on the identical statute of Illinois which is invoked by the appellant in this case. The mortgage, however, on which that suit was founded was made before the statute was passed; and the court held that, because the statute conferred a new and additional right on one of the parties to the contract, which impaired its obligation, it was for that reason forbidden by the constitution of the United States, and void as to that contract. But the chief justice, in delivering the opinion, further declared that, as to all contracts made after its enactment, the statute entered into and became a part of the contract, and was therefore valid and binding in the federal courts as well as those of the state. As it is impossible to state the case and the doctrine applicable to the case before us any better, we give the language of the court on that occasion:

"When this contract was made," said the court, "no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind, and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery; yet no one doubts his right or his remedy; for, by the laws of the state then in force, this right and this rem-

edy were a part of the law of the contract, without any express agreement of the parties." Speaking of the law now under consideration, he said: "This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made." "Mortgages made since the passage of these laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt, and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions, and they would be obligatory on the parties in the courts of the United States, as well as in those of the state."

In *Clark v. Reyburn*, 8 Wall., 318 (§§ 1047-49, *infra*), the court, in recognition of the doctrine that the statute becomes a part of the contract, uses this language: "In this country, the proceeding in most of the states, and perhaps in all of them, is regulated by statute. The remedy thus provided, when the mortgage is executed, enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law 'impairing the obligation of the contract,' within the meaning of the provision of the constitution upon the subject."

We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the federal courts in suits in equity cannot be controlled by the laws of the states, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a state, or to add to or take from a contract that which is made a part of it by the law of the state, except where the law impairs the obligation of a contract previously made. And we are of opinion that Mr. Chief Justice Taney expressed truly the sentiment of the court as it was organized in the case of *Bronson v. Kinzie*, as it is organized now, and as the law of the case is, when he said that "all future contracts would be subject to such provisions, and they would be obligatory upon the parties in the courts of the United States as well as those of the states."

It is not necessary, as has been repeatedly said in this court, that the form or mode of securing a right like this should follow precisely that prescribed by the statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court. *Ex parte McNiel*, 13 Wall., 236. In the case before us no better mode occurs to us than that prescribed by the statute; namely, that the master making the sale shall give to the purchaser a certificate of the sale, with the sum at which the land was sold, and a statement that, unless redeemed within fifteen months by some one authorized by the law to make such redemption, he will be entitled to a deed. The matter being thus reported to the court, it can, at the end of the time limited, make such final decree of confirmation and foreclosure of all equities as are necessary and proper; or, if the land be re-

deemed, then such other decree as the rights of the parties consequent on such redemption may require.

The decree of the circuit court will be reversed, so far as it requires the sale to be made in accordance with the course and practice of the court, and the case remanded with directions to modify the decree, by making provision for the sale and redemption in conformity to this opinion; and it is so ordered.

MR. JUSTICE HARLAN dissented.

BLAIR v. CHICAGO & PACIFIC RAILROAD COMPANY.

(Circuit Court for Illinois: 12 Federal Reporter, 750-752. 1882.)

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.— This court, some time back, adopted, and entered of record, rules in regard to the redemption of property from sales under decrees in chancery. One of these rules is in these words: "Any defendant in the suit in which such decree is entered, his heirs, administrators or assigns, or any person interested through or under the defendant in the premises so sold, may within twelve months from said sale redeem the real estate so sold by paying to the purchaser thereof, his heirs, executors or assigns, or to the clerk of the court for the benefit of such purchaser, his executor, administrators or assigns, the sum of money for which said premises were sold or bid off, with interest at the rate of ten per cent. per annum from the date of such sale; and in case such redemption is made by payment of the money to the clerk, the person so redeeming shall also pay an additional sum of one per cent. on the amount so paid in as the clerk's fee for receiving and disbursing said redemption money; and the clerk, on receiving said redemption money, shall at once deposit the same in the registry of the court." A similar rule exists when the redemption is made by a creditor of the defendant who may be entitled under the law to redeem.

The property of the defendant was sold under deed of foreclosure for \$916,100. The purchasers of the property refusing to accept the redemption money, the railroad company was required to pay and did pay to the clerk of this court \$1,012,392.85, being the amount of the sale, with ten per cent. interest from the date of sale as required by the local statute, and one per cent. on the purchase money and interest, as required by the before-mentioned rule. Subsequently, and after the expiration of several days, the clerk, under the order of the court, paid out of the fund to the purchasers of the property \$1,002,369.19, being the purchase money and interest, leaving in court, of the fund, the sum of \$10,023.66.

§ 805. *Section 828, Revised Statutes, is not in conflict with the rule of the court allowing commissions on redemption of real estate in case of foreclosure of mortgage.*

The company now presents its petition asking that the balance of the fund in court, \$10,023.66, be paid over to it. *Held*, the petition of the company rests upon the ground that the court had no power, by rule or otherwise, to require a party exercising the right of redemption given by statute to pay anything more than the purchase money, with the prescribed interest thereon. But in this view the court does not concur. The statutes of the United States provide that "for receiving, keeping and paying out money in pursuance of any statute or order of court there shall be paid to the clerk one per cent.

of the amount so received, kept and paid." R. S., §28; 10 St. at Large, 163-167. The rules in question were made with reference to the decision of the supreme court of the United States in *Brine v. Insurance Co.* [96 U. S., 627; §§ 800-804, *supra*], which, reversing the long-established practice in this court, ruled that the right of redemption given by the statutes of Illinois constituted a rule of property to be respected alike in the federal and state courts in cases of decretal sales. The law of the state prescribed the mode in which redemption might be effected, and it was deemed necessary that this court should make rules upon the subject in conformity as near as might be with the rules governing the courts of the state. The rules in question were doubtless also made with reference to the statutes of the United States fixing one per centum as the amount to be paid to the clerk on money received, kept and paid out by him in pursuance of a statute or an order of court. And that statute, it may be observed, giving this one per centum, is to be construed in connection with other provisions which require the clerk to report to the attorney-general semi-annually all fees and emoluments of any kind by him received, and which limit the amount to be retained by him for his personal compensation in any one year to the sum of \$3,500. All above that sum is to be accounted for by him to the United States. It is not perceived why, upon money paid to the clerk of the court for the purpose of redeeming property sold, and by him kept and paid out, the statutory commission of one per cent. shall not be allowed as well as upon other moneys received, kept and paid out by him under order of court. This case seems to be embraced by the language of the statute, and the rule of court is only in furtherance of the objects intended to be accomplished by it. The amount so paid to the clerk by the party redeeming may be regarded not only as a part of the costs of the litigation to be paid by the losing party, but also as part of the necessary costs and expenses incurred in carrying on the business of the court, and is to be accounted for to the government. That the right to redeem is a statutory right given by the state does not affect the question. The purchaser of the property could not be required to pay the commissions of the clerk, since, under the statute, he was not obliged to surrender the property and the benefit of his purchase unless he received the full amount of his bid and interest thereon. The only mode, therefore, to obtain the per cent. which the statute in express words allows on all moneys received, kept and paid out by the clerk was to require payment thereof by the losing party — that is, the party redeeming.

In brief, the duty of the court to allow the redemption given by the state law must be discharged, subject to the provision of the act of congress fixing the amount to be paid to the clerk on all moneys received, kept and paid out by him under order of court. The petition is denied.

PAIGE v. SMITH.

(Circuit Court for Minnesota: 2 McCrary, 457-459. 1881.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.— This is an action of ejectment, tried without a jury. The defendant has paid the costs of the first trial, which resulted in a judgment against him, and the case is tried again as is allowed in such case by the statute of Minnesota. The plaintiff claims title as grantee of "Marcy," who held a mortgage given by Cummins & Rouse on the undivided three-fourths of

the land in dispute. This mortgage was foreclosed and the property sold October 30, 1875, and purchased by Marcy, the mortgagee, to whom a certificate was given by the sheriff, which was assigned March 8, 1876, to the plaintiff and L. L. Hubert, copartners. The defendant claims through numerous conveyances and assignments from Cummins, the co-tenant of Rouse, and his successors in interest, by virtue of an alleged redemption from the foreclosure sale under the Marcy mortgage, and also through conveyances and assignments under a sale of the property to satisfy mechanics' liens. If Cummins redeemed from the sale under the Marcy mortgage in time, the defendant is entitled to judgment. On the first trial the evidence showed that Cummins, before the time for redemption expired, tendered to the sheriff a portion only of the bid made by the purchaser, and received a certificate of redemption of a certain part of the property, and, on the day after the time for redemption expired, he received a certificate of redemption for the remaining portion of the property sold on payment of the balance of the bid.

The decision on the first trial upon this state of facts was controlled by the following propositions: *First.* The redemption must be made by payment of the sum for which the property was sold. The whole debt must be paid, and the redemptioner then stands in the place of the party whose interest in the property he discharges. *Second.* A co-tenant of an equity of redemption has no right to compel a mortgagee, or a purchaser of the property at the sale, whose rights are the same as the mortgagee, to release such part of the mortgage title as is proportionate to his share in the equity of redemption on being paid a corresponding part of the mortgage debt. The mortgagee is not obliged to accept payment of anything less than the whole debt, nor is the purchaser at the foreclosure sale obliged to accept less than the whole of the purchase money and become a co-tenant in the property with a redemptioner.

§ 806. *A sheriff's certificate of redemption from a mortgage foreclosure may be contradicted.*

On the second trial the defendant proved that the whole amount of the bid at the foreclosure sale was paid the sheriff previous to the day when the time for redemption expired, and that a certificate of redemption covering the whole property was executed and delivered by the sheriff to Cummins, and that there was a single payment for the entire redemption at that time. This certificate, the evidence shows, was subsequently returned to the sheriff, and other certificates of different dates, covering distinct portions of the mortgaged property, were given, on account of the difficulties in the mind of the agent who acted in behalf of Cummins. This person was only anxious to make a legal and sufficient redemption, but was perplexed as to the proper form of making the certificates, and in doubt whether, Cummins being a lienholder by virtue of a mortgage taken by him on the sale of the property subsequent to the date of his mortgage to Marcy, there should not be separate certificates. The fact is proved, however, that the sheriff received the whole amount of the purchaser's bid for redemption within the time provided by the statute, and by this payment Cummins made a valid redemption. It is urged by the plaintiff's counsel that this evidence contradicts the sheriff's certificates and is inadmissible. I cannot agree to the proposition that these certificates are conclusive upon the party who made the redemption. The question to be determined is, Did Cummins pay for the purpose of redeeming from the Marcy foreclosure sale the full amount necessary, and within the time fixed by the statute to make a valid redemption? I think the evidence proves he did pay the whole amount of the

bid two days before the year expired, and complied with the statute, which entitled him to the property released from any claim of the purchaser.

The statute giving the redemption should be liberally construed, and when the money is paid in good faith the person redeeming should be protected, although the sheriff's certificate may recite a different state of facts. Judgment will be entered in favor of the defendant, and it is so ordered.

BURLEY v. FLINT.

(15 Otto, 247-249. 1881.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.— Flint obtained, on the 19th of October, 1877, a decree foreclosing a mortgage against Kriegh, the mortgagor, Burley, his assignee in bankruptcy and others. The decree ordered a sale according to the usual course and practice of the court, which, in the case of *Brine v. Insurance Co.* 96 U. S., 627 (§§ 800-804, *supra*), we held to mean a sale without any right of redemption. Such a sale was made to Flint. An order confirming it, and for a deed, and the delivery of possession, and expressly cutting off all right of redemption, was entered by the court on the 13th of March, 1878, with a further decree against the assignee for payment, out of assets *pro rata*, of a balance not satisfied by the sale. On the 17th day of October, 1879, Burley filed in the same court, but without leave, a bill of review, seeking to reverse so much of the former decrees of the court as denied the statutory right of redemption given by the laws of Illinois in regard to the land sold under such decrees.

§ 807. *Decree of sale under foreclosure not opened after time of redemption has expired.*

A hearing was had on a motion to dismiss, which, by consent of counsel, as the record states, was to be treated also as a demurrer. The court dismissed the bill, from which order this appeal is prosecuted by Burley. The appellant in his bill does not seek to reverse the order of sale to satisfy the amount found due to Flint, nor ask that the sale thereunder be set aside and a new sale ordered. He does not offer to redeem by payment of the amount due on the original mortgage, or to pay the amount bid at the sale by Flint, nor tender any sum as assurance that he will do so. He simply and purely asks that so much of the decree as forecloses this statutory right to redeem may be reviewed and reversed. What will such an order avail him? The decree and the sale under it will still stand good. The time within which a defendant can by the statute of Illinois redeem has long since passed and he has made no offer to redeem. The sale was made prior to February 23, 1878, the date of the master's report, and the present bill filed October 17, 1879, twenty months afterwards, and at a time when, by the statute, both the defendant and his judgment creditors had ceased to have any right of redemption.

If the appellant had appealed from the original decree to this court his remedy was plain, and the decree would have been reversed. The same result would probably have followed an appeal from the order confirming the sale and cutting off the right to redeem. He did not see proper to follow such a course, but seeks by this bill of review to let the original decree and sale stand, but to have a declaration of the court that the order foreclosing the statutory right of redemption be reversed. How can this avail him since his time for

redemption had expired before he filed his bill? It would be of no use to him unless the court should go further and make a decree that he *now* has the right to redeem in the same manner as if he had tendered the money within the twelve or the fifteen months which the law allowed for that purpose. We do not think the court should decree that he may now redeem on payment of the sum bid and interest. If he designed to avail himself of the right of redemption purely statutory, he should bring himself within the terms of the statute. Such is the view of a case precisely similar taken by the supreme court of Illinois.

That court in the case of *Suitterlin v. Connecticut Mutual Ins. Co.*, 90 Ill., 483, while recognizing the doctrine of the case of *Brine v. Insurance Co.*, holds that the party seeking to redeem under such a decree and sale as the one before us, can do so by making the offer within the time prescribed by the statute and cannot do so afterwards. We concur in that view. Decree affirmed.

MASON v. NORTHWESTERN INSURANCE COMPANY.

(16 Otto, 168-166. 1882.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—A bill was filed by the Northwestern Insurance Company to foreclose a mortgage made by Murphy. Mason, who was trustee in a deed of trust conveying the same property to secure Murphy's creditors, was made a party defendant to the bill. Under the decree of the court the land was sold and the defendants were adjudged to be barred from all equity of redemption. Mason appealed.

Opinion by MR. JUSTICE MILLER.

The error relied on to reverse the decree is the absolute foreclosure of the equity of redemption, without allowing the time for that purpose which the statute of Illinois provides. The case comes directly within *Brine v. Insurance Co.*, 96 U. S., 627 (§§ 800-804, *supra*). Indeed, it is stronger; for while in that case we took the admission of counsel on both sides that "a sale in accordance with the course and practice of the court" meant a sale which did not admit of any equity of redemption, we have in this case a decree of confirmation of the sale which expressly and in the strongest terms cuts off all such right. In accordance with the principle settled by this court in the case of *Brine v. Insurance Co.*, both these decrees are erroneous.

§ 808. *Tender of redemption money within the time limited in case of appeal.*

It is, however, urged as a reason for not applying that principle in the present case, that the appeal was not taken until after the period had elapsed within which the appellant could by the statute have exercised the right of redemption, and that he has neither paid nor tendered the sum necessary to redeem. *Burley v. Flint*, 105 U. S., 247 (§ 807, *supra*), and *Suitterlin v. Connecticut Mutual Ins. Co.*, 90 Ill., 483, are relied on in support of this view. The first of these cases was a suit in a local court of Illinois to obtain the benefit of the right of redemption from a sale under a foreclosure decree in the circuit court of the United States. The supreme court of that state refused the relief asked because no effort had been made to redeem within the statutory period,—a ruling which, in *Burley v. Flint*, we held to be sound. The reason for this is that, while not seeking to reverse the decree, nor to set aside the sale made thereunder, the proceeding recognized both as valid, and asserted the right of the party to redeem, as though the sale had been made in accordance with the statute of Illinois. This right, of course, could only be secured by a strict

compliance with that statute, and having permitted the period to elapse within which he had a right to redeem, he came too late. The court very properly dismissed the bill.

In *Burley v. Flint* this court approved and adopted the views of the Illinois court, and applied the principle to the case of a bill of review which sought the same end. The bill was filed after the expiration of the period of statutory redemption, and the amount necessary to redeem had not been tendered within that time. Both cases differ from the present in that they were attempts to enforce the right of redemption outside of and against the terms of the decree, while the present case seeks by an appeal to reverse and set aside the decree. In the former cases equity required that before coming to the court for the relief which the plaintiffs asked, they should have complied with the requirements of the law, or at least offered, within proper time, to pay the redemption money. Not having done this, the court very properly refused to permit them to exercise this right after that time had passed, and with it the right to redeem. In the present case the appellant has exercised his right of appeal from the decree within the time allowed to him by the laws of the United States for that purpose. He has, therefore, rightfully brought this case before us for review. His right to do this does not depend upon any offer to redeem within the fifteen months allowed by the Illinois statute, but is an absolute right, which we cannot refuse or deny. As it is apparent from the face of the decree and from what we have said in *Brine v. Insurance Co.*, that both the original decree of sale and the subsequent decree of confirmation are erroneous in refusing to allow the right of redemption under the statute, they must be reversed. If anything were necessary to add force to this reasoning it would be found in the fact that the appellant Mason, in his answer to the original foreclosure bill, expressly referred to the statute of Illinois, and asked that any decree made in the case should make provision for redemption within fifteen months after the sale.

Decrees reversed and cause remanded for further proceedings in accordance with this opinion.

SWENSON *v.* HALBERG.

(Circuit Court for Minnesota: 1 McCrary, 96-100. 1880.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.—The plaintiff brings his action of ejectment to recover the property hereinafter described, which is tried by the court without a jury. It is admitted the plaintiff, on December 26, 1864, was seized of the property described as block five (5) in the platted town of "Centre City," in the state of Minnesota. On that day he conveyed it to Louis Shogren and John Shogren, together with lots 1, 2, 3, 4 and 5, in block 4, in that town. On July 17, 1868, Louis and John Shogren gave a mortgage of all this property to J. N. Castle, who assigned it to H. F. Noyes, October 10, 1868. This mortgage was foreclosed by advertisement under the laws of Minnesota, and on April 23, 1870, the mortgaged property was sold at public auction, and was bid in by H. F. Noyes, to whom a certificate was given by the sheriff, dated May 12, 1870. The sale, however, was subject to the redemption provided by law. The property was sold by the sheriff in a body, not in separate lots or tracts, and the published notice of foreclosure sale, in specifying the amount claimed to be due, included therein the debt, interest and \$50 attorneys' fees, whereas the

mortgage, in terms, stipulated for \$25 attorneys' fees. Two certificates were issued to the purchaser — the first, executed by the sheriff, but not in his official capacity; the second, properly executed, to cure defects. The second certificate, of the same date as the first, was assigned on June 25, 1870, by H. F. Noyes — one-half to Louis Torenus, one-fourth to I. E. Staples, and one-fourth to W. G. Bronson. All the aforesaid instruments were duly recorded.

On May 12, 1869, John Shogren and wife executed a deed of the property embraced in the mortgage to Louis Shogren. Louis Shogren was adjudged a bankrupt June 14, 1870, on a petition filed on the third day of the same month, and Enoch Horton was appointed assignee, and an assignment was made to him of the bankrupt's estate, by the register in bankruptcy, August 16, 1870, and he filed a certificate of exempt property on August 23, 1870. Torenus, Staples and Bronson submitted exceptions to this certificate, and after argument, on February 18, 1871, an order was entered setting aside the designation of exempt property, deciding that block five (5) was the homestead of the bankrupt, and directing the assignee to set it aside. On May 19, 1871, the bankrupt and wife conveyed block five (5) to the plaintiff, and under this deed he claims title.

Horton, the assignee, having first obtained an order therefor from the court, redeemed from Torenus, Staples and Bronson, who held the certificate, the property mentioned therein, including block five (5), on April 21, 1871, three days before the equity of redemption vested in the bankrupt expired. He was compelled to pay to them the full amount, as the property was originally sold in one body, and to redeem with the other premises block five (5), the homestead, in which the bankrupt had an equity of redemption only. The time for redemption by the bankrupt expired April 23, 1871, and no steps were taken by him to perfect his title to block 5, thus set apart to him as a homestead. He allowed the time for redemption to lapse, and the assignee obtained an order, June 20, 1871, to sell the property in block 4. He, however, sold not only this property, but block 5 also, which was not included in the order, and on October 23, 1872, the sale was confirmed. At this sale all the property was purchased by Torenus, and the assignee executed to him a deed October 3, 1872. Torenus conveyed to the defendant Halberg, October 23, 1873, and Halberg conveyed to defendant Peterson May 12, 1873. This controversy is with reference to the title to block five (5). The plaintiff urges: *First*, that the foreclosure and sale under the advertisement was void, for the reason that a larger attorneys' fee was claimed than stipulated in the mortgage; *second*, that the same was void for the further reason that the property was not sold in separate parcels, or tracts, as the statute required; *third*, that the redemption of the homestead from the sale inured to the benefit of the bankrupt and his assigns, and satisfied and canceled the mortgage, and all title derived under it.

§ 809. *Under mortgage laws of Minnesota the insertion of a claim for fifty dollars instead of twenty-five dollars for attorneys' fees, in an advertisement, does not vitiate the sale.*

It is sufficient to say upon the first two propositions that the foreclosure was regular. There is no fraud charged and it does not appear that the other party was prejudiced by the insertion of \$50 instead of \$25 as attorneys' fees. The mistake is not such as will disturb the sale; neither will it be set aside for the reason that the tracts were not sold separately.

§ 810. *Provision for sale in separate parcels is directory.*

The section of the law requiring the sale of separate and distinct tracts in separate parcels is directory, and the sale will not be disturbed unless it was

sold fraudulently, or it is shown that the mortgagor or owner of the equity of redemption was damaged thereby. 24 Minn. R., 281. It does not appear that the sale of the separate tracts in a body was the result of actual fraud, and it is not shown that Shogren was prejudiced thereby. He made no effort, as before stated, to secure his homestead which was subject to the mortgage.

The third proposition cannot be sustained. The assignee redeemed the mortgaged property from the foreclosure sale, by virtue of the bankrupt law, under the order of the court. The equity of redemption to a portion of the mortgaged property was vested in the assignee as the representative of the estate of the bankrupt, and, under the authority of the bankrupt act, he was ordered to redeem. The rule in this state is that a person having an equity of redemption in a part of real estate sold may redeem from the sale, and this property being sold in a body and for one price, the assignee was compelled, in order to redeem the only property to which he had any right, to pay the full amount of the bid and take a certificate of redemption for the whole property. In doing this he took by the redemption block five (5), subject to Shogren's right to redeem from him. He was not authorized by this order of the court to redeem for the benefit of any but the creditors of the bankrupt, and Shogren's equity of redemption in block five (5) was not destroyed.

The assignee is not governed by the state statute regulating the proceedings necessary to be followed by a mortgagor or creditors in redeeming. Of course the law prescribing the time within which the right of redemption can be exercised will apply, and it cannot be extended by the bankrupt courts. Having full control over the bankrupt's estate after adjudication, the law itself, and the spirit and object of it, govern the court in the exercise of its jurisdiction, necessary "to collect all the assets of the bankrupt, . . . liquidation of liens, . . . and to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties," etc. Sec. 1, Bankrupt Law. It is the duty of the bankrupt court to protect the rights and interests of the bankrupt as well as the creditors, and secure to the former all the law allows in the way of exemptions, but no more. The assignee had no title by virtue of the assignment to him to the block five (5), which was declared to be the homestead.

§ 811. Redemption of a homestead by an assignee in bankruptcy.

The decision of the bankrupt court did not enlarge the present interest of the bankrupt in this homestead. His right, title and interest therein were only an equity of redemption, and by the redemption from Torenus and others the assignee held this block subject to this right, and the bankrupt by proper proceedings could have had his interest adjusted before he lost it. His homestead right in block 5 was fully recognized by the court two months before the time for redemption expired, and the bankrupt made no effort to ascertain the amount necessary to redeem it. The homestead exemption act (Minn. R. S., § 2) provides that "such exemption shall not extend to any mortgage thereon lawfully obtained." The bankrupt court, on application, in marshaling the assets would have by appraisement or otherwise fixed the sum necessary to be paid in order to entitle the bankrupt to the homestead free from all liens. Instead of applying to the court the bankrupt allowed his right of redemption to expire, and therefore the plaintiff took nothing by the deed executed May 12, 1871. Judgment will be entered in favor of the defendants.

McCORMICK v. KNOX.

(15 Otto, 122-126. 1881.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Bruff, in 1871, mortgaged the property in question to Meyer to secure a debt of \$5,000, Wimer being the trustee. In June, 1872, he conveyed the land to Wheeler, who executed a note to him for \$2,000, securing it by deed of trust on the land to Ward as trustee. On July 1, 1872, Bruff, with Holtzclaw, his partner, borrowed from the Freedman's Bank \$3,000, and gave Wheeler's note as collateral security. In June, 1873, Wheeler conveyed the property to McCormick by deed absolute on its face, but which was proved to be a security for a debt. The Freedman's Bank having failed, Knox became its trustee. Bruff and Holtzclaw's note not being paid, Ward was called upon to execute the trust he held by selling the property to pay the Wheeler note, which was done, and the land was bought for the commissioners, who preceded Knox as trustee for the Freedman's Bank. They paid Meyer's note for \$5,000, and received a deed of release from Wimer. On March 15, 1879, McCormick filed his bill against the commissioners, claiming the property under the deed to him from Wheeler, and attacking the sale made by Ward as irregular and void. The commissioners filed an answer and cross-bill. Knox was substituted for the commissioners by act of congress and was made party in their place to the suit. In the trial court the decision was in favor of Knox, and McCormick appealed.

§ 812. *Amount payable to redeem from mortgagee who has paid prior incumbrances.*

Opinion by MR. JUSTICE WOODS.

The counsel for appellant has submitted an argument to show that the sale and deed made by Ward, the trustee, to the commissioners of the Freedman's Savings and Trust Company were void. Without discussion of this question, we simply declare our opinion to be that there is no solid ground for this contention to rest upon. But whether the sale is valid or not is an immaterial question in this case, for the decree of the court below permitted the complainant to redeem the property, and so avoid entirely the effect of the sale and deed by the payment of the balance due on the promissory note for \$3,000 made by Holtzclaw and Bruff to the Freedman's Savings and Trust Company, and the amount due on the note for \$5,000 made by Bruff to Meyer, and the taxes, etc., paid by the commissioners of the Freedman's Savings and Trust Company after deducting the rents received by them. The decree of the court below substantially gives the appellant all the relief prayed for by his bill, on condition, however, that he should pay off the incumbrances on the property in question older and better than his own. The only practical question, therefore, is, Are the terms upon which the appellant and his grantor, Mrs. Wheeler, were allowed to redeem, just and right? Upon this point, it seems to us, there can be no doubt. The amount due on the note of Holtzclaw & Bruff, it is conceded, is less than the sum due on the note of Mrs. Wheeler, which it was pledged to secure. Neither she nor her grantee, the appellant, can complain if they are required to pay the balance, whatever it may be, due on the Holtzclaw & Bruff note before they can be allowed to redeem. It is equally clear that they ought to be required to pay the sum applied by the commissioners to discharge the amount due on the note held by Meyer, which was secured by a trust deed on the premises in controversy, and was the first lien thereon.

The contention of complainant that he should receive a clear title to the property, without first discharging the lien thereon created by the trust deed of Mrs. Wheeler, and without first paying the sums which had been applied by the commissioners to the discharge of the lien held by Meyer, both of which were prior in date to his own, is not founded on any equity, and is not supported by any authority. On the contrary it is clear that the commissioners, having paid off the oldest incumbrance on the property, are entitled to be subrogated to the rights of the incumbrancer. *Robinson v. Ryan*, 25 N. Y., 320; *Redmond v. Burroughs*, 63 N. C., 242.

A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid the sum so advanced when the mortgagor or his vendee comes to redeem. *Page v. Foster*, 7 N. H., 392; *Arnold v. Foote*, 7 B. Mon. (Ky.), 66; *Harper v. Ely*, 70 Ill., 581. The same rule applies to the payment by the mortgagee of taxes on the mortgaged premises, or any valid assessment thereon for public improvement. *Dale v. McEvers*, 2 Cow. (N. Y.), 118. The decree of the court below gave the complainant every right which the law accorded him. It must, therefore, be affirmed.

DODGE v. FULLER.

(Circuit Court for Michigan: 2 Flippin, 603, 604. 1880.)

§ 513. *Effect of redemption by a junior mortgagee pending proceedings to foreclose the prior mortgage.*

Opinion by WITHEY, J.

The bill in this cause was filed to foreclose a mortgage made by the defendant Hettie Fuller to the complainant's assignee, William P. Hall, and also a certain mortgage executed by the same defendant to John Marley and from which the complainant was compelled to redeem, for his protection, after a sale had been had upon foreclosure proceedings, instituted by advertisement under the statute. The complainant claims that this redemption put him in position of assignee of the mortgage, and it becomes necessary to determine whether the position taken by complainant is correct, as, if he is entitled to enforce the mortgage as assignee, he will be entitled to interest at the rate per cent. which the mortgage bore, viz., ten per cent., while if, on the other hand, he is simply entitled to an equitable lien for the money paid on redemption, he must content himself with the legal rate of interest, as equity cannot go so far as to make a contract for the parties, fixing the rate of interest. There is no question that had the redemption occurred before any proceedings were had to foreclose the mortgage given to Marley, the complainant would have become in equity the assignee of such mortgage. *Jones on Mortgages*, sec. 1086; *Mattison v. Marks*, 31 Mich., 421.

It remains to be determined whether any different rule obtains where proceedings to foreclose have been taken, which have not terminated in a complete foreclosure by the expiration of the equity of redemption. Section 6922, C. L. of 1871, provides, in effect, that in case of redemption after sale, the deed given on the sale shall be void and of no effect. We think that the effect of the redemption by complainant was to annul the sale, and that as the complainant was under no obligation to pay the mortgage, such payment will not in equity be treated as operating to discharge the same, but that, as in case of redemption before any proceedings to foreclose are taken, he will be treated as assignee of

the mortgage lien. It follows that he will be entitled to interest upon this mortgage at the rate of ten per cent. Let a decree be entered in accordance with these views.

DEXTER v. ARNOLD.

(Circuit Court for Rhode Island: 1 Sumner, 109-120. 1831.)

STATEMENT OF FACTS.—Bill to redeem a mortgage of property in Providence, and other lots on Fox's Point. The mortgage was made in 1800 by Jonathan Arnold to Thomas Arnold. Jonathan died insolvent in 1806, leaving several heirs, and, among others, Marcy Dexter. Administration upon the estate of Jonathan Arnold was taken by Thomas, who took possession of the property and in 1810 sold the Fox's Point lots, which the purchasers have since held. The other mortgaged property remained in the hands of the mortgagee until his death in 1826, and his heirs succeeded. The plaintiffs claim under Marcy Dexter, and are the ultimate *cestuis que trust* of a trust declared by her will on the residue of her estate, of which her interest in the mortgaged property was part.

Opinion by STORY, J.

This case has been very elaborately argued at the bar; but the view which is taken of it by the court does not require all the points and arguments to be brought into the reasoning on which the decision is founded.

§ 814. *Trustees invested with the legal estate, rather than the cestuis que trust, are the proper parties to redeem land held under a mortgage.*

It appears to us very clear that the trustees under the will were invested with the legal estate, and consequently they are the proper parties to file a bill to redeem. See Powell on Mortg., by Coventry, with Rand's Notes, 1 vol. 331, 332; Grant v. Duane, 9 Johns., 591. It does not appear from the bill that the plaintiffs are really entitled to anything under the will; for it is not alleged that anything would or did remain after satisfying the prior trust in favor of Susannah Dexter. If it did, still the trustees, being owners of the legal estate, are solely entitled to redeem, unless they have refused to redeem, or have colluded with the mortgagee, or some other impediment is shown to the redemption on their part. The bill ought to have contained specific allegations on this head, stating a case which would establish a residuary interest in the plaintiffs, and a ground for their claim to redeem, instead of the trustees. No such allegations are found in the bill; and on this account it is in its present shape fatally defective. It is true that the trustees are made parties to the bill, and have answered, and there is a general charge of confederacy against them. But this will not supply the defect of proper allegations to establish the plaintiffs' claim to redeem. The trustees must be called upon to answer, and must answer specifically to such matters as will justify the court in acting without or adversely to them. This, however, is a defect which the court are not precluded from allowing the plaintiffs to supply, in order to prevent a failure of justice, if the plaintiffs have any merits.

§ 815. *All the heirs of the mortgagor should be before the court in case of a redemption of a mortgage.*

All the other heirs of Jonathan Arnold, the mortgagor, or their representatives, are before the court, as defendants to the bill, with the exception of one Benjamin Arnold, a citizen of New York, who is alleged to be out of the jurisdiction of the court. But there is no allegation in the bill that he is unwilling or unable to assist in the redemption. Now, in general, it is certainly

proper that all the persons who are heirs of the mortgagor should be before the court before a redemption of the estate is decreed. And this for two reasons: first, that their rights and interests may not be affected by any change of the title without their consent; and secondly, that they may be parties to the account, and the mortgagee or his heirs and representatives not be harassed by a new suit for a new account. We do not know that, where an heir is beyond the jurisdiction of the court, the difficulty is absolutely insuperable. But if it is not, still the court is bound in its decree to take care of his interests, as far as it may, and to give him by notice an opportunity, if practicable, of coming in before the master and litigating for his interests in the taking of the account and the decree of redemption.

§ 816. *Heirs of the mortgagee are generally indispensable parties to a redemption of a mortgage.*

Another difficulty has suggested itself to our minds; and that is, whether the court can proceed to a decree of redemption without having all the heirs of the mortgagee, as well as his personal representatives, before the court. The bill itself shows that James Arnold, one of the heirs of the mortgagee, is not before the court, and he is stated to be out of the jurisdiction. No one can doubt the propriety of having all the heirs of the mortgagee before the court, if they can be made parties. See *Powell on Mortg.*, by Coventry, with *Rand's Notes*, vol. 1, 968, 970, and note N; *Cooper, Eq. Plead.*, 37. The only question is, whether they are not indispensable parties. In England, the heirs must be before the court, in order to reconvey the estate to the mortgagor; for it descends to them, though generally in trust for the personal representative of the mortgagee. There may be peculiar cases, in which, where one of the heirs is beyond the jurisdiction, or cannot by any diligence be found, the court will act without him. *Powell on Mortg.*, by Coventry, vol. 1, p. 403, note N. But in these cases the relief granted must be necessarily imperfect, as it cannot bind persons not before the court. In the case at bar, if there had been no entry or possession by the mortgagee, in his life-time, in the premises, there would not have been any substantial difficulty in proceeding against the personal representative of the mortgagee, who is before the court.

§ 817. — *in Rhode Island, where the mortgagee has never taken possession, the presence of the heir may be dispensed with.*

The statute of Rhode Island has declared that in all cases debts due by mortgage shall be considered as personal property, and distributed as such. And where the mortgagee has deceased without taking possession of the mortgaged estate, the debt is deemed personal assets, and the mortgage under the same control of the executor and administrator as if it had been a pledge of personal estate; and the executor and administrator may bring an ejectment to recover possession, in which action it is made sufficient to declare on the seizin of possession of the mortgage. And the executor and administrator are authorized to discharge the mortgage on payment, by release, quitclaim, or other legal conveyance. *Statutes of Rhode Island*, Digest of 1798, p. 303; Digest of 1822, pp. 233, 234. So that, in such cases, the presence of the heir seems wholly unnecessary, and may therefore be dispensed with. But the difficulty in the case at bar is, that the mortgagee had taken possession during his life-time (in what manner we shall hereafter consider), and continued that possession for about twenty-six years. And the question, therefore, whether it is to be treated as a subsisting mortgage, or as an absolute estate, is most material to all the heirs of the mortgagee, and upon which they are entitled to be heard.

The difference between the case of a possession, and of a want of possession by the mortgagee, has been treated by the supreme court of Massachusetts, under a local statute, very similar to that of Rhode Island, as most material; for, where there has been such possession, the estate is held to pass by descent to the heirs; where there has been none, it goes directly to the executor and administrator. See *Smith v. Dyer*, 16 Mass., 18. Without, however, considering this objection as insuperable and reserving it, as it has not been argued, for further consideration, as one of the heirs against whom relief may be had *pro tanto* is before the court, we shall proceed to the main question in the cause.

And, in the first place, are the plaintiffs, supposing all other difficulties overcome, entitled to relief against the defendants who are claimants and proprietors of the Fox Point lots? We are clearly of opinion that they are not. They are *bona fide* purchasers for a valuable consideration without any actual notice of the mortgage, and affected by it only so far as it varies constructively from the registry of the mortgage. The application is made after they have been in uninterrupted possession of the premises for eighteen years under their purchase, and have made valuable improvements thereon. We make no distinction between their possession of the upland and the flats. The latter were a part of their grant, and, whether visibly occupied or not, follow the seizin of the other part, there being no pretense of any adverse possession. In addition to this, the mortgagee, when he sold to them, had been in visible possession of the estate for ten years. The mortgage had been forfeited by breach of the condition for nine years. The mortgagor had been dead four years; his estate was utterly and hopelessly insolvent at the time, and became solvent only by the ultimate settlement of the Yazoo claims by congress in 1814. The estate was administered upon by the mortgagee; and all the circumstances must have been well known to him and to the heirs. At least, the heirs had far better means of knowledge than the purchasers, and must be presumed to have had constructive notice of their rights. Under such circumstances, the equity of redemption must, in respect to these purchasers, have been deemed of no value, and to have been abandoned by all parties. The heirs had no interest to redeem, for the estate was insolvent; the creditors made no effort to redeem; and the property lay in the hands of the mortgagee as a pledge not worth redemption. If afterwards, after the estate became solvent, the heirs had then pressed forward their claim against the purchasers, there might have been some foundation for relief. But they lay by through a period of fourteen years more without any stir, and until the mortgagee was himself dead. Now, there is nothing in the case to break the force of these circumstances in respect to these purchasers.

§ 818. *Acknowledgments by the mortgagor after a sale by him do not affect purchasers under him.*

It is said that in another suit in equity in 1822, the mortgagee acknowledged that he held the estate in mortgage and that it was not irredeemable. But how can this affect these purchasers? They are not affected, much less bound, by any admissions made by the mortgagee after the sale to them, whatever they may be. Their rights are not to be affected by his confessions. He sold to them as absolute owner, and they are entitled to be secure against any subsequent admissions which should control that solemn declaration under his own seal. But it is said that, though the mortgagee took possession of the mortgaged estate, it was as agent of the mortgagor. This is the allegation in the

amended bill. In the original bill the possession is stated without any such qualification. Now, this qualification of the possession is utterly denied by the answers, and of course must be proved in order to control those answers. No such proof exists in the case; and it seems to us that it is in its nature almost incapable of proof. A mortgagee entering into possession and taking the profits must be deemed to take them in his character as mortgagee. If in any sense he can be said to take them as agent, it must be as agent-mortgagee. Before forfeiture he may properly be deemed, in some sort, an agent. But after forfeiture his possession is under his title; and if he then takes the profits, he must be deemed to take them as mortgagee, and not otherwise, unless there be the most plenary and irresistible proof that he has disclaimed that character, and taken them to account, and has accounted therefor as a stranger-agent. No such account is pretended in the present case. All the circumstances are against it. There has been no account whatever rendered, at any time, on the footing of the mortgage. When the mortgagor died, in 1806, the agency must at all events have terminated; and the possession, after that time, was about twenty years without any account. There cannot be any reasonable doubt that the utter insolvency of the estate at that period made it no object with the heirs to treat it as mere security; and the creditors, from ignorance, or laches, or indifference, slumbered over their rights. It appears to us that, under all the circumstances, there would, after such a lapse of time, be gross injustice in allowing a redemption against these purchasers. Our judgment accordingly is, that the bill, as against them, ought to be dismissed, but without costs.

§ 819. *After twenty years' possession by the mortgagee the right to redeem will be presumed to have been abandoned.*

But, in respect to the Main street estate, which remained in the mortgagee's possession up to the time of his death, very different considerations may well enter into the question of redemption. Generally speaking, no lapse of time will bar the right to redeem, so long as the mortgage has been treated between the parties as a subsisting mortgage and security only. But if the mortgagee has been in possession of the mortgaged premises for twenty years, taking the profits without any account or act done, by which he admits himself to hold it as a qualified estate, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagee; and a bill to redeem will not be entertained by a court of equity. This, as a general principle, is not denied; and is too clearly established by the authorities to admit of doubt. See Powell on Mortg., by Coventry and Rand, vol. I, p. 360, and notes T, U; id., p. 366; id., p. 369, and note B; id., p. 370, note C; id., p. 392, note (1). What acknowledgment, or other act done within the twenty years, shall be sufficient to entitle it to be deemed, between the parties, a subsisting mortgage, may be matter of discussion, according to the circumstances of each case. But no one can doubt that a solemn acknowledgment in writing, made within the twenty years by the mortgagee, that he deems it a mere security, will open the estate to redemption. The authorities are pointed to this effect. See Powell on Mortg., by Coventry and Rand, vol. I, p. 370; id., p. 371, note D; id., p. 377, note G; id., pp. 379-382, note H; p. 385, note (1); id., p. 386.

§ 820. *Effect of an admission of a mortgage by the mortgagee.*

Now, in the present case, there is the most solemn and pointed admission by the mortgagee, in his answer to the bill filed in 1821 against him for an account, as administrator of Jonathan Arnold, that he then held this estate as a mortgage, and only as a mortgage, under Jonathan Arnold. This admission was in

a suit between third persons, and not between the parties now before the court. But that circumstance does not vary its force. It is still an admission, and a most solemn one under oath, by the mortgagor; and, as such, ought to bind his personal and real representatives, although it would not bind third persons. Cases are cited in the note to Mr. Rand's valuable edition of Powell on Mortgages, by Coventry (vol. I, p. 385, note 1), which are directly in point; and we gladly refer to them in their compendious form, as satisfactory and conclusive. Then, again, it may be suggested that there cannot be any redemption of a mortgage, unless of all the premises contained in the original mortgaged deed; and, therefore, if there be a bar to any part, that operates as a bar to the whole. Our opinion is that this objection (if it should be made) is not maintainable in point of law. There is neither reason nor policy to support it; and we are not aware of any case which goes the length of establishing it. It seems to us that the authorities, so far as they go, point the other way. See Powell on Mortg., by Coventry and Rand, vol. I, p. 385; note (1), under pp. 388, 389.

The present is not a case where the mortgagee has entered into possession to foreclose his mortgage in the manner pointed out by the Rhode Island statutes (see Rhode Island Acts, Dig. of 1798, p. 275, and Dig. of 1822, p. 209), and where his possession for the stipulated period bars the equity of redemption. The case stands upon the general principles of a court of equity; and the bar, if any, arises only from the rules which it has prescribed in its own administration of its jurisdiction. Supposing, therefore, that the other difficulties already alluded to are overcome, we perceive no solid objection to allowing the plaintiffs to redeem according to the prayer of their bill so far as respects the Main street estate.

What we propose at present is to pass an interlocutory decree dismissing the bill as against the purchasers and proprietors of the Fox Point lots; and, retaining the bill as to the other defendants, to allow the plaintiffs to amend their bill as to the trustees under Marcy Dexter's will in the particulars mentioned; and, as consequent thereon, to allow the trustees to answer as to such amendatory matter. And, in order to prevent any unnecessary delay, we propose, if the trustees do not interpose any objection, to refer it to a master to take an account of what is due on the foot of the mortgage; to direct notice to James Arnold and Benjamin Arnold, before the taking of the report, that they may become parties to the bill and contest for their interests in the matter thereof; and to reserve all their rights, to be heard fully by the court upon the merits, if they shall become parties. The question of the ultimate right of redemption by the plaintiffs, if no other parties shall appear in the progress of the suit than those who are now before the court, is to be reserved for future consideration when the master's report comes in.

Decree accordingly.

§ 821. **Jurisdiction for redemption.**—The owner of the equity of redemption, or the party entitled to redeem, must seek the mortgagee, or the party holding the lien on the land, in the forum where jurisdiction *in personam* can be obtained over such mortgagee or party, without reference to the *situs* of the land. The subject of controversy is immediately the mortgage or trust security from under which the land is sought to be redeemed. That is personal property and follows its owner. *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*,* 7 Blatch., 391.

§ 822. **Resulting trust in favor of mortgagor upon payment.**—A mortgagee holds the legal title in trust to secure the payment of money. Upon its payment there is a resulting trust in favor of the mortgagor. *Bronson v. Kinzie*, 1 How., 316, 318.

§ 823. **Redemption may be had after a release of the equity of redemption to the mortgagee when it appears that no consideration was paid for the release or this was made by mistake.** *Russell v. Southard*, 13 How., 189 (§§ 491-509).

§ 824. The courts of the United States in giving substantial effect to a state law allowing time for redemption may adhere to their own modes of proceeding. *Allis v. Insurance Co.*,* 7 Otto, 144.

§ 825. An objection to a foreclosure sale that the statutory time for redemption was not allowed by the decree can only be made with an offer to redeem. *Hards v. Conn. Mut. L. Ins. Co.*,* 8 Biss., 284.

§ 826. Redemption must be had before statutory time expires.—Whether a decree in a foreclosure suit provides for redemption or not, the defendant has the right to redeem at any time within the statutory period. But if the decree orders an absolute sale, and the defendant allows the statutory time for redemption to expire without an offer or effort to redeem, his bill of review for errors on the face of the record is without equity and must be dismissed. *Burley v. Flint*, 9 Biss., 204, 211.

§ 827. Where a judgment debtor redeems at any time before the time of redemption expires, the effect of any sale made therein before is terminated. *Lauriat v. Stratton*,* 6 Saw., 339.

§ 828. Statute does not apply to existing mortgages.—An act of a state legislature authorizing the redemption of lands sold under mortgages at any time within two years after the sale is void as to existing mortgages. *Howard v. Bugbee*, 24 How., 461, 464.

§ 829. Redemption by heirs.—If an administrator who is also mortgagee of the estate of his intestate conveys the title by a general warranty, he does not thereby prejudice the right of the heirs to redeem, but they cannot require him to account for money as administrator, which he received in his own right; for the surplus, after paying the mortgage debt, does not constitute any part of the intestate's estate in the hands of the administrator. *Dexter v. Arnold*, 8 Mason, 284, 287.

§ 830. A second mortgagee has a right to redeem the first mortgage by tendering the amount due upon that. *Searles v. Jacksonville, etc., R. Co.*, 2 Woods, 621, 625.

§ 831. Whole debt must be paid.—To redeem property which has been sold under a mortgage for less than the mortgage debt, the whole mortgage debt must be tendered or paid into court. *Collins v. Riggs*, 14 Wall., 491, 493.

§ 832. In redeeming from one whom the mortgagor has induced to purchase the mortgage, upon his promise in writing to pay the whole sum advanced with interest, an assignee of the equity of redemption, with notice, must pay all that the mortgagor must have paid. *Holbrook v. Worcester Bank*,* 2 Curt., 244.

§ 833. If one of several mortgagees obtains an annulment of a tax sale of the mortgaged property, this inures to the benefit of all the mortgagees of the property so far as the vacating of the tax conveyance is concerned, though the mortgagee who obtained such annulment is entitled to be reimbursed out of the mortgaged property. *Weaver v. Alter*,* 8 Woods, 152.

§ 834. The lien of a mortgage cannot be tacked on to a prior lien of a judgment. No lien can commence at a time anterior to its own existence. *Scriba v. Deanes*, 1 Marsh., 166, 170.

§ 835. Offer to redeem.—On a bill in equity to redeem a mortgage given to secure the mortgage against an incumbrance upon another estate purchased by him, the plaintiff claimed as owner of the equity of redemption against the defendant to whom the mortgage was assigned. A demurrer was filed setting forth that a sufficient cause of action was not stated, because the bill did not set forth that the condition of the mortgage had been fully performed and the incumbrance extinguished. It was held that in equity the bill could be maintained upon an offer to redeem and the plaintiff proving himself able and ready to discharge incumbrances and procure releases thereof, and of claims on account thereof. *Upham v. Brooks*,* 2 Story, 623, 630.

§ 836. The time for redemption after a decree will not usually be extended. The same reasons do not exist for such extension of the time that exist in case of a strict foreclosure, because in redemption the plaintiff should be prepared to pay, and he in fact proffers payment in his bill. *Jenkins v. Eldredge*, 1 Woodb. & M., 61.

XX. MORTGAGEE'S ACCOUNT.

SUMMARY — *Accountable for rents actually received*, § 837; *or for rental value*, § 838. — *Adverse title*, § 839. — *Interest on surplus rents*, §§ 840, 841. — *Improvements*, § 842. — *Assignment of surplus rents and profits*, § 843. — *Right of second mortgagee to surplus rents*, § 844. — *Mortgagee entitled only to his principal and interest*, § 845. — *Where mortgagee has kept no proper accounts*, §§ 846, 847. — *Proceeds of absolute sale*, §§ 848, 849. — *Rate of interest agreed upon continues after maturity*, § 850.

§ 837. A mortgagee in possession is not accountable for anything more than the actual rents received, when he has been unable to lease the property or to collect the rent after judicious leasing. *Engleman Trans. Co. v. Longwell*, § 851.

§ 838. But where the mortgagee has entered into a partnership and used the mortgaged property therein, and the business has proved disastrous, the court will not inquire whether there was profit or loss, but will charge him with the fair rental value of the premises over repairs, insurance and the like. *Ibid.*

§ 839. A mortgagee or his assignee who has recovered and occupied the mortgaged premises is deemed to have received the rents under the mortgage, and he cannot set up an adverse title. *Gordon v. Lewis*, §§ 852-861.

§ 840. Where a mortgagee is in possession and the rents and profits exceed the interest he should pay interest on the surplus rents and profits. *Ibid.*

§ 841. Where a mortgagee receives rents after his debt has been satisfied he is chargeable with interest. *Ibid.*

§ 842. No allowance is made for improvements on mortgaged premises if their value is not enhanced thereby. *Ibid.*

§ 843. An assignment may be made of the surplus rents and profits after payment of a mortgage. Rents and profits are incidents in equity of the equity of redemption. *Ibid.*

§ 844. A second mortgagee, after the satisfaction of the first mortgage, can claim from the first mortgagee all surplus rents and profits not paid over to the mortgagor. *Ibid.*

§ 845. A mortgagee cannot get any more out of the mortgage fund than his principal and interest. *Ibid.*

§ 846. If the mortgagee has kept no proper accounts of the rents and profits received by him he is chargeable with what he might have received, and must be presumed to have received, by the use of ordinary care. *Dexter v. Arnold*, §§ 862-870.

§ 847. The master may exercise a sound discretion as to rents and profits where no accounts are kept. *Ibid.*

§ 848. A mortgagee is chargeable with money received upon giving an absolute deed of a portion of the mortgaged premises. *Ibid.*

§ 849. An absolute deed by a mortgagee conveys a defeasible title only and does not operate as a disseizin as between mortgagor and mortgagee. *Ibid.*

§ 850. The rate of interest agreed upon by the parties continues after maturity until the debt is paid or merged in a judgment. *Burgess v. Southbridge Savings Bank*, §§ 871-873.

[NOTES.— See §§ 874-880.]

ENGLEMAN TRANSPORTATION COMPANY v. LONGWELL.

(Circuit Court for Michigan: 2 Flippin, 601, 603. 1880.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.— Mrs. Longwell, one of the defendants, a mortgagee in the possession of the undivided half of premises, the conveyance being absolute in form, has been required to account for the net rents and profits. It turns out that she has received from one of the two parcels of real estate no rent, and claims, therefore, that she is not chargeable with rent. The title of an undivided half of the property, upon the face of the records of the county where the property was situated, was in Mrs. Longwell; defendant Sherman owned the other half. She gave him a mortgage on her half to secure one-half of the costs of repairs which he made on one parcel of the property; Sherman agreeing to carry on the business of milling and flouring for five years

from September, 1875, and pay to Mrs. Longwell one-quarter of the net profits, she to bear one-half of the losses, if any. Her quarter of profits Sherman was to apply towards paying her share of the advances made by him, secured by the mortgage on her undivided half. The business of milling proved disastrous; instead of a profit there was a loss; consequently there was no reduction of the mortgage given to Sherman.

§ 851. *When a mortgagee in possession is not accountable for rents.*

Now it is claimed that Mrs. Longwell is not chargeable with any rents whatever, as she received none. We regard this view to be a misapprehension of the rule under the facts. Mrs. Longwell, as mortgagee in possession of the undivided one-half of the mill property, would not be accountable for rent if she had been unable to lease the property or had failed, after judicious leasing, to collect rent; but when she entered into a partnership arrangement with Sherman to do a milling and flouring business with this mill property (the rule would be the same if she had alone carried on the business), and the venture turned out disastrous, a court of equity will not inquire, under such circumstances, whether there was profit or loss, but will charge her with the fair rental value of the premises over repairs, insurance, etc., and taxes paid. The master is therefore directed to ascertain what the fair net rental value of the undivided half of the mill was during the period of the accounting, in the condition it was after the improvements were made, and credit her with the cost of her share of the improvements beneficial to the freehold.

GORDON v. LEWIS.

(Circuit Court for Maine: 2 Sumner, 148-156. 1885.)

STATEMENT OF FACTS.—Bill in equity by the assignees of the mortgagor, to redeem from the assignees of the mortgagee the mortgaged premises. The bill states that Webb mortgaged the property to Haskell, who assigned the mortgage to Lewis, who assigned it to the Portland Manufacturing Company. Webb conveyed the property to John Gordon, who conveyed to Jesse Gordon, the plaintiff. The bill alleges a tender, and prays an account and redemption. The answer sets up an entry for foreclosure after condition broken, and an absolute title matured by lapse of time. The cause was heard in 1834, when a decree for redemption was made and an account ordered. The case is heard on exceptions to the master's report.

Opinion by STORRY, J.

This cause has now come before us upon the master's last report, made since the subject has been recommitted to him, in pursuance of the order of the court on the 21st of January last; and upon the exceptions filed by the defendants to that report.

§ 852. *Whatever is insisted on before the master is waived if not made matter of exception.*

I shall examine the exceptions in the order in which they stand, and not in the order in which they have been brought before the court by the defendants' counsel, in the argument at the bar. Before, however, I proceed to that examination, it is proper to state that nothing is properly before the court except the matter of those exceptions; for whatever may have been insisted upon before the master, by way of argument or objection, is considered as waived or abandoned if it is not made matter of exception, unless, indeed, it manifestly appears upon the face of the report itself that the master has committed an

error which ought to be corrected. I mention this the more freely because the argument of the defendants' counsel has insisted upon some matters which were taken by way of objection or reasoning at the hearing before the master, and which are not directly within the scope of any of the exceptions to the report; and certainly, unless such objections appear now maintainable upon the very face of the facts contained in the report, they must be deemed to have been abandoned.

§ 853. *Where a party has recovered and occupied premises as assignee of a mortgage he is deemed to have received the rents under that title and cannot set up an adverse title.*

The first exception respects the allowance, made by the master, of the rents and profits of the Little Revenge Mill. The decision of the master on this point was perfectly correct. The defendant Lewis actually recovered and occupied that mill in virtue of his title as assignee of Haskell, the original mortgagee, and he must be deemed to have received the rents and profits under that title, and to be accountable accordingly. He cannot now be permitted to set up an adverse title against the mortgagor or his assignees, to protect himself from such accountability. The reasoning of the master on this point is entirely satisfactory. The second exception, in its actual form, is equally unmaintainable. It is, that the master has not stated the evidence or mode of acquisition of Lewis' title to the said mill, although it was exhibited before him. Now, certainly, it was no part of the master's duty, under his commission, to ascertain or report such title. That title, so far as it was put in issue by the bill and answer, had already been passed upon by the court, and was not within the scope of his commission. There are no facts in the report which bring this exception before the court, or justify it.

§ 854. *Where a mortgagee is in possession and the rents and profits exceed the interest he should pay interest on the surplus rents and profits.*

The third exception is to the allowance of interest on the rents and profits, and making annual rests, and charging interest on the value of the premises. The commission of the master expressly authorized him "to cast interest on the rents and profits, making proper rests." He has cast interest accordingly; and if any rests were proper, annual rests were undoubtedly to be made. There is no error, therefore, on these points in the master's report. The question is necessarily open upon the report, and is reserved for the court to decide whether such interest is allowable or not. The other part of the exception (as to charging interest on the value of the premises) seems unfounded in fact, unless it refers to the interest allowed as an occupation rent, or such as might have been received by the Portland Manufacturing Company after their purchases. If it does so refer, then it is governed by the remarks already made. The proper construction of the master's report seems to be that he allowed the interest as an occupation rent. The question, then, which alone is left for consideration under this head is, whether interest ought, upon the whole circumstances of the case, to be charged upon the annual rests of rents and profits. It appears by the master's report that the mortgage was in fact extinguished by payment from the rents and profits on the 23d of April, 1818. The question as to interest seems narrowed down, by the argument, to the period which has since elapsed. It could scarcely admit of doubt that as to the antecedent period the report of the master was as favorable to the defendants as the principles of a court of equity would allow. Where a mortgagee is in possession, taking the rents and profits, and these annually exceed the annual interest of

the debt on the mortgage, there is the strongest reason for directing interest to be paid upon the surplus rents and profits, to keep pace (*pari passu*) with the interest on the debt. The cases of *Shephard v. Elliot*, 4 Madd., 254; *Gibson v. Crehore*, 5 Pick., 160; *Saunders v. Frost*, 5 Pick., 259, and *Reed v. Reed*, 10 Pick., 398, fully support such a charge. In point of fact, however, it does not appear by the report that any interest was allowed on the rents and profits during the antecedent period.

§ 855. *Where a mortgagee receives rents after his debt has been satisfied he is chargeable with interest.*

There is great good sense in the doctrine held by Lord Gifford in *Wilson v. Metcalfe*, 1 Russ., 535, that if a mortgagee receiving the rents of a mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest; and that it makes no difference whether he is receiving such rents or is charged with an occupation rent. The case of *Quarrell v. Beckford*, 1 Madd., 269, turned upon similar considerations. See, also, *Davis v. May*, Coop. Eq. Pl., 238; S. C., 19 Ves. Jr., 382; *Archdeacon v. Bowes*, 13 Price, 369. As a general rule it appears to me that this doctrine ought, in the ordinary cases of persons standing in the admitted relation of mortgagor and mortgagee, to be adopted. But it is but a general rule: There must be some exceptions to it, where it would be inequitable to make such a charge. And I cannot but think that the proper cases for such a charge are those only where there is a present duty to pay over the rents and profits arising from the uncontroverted relation of mortgagor and mortgagee. If the mortgagee has reason *bona fide* to treat the rights of the mortgagor as extinguished; or if he *bona fide* supposes himself, under circumstances fairly authorizing such a belief, to be the absolute owner of the premises, it seems to me that he is not to be affected with interest, if it turns out in the event that he is under a mistake as to his absolute title; for he has not knowingly deviated from his proper duty. In such a case, it seems to me that the right to interest does not accrue until some demand is made upon him, or some notice given of the claim, and then interest may properly be charged from that period. Now, it is very certain in the present case, that no claim or notice was brought home to the defendant Lewis by John Gordon (the second mortgagee or assignee of the mortgagor), while he held the estate; nor by the plaintiff until the time when he brought the present suit, in March, 1832. The original mortgage by Webb to Haskell was in November, 1808, the assignment of it by Haskell to Lewis in August, 1816, and the conveyance by Lewis to the Portland Manufacturing Company in August, 1831. John Gordon's title, as second mortgagee, commenced in April, 1812; and the plaintiff's title, as his assignee, in January, 1832. No demand was ever made by John Gordon against Haskell or Lewis, or the Manufacturing Company, during a period of nearly twenty years after the commencement of his title. And taking the other facts in the case, as they appeared at the original hearing, the adverse title under certain levies by execution, and the entry for a foreclosure (though neither became effectual in point of law), and the long and undisturbed possession by Lewis, ever since August, 1816, I am not satisfied that Lewis had not a right to treat the equity of redemption as being abandoned, or at least as not worth reclaiming. I see no reason, therefore, for holding the plaintiff entitled to any interest, under all the circumstances of this case. Interest is not of course; and is allowable only when the mortgagor or his assignee makes out a strong case in equity.

The case of *Archdeacon v. Bowes*, 13 Price, 353, and *Quarrel v. Beckford*, 1 Madd., 269, establish that interest is not of course from the period when there is a surplus in the hands of the mortgagee; but where there are any equitable circumstances it will be confined to the period of notice. In this very case, the plaintiff himself does not in his bill set up an averment that the mortgage has been paid or that any surplus is in the hands of the mortgagee. On the contrary, he has tendered in court a sum as still due on the mortgage. My opinion, on the whole, is, that, under all the circumstances of this case, interest ought not to be allowed.

§ 856. *No allowance is made for improvements on mortgaged premises if their value is not enhanced thereby.*

The fourth exception is, that the defendants are not allowed for the improvements made by the Portland Manufacturing Company after their purchase; and that the master has not stated the evidence thereof. It does not appear by the report that the master was requested to state the evidence on this point. The master does, however, state that the company have expended money on the privilege by the erection of a dam in a place different from that where the old dam of the Haskell saw-mill stood (principally from the materials of the old dam), but that he is not satisfied that the value of the mortgaged premises has been increased thereby. Now, under such circumstances, it is clear that the company are entitled to no allowance for such expenditures; for they have made no lasting or beneficial improvements on the estate. See *Moore v. Cable*, 1 Johns. Ch., 387; *Russell v. Blake*, 2 Pick., 505; *Saunders v. Frost*, 5 Pick., 259, 270; *Reed v. Reed*, 10 Pick., 398. This exception ought, therefore, to be overruled.

§ 857. *Where the answer of the defendants asserts a mortgage title to the whole of the premises, it is not competent for them to set up a different title (as to a moiety) before the master.*

The fifth exception is, that the defendants are charged with the rents and profits of the whole of the tracts described in the deed, whereas (as is said) one-half only of the same was mortgaged, and the evidence thereof was before the master. The bill asserts, substantially, a title in the defendants to the whole tracts described in the mortgage deed; and the answer of the defendants admits a title to the whole tracts described in the same deed, as held by the defendants. And upon this state of facts the original decree proceeded to direct an ascertainment of the rents and profits, etc., before the master. When the matter came on before the master, upon the recommittal of the report, the defendants offered in evidence a deed, purporting to be the original mortgage deed of the 1st of November, 1808, from Webb to Haskell, in which the original words of conveyance included the whole tract; and there was an interlineation of words cutting it down to one moiety. The plaintiff objected before the master to the admission of the deed so offered, it never having been an exhibit or filed in the cause. The master admitted the deed, and his report contains an alternative view of the state of the case, as the court shall decide, whether the deed was admissible or not. My opinion is, that the deed was inadmissible as evidence to establish that the mortgage was but of a moiety of the estate. I do not meddle with the case as a matter of suspicion, or of question as to the genuineness or falsity of the interlineation. The true ground is, that the answers of the defendants assert a mortgage title in the whole of the premises; and it is not now competent for the defendants to set up a different or more limited title upon a collateral inquiry before the master. That would

be to contradict the answers and to try a very different case from that asserted in the pleadings. The cause has been heard upon the bill, answers and proofs; and an interlocutory decree had; and the defendants are not at liberty to substitute a new case for that formerly stated and already decided on. It may be their misfortune or their fault; but it is irremediable in this stage of the cause. The exception, therefore, is unmaintainable, and the report of the master must stand as to the rents and profits of the whole of the premises.

§ 858. *In matters of set-off, courts of equity generally follow the law, unless there is some equity attaching to the particular transaction between the parties.*

The sixth exception is in substance an objection to the title of the plaintiff to recover or receive the surplus rents and profits accruing after the satisfaction of the first mortgage and before the conveyance to him in January, 1832. And in support of this objection it is asserted that John Gordon is insolvent, and was at the time of the accruing of these rents largely indebted to Lewis, and that he had a right of set-off against such surplus of his debt so due. Now, it might be a sufficient answer to this suggestion, that the master reports that the plaintiff denied any such indebtedment, and no proof was offered before him to establish the fact clearly; therefore, the suggestion of indebtedment and right of set-off must, under such circumstances, be treated as a new unfounded claim. But if there had been proofs of such an indebtedment, still it would not follow that the right of set-off would exist. There is no pretense to say that such a set-off to the mortgagor's claim would be allowable at law. In matters of set-off courts of equity generally follow the law, unless there is some equity attaching to the particular transactions between the parties; such as mutual credits. Upon this I need do no more than to refer to the authorities which were acted upon in *Jackson v. Robinson*, 3 Mason, 138; and *Greene v. Darling*, 5 Mason, 201. In the present case there is no pretense of any mutual credit; that is to say, of any credit given by Lewis to John Gordon, on account of the supposed debt due from Lewis to Gordon for rents. The whole structure of the answer disclaims any such intendment. It insists upon an adverse exclusive title to the mortgaged premises, and, of course, to the rents and profits.

§ 859. *An assignment may be made of the surplus rents and profits after payment of a mortgage.*

The right of the plaintiff to the surplus rents and profits is, upon the structure of the bill, wholly dependent upon the point whether it is an incident to the exclusive and absolute ownership of the equity of redemption. The bill does not assert any title to such rents and profits in virtue of any assignment thereof, *in verbis*, as rents and profits. Indeed (as has been already suggested), the bill not only does not suppose there to be any surplus rents and profits capable of assignment, but it supposes a balance to be due on the mortgage, and tenders a payment of it in order to a redemption. There is no question that an assignment may be lawfully made of such surplus rents and profits as a *chose in action*, and that the assignee may, in virtue thereof, maintain a suit in equity for an account and satisfaction under such a title by assignment. But, then, if such a title is relied on, it must be alleged in the bill and put in issue; for the decree must be *secundum allegata et probata*, and not merely *secundum probata*. So that the present bill puts out of question all claim under any assignment of the rents and profits as such; and if the rents and profits are recoverable at all by the plaintiff, they are so as incidents to the ownership of the equity of redemption. My opinion is that they do attach to such ownership *de jure* in the view of a court of equity.

§ 860. *Right of second mortgagee to surplus rents.*

The mortgage to Haskell was extinguished by satisfaction out of the rents and profits on the 23d day of April, 1818. At that time, and from thence down to January, 1832, when John Gordon conveyed the mortgaged estate to the plaintiff, he continued the qualified owner thereof, under his original mortgage deed from Webb, in April, 1812; and as such, he was entitled to the whole surplus rents and profits in the hands of the mortgagees, under the first or Haskell mortgage, as far as his title extended; that is, as far as they were necessary to satisfy his (Gordon's) mortgage. See *Archdeacon v. Bowes*, 13 Price, 353, 362, 363, 365, 368, 373. Beyond this, the surplus rents and profits belonging to Webb, the mortgagor, unless his title to the equity of redemption has since been absolutely released or extinguished. Now, the plaintiff, at most, can take no more under the assignment of John Gordon, to him, than the title of the former under his mortgage. The bill does not in terms assert any absolute title to the equity of redemption to the premises, either in John Gordon or in the plaintiffs, or any release or extinguishment of Webb's equity of redemption. It asserts, indeed, that in virtue of the deed of the 14th of April, 1812, John Gordon "became seized of all the right, interest and estate of the said Joshua Webb, whether in fee or in equity, to redeem the same;" and then proceeds to allege that all the right, title, interest and estate which he (John Gordon) had in virtue of the aforesaid conveyance in the premises was assigned to the plaintiff by the deed of the 23d day of January, 1832. But in both instances, a profert is made of these deeds by the bill, and upon the production and proofs of them it is apparent that the title is nothing but a mortgage title. So that the bill asserts no absolute title in the plaintiffs; and the proofs establish no extinguishment of Webb's equity of redemption. There are then no allegations or proofs of any absolute title to the premises in the plaintiff. No account has been taken to show what is the state of accounts between the plaintiff and Webb, or to show what is due by Webb on the mortgage to John Gordon. Webb is not even made a party to the bill. So that it is clear that his rights and interests cannot, and ought not, to be disposed of in this suit, in its present form. Under these circumstances, a decree cannot be made, directing the amount due for rents and profits to be paid over to the plaintiff. The most that can be done is to order this amount to be brought into court, subject to the order of the court; and to retain the fund until an opportunity is given for all the parties in interest to appear, by supplemental proceedings, to litigate and establish their just rights thereto. I had at first some hesitation, whether, under the actual posture of the case, we ought to go quite so far. But the case of *Archdeacon v. Bowes*, 13 Price, 353, 373, seems to me fully to justify this proceeding; as it also conclusively establishes the right of a second mortgagee, after the satisfaction of the first mortgage, to claim from the first mortgagee, after notice, all the rents and profits which have not been paid over or accounted for to the mortgagor, so far as they are necessary for the satisfaction of the second mortgage. See *Parker v. Calcraft*, 6 Madd., 11, 12; *Berney v. Sewell*, 1 Jac. & Walk., 360; *Ex parte Wilson*, 2 Ves. & B., 251. Indeed, I should have entertained no doubt upon this last point, if there had been no authority to support it, upon the general principles flowing from the relationship of the parties as mortgagees.

The seventh and last exception to the master's report is, that he has allowed nothing for the extra exertions of Lewis in taking care of the mortgaged property, and obtaining the rents and profits. This exception does not require any

elaborate consideration. There is nothing in that report which establishes the right of Lewis to any compensation in taking care of the property and obtaining the rents and profits beyond what the master has allowed him.

I have not thought it necessary to go over the other grounds of objection to the report, suggested at the argument. So far as they have not been already answered, they were in effect disposed of by the former opinion of the court. For instance, the title under the levy in execution having been held void, it is impossible, in a court of equity, that the defendants can be permitted to avail themselves of that as an adverse title to hold possession of the premises, when they had a good title as mortgagees to the possession which the mortgagor and his assignees could not impugn or disturb. But, in truth, the objection is not so properly addressed to the report itself as it is to the former opinion of the court and to the order on which that report is founded.

§ 861. *A mortgagee cannot get any more out of the mortgage fund than his principal and interest.*

Then again as to the rents and profits it is contended that the actual rents and profits ought not to be charged against the defendants, but only what is to be deemed a fair rent, by which must be understood a fair occupation rent. I know of no rule of a court of equity which could justify such a course of proceeding on the part of the court. No principle is better established than the principle that a mortgagee shall not get any advantage out of the mortgage fund beyond his principal and interest. See *Gubbins v. Creed*, 2 Sch. & Lefr., 218; 4 Kent Comm., Lect. 58, pp. 166, 167, 2d edit.; 3 Powell on Mortgages, Coventry & Rand's edit., page 949, note E. 2. Between mortgagor and mortgagee the latter, when in possession, must account for the actual rents and profits received or made by him, if these rents and profits can be actually ascertained. Where they cannot be, there must be a resort to a fair occupation rent. Here the master has ascertained the actual rents and profits. In both cases the mortgagee may entitle himself, under circumstances, to compensation for all lasting improvements upon the premises. But in the present case there is not the slightest proof that the master would have disregarded any such claim, if properly substantiated. His report states no such fact, and justifies no such conclusion.

Upon the whole my opinion is that there ought to be a decree to bring the surplus rents and profits of the whole mortgaged premises into court to abide the future orders of the court upon the proper supplementary proceedings. The personal representatives of Lewis are to bring into court, if they have assets, the surplus of the rents and profits from the extinguishment of the mortgage on the 23d of April, 1818, to the time of the sale to the Portland Manufacturing Company, on the 3d of August, 1831. From that period the Portland Manufacturing Company are to bring into court the rents and profits.

As to the possession of the premises, it is plain that a decree must pass for an immediate possession, since the original mortgage to Haskell has been long since satisfied. A decree will be accordingly framed upon these principles, as the district judge concurs in this opinion.

DEXTER v. ARNOLD.

(Circuit Court for Rhode Island: 2 Sumner, 108-132. 1834.)

STATEMENT OF FACTS.—Bill in equity to redeem a mortgaged estate. The case came on to be heard on the report of the master, to whom the cause was referred for an account. The report of the master is very long, and there were

numerous exceptions to it, filed by both parties. The general facts in the case appear in 1 Sumner, 109 (§§ 814–820, *supra*), to which reference is made.

The exceptions of the plaintiffs are: (1) That the master stated that there was due on the mortgage \$1,366.36, whereas there was nothing due. (2) That the master should have inquired into the original consideration of the mortgage, which he declined to do. (3) That the master allowed to defendants the full amount of the supposed consideration, which he should not have done. (4) That the master allowed a deduction to the mortgagee from the rent of the premises, because they became dilapidated while in his hands, whereas he should have charged the full annual value, deducting a proper sum for repairs. (5) That the master charged nothing to the mortgagee for the dilapidation of the buildings while in his possession. (6) That the master charged nothing to the mortgagee on account of a note for £100, which it is alleged was twice paid to the mortgagee. (7) That the master refused to allow plaintiffs \$192, paid by mistake to the mortgagee for insurance on the schooner Fame, no such sum being due for insurance. (8) That the master refused to charge the defendants with \$573.87, paid to the mortgagee to take up Rogers' note against the mortgagor, and to receive evidence on that subject. (9 and 10) Other sums which the master refused to allow. (11) That the master made improper charges of interest. (12) That the master did not require of defendants the production of the cash books of the mortgagee. (13) That the master refused to permit plaintiffs to examine such books as he did require defendants to produce. (14) Unimportant. (15) That the master refused to receive evidence impeaching the account of 1801. (16) Unimportant.

The defendants' exceptions to the report, cited by the court in the opinion: (1) That complainants were allowed one-third of the amount received for the Fox Point lots. (2) That the master has charged the estate of Thomas Arnold with rents that were never received by him. (3) That the master allowed a larger amount of rents than are contained in the accounts of the administratrix.

The other exceptions of the defendants were unimportant.

Opinion by STORY, J.

The exceptions have been argued by the learned counsel at large, but our opinion will be briefly stated upon all of them, as we do not think that they involve any serious difficulty. We shall first consider the exceptions of the plaintiffs.

§ 862. *A general assignment of errors in a master's report is not sufficient.*

1. The first exception is utterly unmaintainable. It is too loose and general in its terms and points to no particulars. It comes to nothing, unless specific errors are shown in the report, and those errors, if they exist, should have been brought directly to the view of the court in the form of the exception itself. At present it amounts only to a general assignment of errors, and the argument on this exception has shown none.

§ 863. *A master is not bound to inquire into the consideration of a mortgage where it has been treated by the parties as a valid mortgage.*

2 and 3. The second and third exceptions apply to the refusal of the master to inquire into the original consideration of the mortgage. Under the circumstances the master was perfectly right. In the first place, in the account settled between the original parties, on 31st of March, 1801, the mortgage was treated as a good subsisting mortgage for the full amount of the debt stated therein. In the next place the bill does not charge that the consideration of

the mortgage was nominal, or less than the amount stated therein; or that there is any error or mistake therein; neither does it ask for any examination or overhauling of the original consideration upon any alleged error or mistake. It was clearly, therefore, a matter not properly in issue before the master. See *Chambers v. Goldwin*, 9 Ves. Jr., 265, 266.

§ 864. *Liability of a mortgagee in possession for rents and repairs.*

4. The fourth exception is on account of the master's having made a deduction of the supposed rent upon the ground that the premises were out of repair and partly untenable while in possession of the mortgagee and his representatives. The argument seems to proceed upon the ground that the mortgagee was bound to keep the premises in good repair, and therefore ought to be accountable for such rents as might have been obtained if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate. In *Godfrey v. Watson*, 3 Atk., 518, Lord Hardwicke said that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In *Russel v. Smithies*, 1 Anst., 96, it was decided that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact also that there has been a diminution of value of the rents was there declared not to be sufficient proof of a want of proper repairs. See *Chambers v. Goldwin*, 6 Ves. Jr., 265, 266. It is quite a different question whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations. See 1 *Powell on Mortgages*, by Coventry & Rand, 189 (a); 3 *Powell on Mortgages*, 956, note (a); *Saunders v. Frost*, 5 Pick., 259; *Moore v. Cables*, 1 Johns. Ch., 385; *Trimleston v. Hamill*, 1 Ball & B., 385; *Marshall v. Cave*, cited, 3 *Powell on Mortgages*, 957 (a). But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damage occasioned thereby. That was the doctrine asserted in *Hughes v. Williams*, 12 Ves. Jr., 495. And there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself if he does not take care to have suitable repairs made to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the master's report which establishes any fact of wilful default or gross negligence in the mortgagee.

5. These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings while in possession of the mortgagee. There is no proof whatever that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

6, 7, 8, 10. The sixth, seventh, eighth and tenth exceptions are disposed of by two simple considerations. (1) They all relate to matter which had been already disposed of in a former suit (*Dexter v. Arnold*, 5 Mason, 304). (2) If *Thomas Arnold* (the intestate) was accountable at all for any of these matters, he was

so in a suit brought against him as agent or administrator of Jonathan Arnold, and not in this suit, which is merely a bill to redeem a mortgage.

9. The ninth exception admits of the same answer, with this additional consideration, that the facts referred to in it are not stated in the master's report.

§ 865. *Examination of books of account.*

11. The eleventh exception proceeds upon the objection that the master has allowed interest where none was due. This exception proceeds upon the supposition that the second and third exceptions were well founded. We have already decided that the master was right in holding the consideration stated in the mortgage deed to be the true sum due, as ascertained in the account settled in 1801.

12. The twelfth exception is, because the books of Thomas Arnold were not produced before the master, or required by him to be produced. This is founded in a clear mistake, for the affidavits of Anna Arnold and James Arnold establish the fact that they were produced.

13. The thirteenth exception is to the supposed denial to the plaintiffs of the right of examining the books of Thomas Arnold, produced under notice before the master. This exception has no facts on which to rest it in the master's report. The plaintiffs had no right to examine those books generally; but only such parts as related to entries, charges and accounts relative to the matters in controversy in the suit. If we pass aside from the master's report, it appears by the affidavits already alluded to that a full examination as to these matters was allowed, so far as any of the books contained entries, charges or accounts relative thereto.

14. The fourteenth exception is, that the report states no reason for the refusal of Samuel G. Arnold to join in making repairs on the premises. That was not necessary. It was mere matter of evidence for the consideration of the master, in examining the point, whether there was any wilful default or gross negligence of the mortgagee in not making repairs upon the premises.

§ 866. *A master has no right to open a settled account where no leave is given to surcharge and falsify.*

15. The fifteenth exception is to the refusal of the master to open the account settled in March, 1801. No leave was given to surcharge or falsify that account before the master; and after the long lapse of time and the circumstances stated by the master, that that account had been already adjudicated upon by this court in a former suit, we have no doubt that he was right in his refusal to open the account. See 1 Powell on Mortgages, by Coventry & Rand, 390 (a), note; *Chalmer v. Bradley*, 1 Jac. & Walk., 66.

16. The sixteenth and last exception is that the rents allowed by the master are too low. There is no evidence of that; and we are well satisfied with his report on that head.

Let us in the next place proceed to the consideration of the exceptions of the defendants.

§ 867. *The estate of a mortgagee should be charged with the money received upon giving an absolute deed of a portion of the mortgaged premises.*

1. The first exception is, because the master has charged Thomas Arnold's estate with one-third of the amount received by him upon the sale of the Fox Point lots. These lots were a part of the premises included in the mortgage now in question; and Thomas Arnold had sold them in December, 1810, as his own property, by an absolute deed. In that deed there is a covenant of general warranty. The argument of the defendant is, first, that this covenant of war-

ranty formed a part of the consideration and price given by the purchaser for the store lots; and secondly, that as the conveyance was absolute and not an assignment of the mortgage to the purchaser, the representatives of Jonathan Arnold are not now entitled to any part of that price.

§ 868. *An absolute deed by a mortgagee conveys a defeasible title only, and does not operate as a disseizin as between mortgagor and mortgagee.*

We think that the master was right, and that the reasons stated by him for his judgment are sound. Thomas Arnold, the mortgagee, could not lawfully sell this one-third of the premises except under his mortgage. In selling an absolute estate to the purchaser, he was guilty of a fraud and wrong upon the mortgagor; and he ought not now to be permitted to take any benefit or advantage from that misconduct. The covenant of warranty makes no difference in the principles applicable to the case. The deed, though absolute in its form, operated as a conveyance of a defeasible title only to the purchaser as to this one-third, and not as a disseizin, as between the mortgagor and mortgagee. The case is precisely the same, in legal effect, between the present parties as if the mortgagee had elected to sell the one-third for the benefit of the mortgagor who subsequently adopted the act.

§ 869. *A mortgagee who keeps no accounts is chargeable with what he may be presumed to have received.*

2. The second exception is, that the decree was that the master should take an account of the rents and profits *received* by the mortgagee, whereas the master has allowed rents and profits not received by him. The master was right. In the first place the mortgagee kept no proper accounts of the rents and profits received by him; and, therefore, upon general principles he was properly chargeable with what he might have received and must be presumed to have received. In the next place, if the mortgagee was in the personal occupation of the premises or of any part thereof, he was justly chargeable with an occupation rent, which might properly be considered, under such circumstances, as received by him in the sense of the decree. See *Wilson v. Metcalfe*, 1 Russ., 530; 3 *Powell on Mortgages*, by Coventry & Rand, 946 (a), 948 (b), 949 and note. There is more of technical nicety than solid justice in this exception, and we should not be disposed to encourage it when it had no bearing on the merits.

§ 870. *The master may exercise a sound discretion as to rents and profits where no accounts are kept.*

3. The third exception is, that the master has allowed a much larger amount of rents than is contained in the accounts of the administratrix of the mortgagee and admitted to have been received by him. We are of opinion that the master was right for the reasons stated by him. The mortgagee kept no regular accounts; and the master has, therefore, been compelled to exercise a sound discretion upon the whole evidence as to the amount with which he should be charged for rents and profits. The doctrine contained in *Hughes v. Williams*, 12 Ves. Jr., 493, and in *Williams v. Price*, 1 *Powell on Mort.*, by Coventry & Rand, 949 (a), note; S. C., 1 Sim. & Stu., 581, and *Anonymous*, 1 Vern., 45, shows the true grounds on which courts of equity proceed in cases of this nature.

4. The fourth exception insists that the master should not have estimated the rents for which the mortgagee is charged upon his general judgment; but should have charged only such a rent as might have been obtained by a letting at public auction. We think otherwise. The master was bound to charge the mortgagee with a reasonable rent. What, under all the circumstances, was a

reasonable rent was matter for the exercise of a sound discretion, upon all the circumstances of the case. An auction rent would not in many cases afford either a just or a satisfactory standard of the real value for which the premises might be let, or at which the mortgagee should be entitled to occupy them.

5. The fifth exception is that the master has reported that Thomas Arnold kept no regular accounts, which is an incorrect statement. We see no proof of that. The master was the proper judge of that fact upon examining the books and the other evidence in the case. There is no evidence before us that establishes in the slightest degree that his conclusion was incorrect.

6. The sixth exception is founded on the supposed incorrectness of the charge of cellar rent. But there is not any evidence whatsoever upon the face of the report which shows any such error of the master; and, therefore, the report must stand. We cannot presume errors, or go into evidence in support of them which was not laid before the master, or brought by him to the notice of the court. Exceptions must be made to matters apparent upon the face of the report, or upon the accompanying documents and proofs laid before the court upon the allegations and objections of the parties.

7, 8, 9, 10, 11. All the other exceptions are founded in objections to the master's estimate and allowance of rents charged against the mortgagee. We are of opinion that, upon the circumstances stated in his report, that estimate was perfectly just and reasonable. It was a matter for his judgment; and there are no facts in the case which impugn the propriety or soundness of his conclusions.

Upon the whole, our judgment is that all the exceptions on both sides ought to be overruled and the report ought to stand confirmed.

Decree accordingly.

BURGESS v. SOUTHBRIDGE SAVINGS BANK.

(Circuit Court for Massachusetts: 2 Federal Reporter, 500-502. 1880.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—The Southbridge Savings Bank, holding a first mortgage upon the premises which are in controversy here, were made defendants, perhaps without necessity, but were made so in this suit and in several others in which Thomas Burgess is plaintiff. The controversy appears to be between the plaintiff and Mrs. Tyler, holding a second mortgage, which the plaintiff says should be postponed to his, which is, in order of time, the third. By consent of parties a decree was entered for a sale of the land by the savings bank, and for payment into court of the proceeds of sale beyond what is due them on their mortgage. The account has been rendered, and two or three questions are raised upon certain charges made by the bank against the proceeds.

§ 871. *Rule as to interest.*

The debt bears seven per cent. interest by the agreement of the parties, and the first question is whether, after a default, the mortgagees are to charge that rate or only six per cent. Even if I am not positively bound by the decisions in Massachusetts, I ought to follow them in a case of this kind, unless they appear to me decidedly unsound. I understand those decisions to be that the rate of interest agreed between the parties for the forbearance of money is, in general, understood to mean that the rate shall so continue until payment, or until judgment, and, therefore, is the true rule of damages under the statute of Massachusetts, which fixes the rate of six per cent. only when the parties

have failed to agree on some other. *Brannon v. Hursell*, 116 Mass., 63. It is not worth while to examine into the niceties of the cases on this subject, because it is plain that both parties understood that this debt was to bear seven per cent. interest. It was payable on demand, with that rate agreed on, and if that should be held to mean that seven per cent. should be paid until default, and six per cent. thereafter, it is meaningless, as there was a default the day after the mortgage was delivered. The parties have acted on this theory and settled accordingly. Besides, the defendants have been prevented from realizing their money wholly by the suits instituted by the plaintiff.

§ 872. *Insurance premiums chargeable to mortgage fund.*

The premiums of insurance are properly chargeable against the fund. There was a covenant in the mortgage, in the most ample terms, authorizing the bank to insure at the expense of the mortgagees, and a condition for the repayment of the premiums. It is true that after the mortgagees had taken possession they insured on their own moneys, and a question might possibly have been raised upon the form of policy whether it came within the covenant. The evidence is that they intended to insure for all persons interested, and were advised by the agent of the underwriters that mortgagees in possession should insure in this way. Under these circumstances I do not think that they could have refused, in a court of equity, to account for the insurance money if they had recovered it, and therefore they should be allowed the premiums.

§ 873. *Allowances to mortgagee in possession.*

It is admitted that a small item for compound interest must be disallowed; that a return premium received since the account was made up must be credited. The only other question is upon counsel fees and expenses. The charge of the mortgagees for care of the premises is disallowed, because it seems that they agreed with the plaintiff to employ a man for this purpose, and did employ him, and his very reasonable charges are allowed. The mortgage permits the bank to deduct all costs, charges and expenses of suits concerning the premises; and the evidence shows that they have been put to a great deal of charge, rather uselessly, perhaps, and have been obliged to spend money for costs and fees to defend their title. I allow on this account the sum of \$450. Making the changes in the account in accordance with this opinion, the Southbridge Savings Bank stands charged with a balance of \$8,670.79. I understand the money has been invested by consent of the parties, and of course whatever interest is earned will be added to this balance.

§ 874. Where a conveyance absolute on its face is in fact a security for a debt, the vendee in possession is liable for rents, profits and sales towards the debt, and also, if the property is mismanaged, for what the property should have produced while in his custody as mortgagee. *Jewett v. Cunard*, 3 Woodb. & M., 277, 297.

§ 875. *Reasonable repairs.*—A mortgagee in possession is bound to make reasonable and necessary repairs. What are such repairs depends upon the particular circumstances of the case. *Dexter v. Arnold*, 2 Sumn., 108 (§§ 862-870).

§ 876. *Mortgage for improvements on homestead.*—A mortgage on a lot of ground to secure a debt for improving that lot is superior to the homestead right of the owner, under the constitution of Nevada, art. 4, § 80. *Commercial & Savings Bank of San Jose v. Corbett*, 5 Saw., 172, 179.

§ 877. *Taxes.*—Under the constitution of California, it is the duty of the mortgagee to pay the taxes on a mortgage. If the mortgagor is compelled to pay such taxes, he may recover the amount from the mortgagee. *Blythe v. Luning*, 7 Saw., 504, 506.

§ 878. *Premiums of insurance paid by a mortgagee*, in accordance with a provision of the mortgage authorizing him to insure, are properly chargeable in his account against the mortgagor. *Burgess v. Southbridge Savings Bank*, 2 Fed. R., 500 (§§ 872, 873).

§ 879. *Interest.*—A mortgage note drawing a special rate of interest in accordance with a statutory provision, in the absence of a special compact, will draw after maturity only the ordinary legal rate. *Brewster v. Wakefield*,* 22 How., 118.

§ 880. *Rents received in excess of debt.*—When a mortgage debt is fully paid out of the rents and profits of the property, subsequent receipts of rents by the mortgagee constitute a debt which would be barred by the lapse of six years. *Amory v. Lawrence*, 3 Cliff., 523 (§§ 948-937).

XXI. WHEN THE RIGHT TO REDEEM IS BARRED.

SUMMARY—*Twenty years' possession a bar*, §§ 881, 882.—*Verbal acknowledgment*, § 883.—*Rule in Connecticut*, § 884.

§ 881. The rule adopted by courts of equity in regard to the redemption of mortgages is, in analogy with the right of entry at law, that twenty years' exclusive possession is a bar. *Dexter v. Arnold*, §§ 885-891.

§ 882. A state statute which gives special powers to a state court to allow a redemption after twenty years' limitation, will govern the practice in United States circuit court. *Ibid.*

§ 883. A verbal acknowledgment of a mortgage as a subsisting security must be clear and unequivocal in order to prevent the possession from operating as a bar to redemption. *Ibid.*

§ 884. Under the statute of limitations in Connecticut, prescribing fifteen years as the period beyond which an entry shall not be made, a mortgagor is barred by the lapse of this period, during which the mortgage title has not been recognized by the mortgagee in possession. *Fox v. Blossom*, §§ 891, 893.

[NOTES.—See §§ 894-902.]

DEXTER v. ARNOLD.

(Circuit Court for Rhode Island: 8 Sumner, 152-164. 1837.)

STATEMENT OF FACTS.—Bill in equity to redeem the one-third of certain real estate, called the Paget Farm, which the plaintiff sought to redeem, claiming title under the mortgagor, Jonathan Arnold. The bill was filed on the 15th September, 1835, more than forty years after the mortgage became absolute at law from breach of the condition.

Opinion by STORY, J.

There is no dispute about the deraignment of title of either party; and the whole question is, whether, under the circumstances, after such a lapse of time, the plaintiffs are entitled to redeem.

The act of Rhode Island, for quieting possession (Digest of 1798, p. 465, and of 1822, pp. 363, 364), gives to a quiet seizin and possession of lands in fee-simple, for twenty years, the full effect of a good and rightful title in fee, subject only to the common exceptions in favor of persons under age, *femes covert*, *non compos mentis*, or imprisoned, or beyond seas. The act of Rhode Island, respecting mortgages (Digest of 1798, p. 275; Digest of 1822, p. 210), declares, among other things, that the equity of redemption of mortgages made prior to 1798 shall be "within twenty years after possession shall have been obtained of any mortgaged estate, by consent of parties, without legal process;" with a proviso that the supreme court of the state may "allow a redemption of any mortgaged estate after a possession of twenty years, obtained without legal process, if any peculiar circumstances shall, in the opinion of the court, render such redemption equitable." The policy of the legislature, however, manifestly is to shorten the time of redemption in ordinary cases, for in all cases of mortgages made since 1798, and before 1822, the equity of redemption is limited to six years after possession by process of law, or a peaceable and open entry in the presence of two witnesses; and the equity of redemption of mortgages made since 1822 is limited to the still more restricted period of three

years after such possession, without any such proviso giving the court authority upon equitable circumstances to open the right to redeem after the lapse of these respective periods.

§ 885. *Courts of equity follow the analogies of the law as to the limitation of the right of redemption.*

In cases of mortgages, courts of equity, upon general principles, follow the analogies of the law as to the limitation of the right to redeem. *Elmendorf v. Taylor*, 10 Wheat., 152; *Hughes v. Edwards*, 9 Wheat., 489 (§§ 919-925, *infra*); and *Cholmondeley v. Clinton*, 2 Jac. & Walk., 1. And if there were no statute in Rhode Island touching this particular subject, the limitation of twenty years, provided for the quieting of possessions, would furnish to this court by analogy the proper rule for limiting the equity of redemption to the same period.

§ 886. — *a state statute which gives special powers to state court to allow a redemption after twenty years' limitation will govern the practice in the United States circuit court.*

But I think that the statute respecting mortgages ought to govern in this case; and though the clause giving the state court authority to allow a redemption after twenty years' peaceable possession under mortgages made prior to 1798 (as the present mortgage was) is specially addressed to that court, yet it ought to govern us in the present case for two reasons: first, because it furnishes the appropriate analogy upon the known doctrine of courts of equity; and, secondly, because it is but a mere affirmation of the general principles upon which courts of equity act in allowing or refusing a redemption. Whenever, notwithstanding a great lapse of time, peculiar circumstances render the redemption of a mortgage equitable, courts of equity have been in the habit of disregarding any formal limitation, prescribed by their own authority in the exercise of their jurisdiction on this subject. Thus, in *Ord v. Smith*, 2 Eq. Abr., 600; S. C., Select Cas. in Ch., 9, a redemption was allowed, under very special circumstances, after about forty years from the time when the mortgage was made. But in the same case it was said that the general rule should be inviolably abided by, for it is for the quiet of men's estates. *Smart v. Hunt*, cited in *Hardy v. Reeves*, 4 Ves. Jr., 479, is to the same effect, as is also *Hansard v. Hardy*, 18 Ves. Jr., 455. But there were in each of these cases circumstances of a very peculiar nature, showing that the mortgagee, within twenty years, had solemnly treated it as a mortgage, not merely by parol admissions, but by solemn acts and admissions in writing.

It appears to me that the possession of Aza Arnold, under the deed of Thomas Arnold, must be treated as the possession of a person claiming title in fee as absolute owner of the one-third of the premises conveyed by that deed. There is no pretense that Aza ever kept any account of the rents and profits, or ever accounted therefor to any persons except to the heirs of Welcome Arnold. His title was an absolute title, with covenant and warranty, and although he had notice at the time of the conveyance that the original title of Thomas Arnold was under a mortgage, yet it by no means follows that he did then know or believe that there was a subsisting, unextinguished equity of redemption at that time in Jonathan Arnold or his heirs, or that he had not in his life-time by some act informally surrendered it to Thomas Arnold. Jonathan appears to have died abroad, and to have been abroad for some years before his decease, and I think it may fairly be inferred, from an account annexed to the answer of Aza Arnold and James Arnold, that Jonathan Arnold was indebted to Thomas in other sums than those stated in the mortgage; or, at all events, that there were

other unliquidated accounts between them. Be this fact as it may, it seems to me that at all events it may fairly be inferred that Aza Arnold gave the full value of the one-third of the farm at the time of his purchase; and that the title and covenants of general warranty were taken upon that foundation. Under such circumstances he must be deemed to have entered into and to have held possession of the premises adversely to the title and claims of the other heirs of Jonathan Arnold. His possession was notorious and open. The deeds were all recorded. He kept no accounts, and never was called upon to account for any rents or profits by any persons claiming as heirs under Jonathan. His sister, Marcy Dexter, was then living and did not die until 1817; yet she never made any claim whatsoever in her life-time, nor have her devisees made any claim until the present bill was contemplated to be brought. So that here we have an uninterrupted and undisputed possession by Aza Arnold for the space of twenty-six years, and until his death, manifestly under an assertion on his part of an absolute title, and that possession acquiesced in by those who had a known interest to contest it. It is true that Aza Arnold might lawfully be in possession of the whole of the farm as a co-tenant, and, therefore, his possession might be consistent with that of the other heirs of Jonathan Arnold; for the possession of one co-tenant is not ordinarily to be treated as adverse to that of the other co-tenants. But, on the other hand, one co-tenant can oust his co-tenants, and thereby acquire an adverse possession to them; and if he is long in possession, claiming an exclusive right and title in himself, and taking the rents and profits accordingly, and that claim is notorious under a recorded deed conveying an absolute title, it affords clear and determinate evidence of a disseizin of the other co-tenants. Such I take the established rule at law to be; and it seems to me directly applicable to the circumstances of the present case. See *Prescott v. Nevers*, 4 Mason, 327, and the cases there cited. I cannot but impute the acquiescence during so long a period of Marcy Dexter and her devisees (for none of the other heirs of Jonathan Arnold seek any redemption) to one of two causes; either that the equity of redemption had been in fact, though informally, extinguished, or that the mortgaged property was not worth redemption; and, therefore, the adverse possession, though known, was not deemed fit under the circumstances to be resisted.

§ 887. *The general rule in equity, and exceptions thereto as to equity of redemption.*

But let us take the case in the most favorable view for the plaintiffs in which it can be contemplated; and that is as a case in which Aza Arnold had full notice of the mortgage as a subsisting mortgage, with the equity of redemption attached thereto at the time of his purchase, and, of course, that, as to the other heirs of Jonathan Arnold, he was to be treated only as a mortgagee in possession. What then would be the operation of the circumstances in a court of equity? The general rule in equity is that twenty years' exclusive possession by a mortgagee is a bar to the equity of redemption. The exceptions are where there have been within that period acts done or solemn acknowledgments made by the mortgagee recognizing the title as a mere mortgage. The statute of Rhode Island, applicable to this very mortgage, prescribes the same limitation of twenty years. Are there, then, in the present case, any peculiar circumstances which render a redemption equitable after the lapse of twenty-six years? No acts have been done by the supposed mortgagee, Aza Arnold, within this whole period which recognize his title to be purely that of a mortgagee. No accounts have been kept by him as such; no written acknowledg-

ments or transactions are shown, even with strangers, pointing to such a mortgage title. His acts, so far as they go, are all the other way. His title, so far as we can trace it from the title deeds, is opposed to such a conditional right. It is upon its face purely absolute. Admitting that he was made by the notice, in contemplation of law, as to the other heirs of Jonathan Arnold, a mere assignee of the mortgage, it is certain that he did not claim merely as such assignee; but his title deed purported to convey to him an unconditional title; and under that, and not otherwise, he entered, at least as far as any clear proofs exist in the case.

Now, I am not disposed to doubt the authority of those cases which have decided that the acts of the mortgagee within twenty years, clearly admitting the title to be a mortgage, are sufficient to keep open the equity; such, for example, as the bringing of a bill to foreclose within the twenty years; or keeping accounts of the rents and profits under the mortgage; or receiving interest from the mortgagor on the footing of the mortgage; or devising the estate as mortgaged property. See *Powell on Mortgages*, by Coventry & Rand, vol. I, pp. 380-402; *Hughes v. Edwards*, 9 Wheat., 489 (§§ 919-925, *infra*); *Elmendorf v. Taylor*, 10 Wheat., 152; *Dexter v. Arnold*, 1 Sumn., 109, 118 (§§ 814-820, *supra*); *Whiting v. White*, 2 Cox, 290, and cases there cited; *Ord v. Smith*, Sel. Cas. in Ch., 9; *Hansard v. Hardy*, 18 Ves. Jr., 459. Nor am I disposed to question the authority of another class of cases where there has been a solemn recital and acknowledgment of the mortgage as such in solemn deeds and other written transactions with third persons. Such were the cases of *Smart v. Hunt*, cited in 4 Ves. Jr., 479; *Hardy v. Reeves*, 4 Ves. Jr., 466; *Hansard v. Hardy*, 18 Ves. Jr., 455. See, also, the cases cited in *Powell on Mortgages*, by Coventry & Rand, vol. I, p. 385 and note; *Whiting v. White*, 2 Cox, 290, 293, 294. But there is no pretense that there is any evidence in the present case which brings it within the reach of the principle of either of these classes of cases. What then is the principal ground of reliance of the plaintiffs to sustain the right to redeem? It is founded upon certain parol acknowledgments, asserted by two witnesses, Elisha Angell and Jonathan Arnold, to have been made to them in conversation by Aza Arnold.

§ 888. *The effect of parol acknowledgments in conversation or verbal admissions by the mortgagee.*

One question which has been argued is, whether any naked, verbal admissions or parol acknowledgments in conversations are sufficient to establish the fact that the mortgagee has treated the conveyance as a mortgage within twenty years. Such admissions and acknowledgments are certainly open to the strong objection that they are easily fabricated, and difficult, if not impossible, to be disproved in many cases, and that they have a direct tendency to shake the security of all titles under mortgages, even after a very long exclusive possession by the mortgagee; nay, even after the possession of a half-century. I am fully sensible of the force of the objection, and I can scarcely think it can be overstated. Lord Alvanley in *Whiting v. White*, 2 Cox, 290, 300; S. C., Coop. Eq., 1, reprobated the introduction of any such parol evidence; and, commenting on the case of *Perry v. Marston*, 2 Bro. Ch., 397, where it has been supposed (though it is not, perhaps, certain) (see *Powell on Mortgages*, by Coventry & Rand, vol. I, pp. 381, 382, and note (H); *Reeks v. Postlethwaite*, Coop., 161, 164; *Lake v. Thomas*, 3 Ves. Jr., 17; see, also, Mr. Belt's note to his edition of 2 Bro. Ch., 397) that Lord Thurlow thought parol evidence admissible and sufficient to give the plaintiff a decree for redemption; but, he, in

fact, decided against it on another ground. Lord Alvanley said: "I cannot help thinking that it would have been a very wise rule if no parol evidence had been admitted upon these subjects. It is clear that the party obtains an irredeemable interest by twenty years' possession; and then that interest is to be totally changed by this sort of loose conversation." He afterwards added: "I will not take upon myself, in the present case, to lay down any rule that shall contradict that authority because it is not necessary. But, at any rate, I think the declarations must be clear and unequivocal; and in the present case I do not think that the evidence is of that clear and unequivocal nature as to justify the court in giving the plaintiff a redemption." The same point came before the vice-chancellor (Sir Thomas Plumer), in *Reeks v. Postlethwaite*, Coop. Eq., 160; and he, after admitting that there was no case in point, upon principle decided that parol evidence was so admissible. But after sifting the evidence in that case (which sufficiently shows the dangers of such evidence), he decided that it was not satisfactory and refused the redemption.

Then came the case of *Barron v. Martin*, Coop. Eq., 189; S. C., 19 Ves. Jr., 326, where Sir William Grant thought the parol evidence admissible; but, at the same time, on account of its being unsatisfactory, decided against the redemption, and adhered to the rule laid down by Lord Alvanley, that it ought to be clear and unequivocal to justify a redemption. But there is an important remark made by this eminent judge in the same case, which is worthy of special notice. "It is now decided," said he, "that twenty years' possession by a mortgagee will *prima facie* bar a right of redemption; and it lies on the mortgagor to show that such length of possession ought not to produce that effect." He added, "The *onus* lies on the mortgagor to show that fact, in order to defeat the effect of the possession." In *Marks v. Pell*, 1 Johns. Ch., 594, the same point came before Mr. Chancellor Kent; and the only evidence relied upon in favor of the redemption was certain naked, unassisted confessions of the mortgagee, stated by witnesses. The learned judge decided, upon a review of the evidence, that the redemption ought not, under all the circumstances, to be allowed; for "it would be setting up a dangerous precedent to give effect to a stale claim, upon such uncorroborated and loose confessions." In delivering his opinion he said: "It was once observed in the supreme court (6 Johns., 21), that acknowledgments of the party as to title to real property are a dangerous species of evidence; and, though good to support a tenancy or to satisfy doubts in cases of possession, they ought not to be received as evidence of title, as it would counteract the beneficial purposes of the statute of frauds. *That doctrine strikes me as just and sound*; and principles are essentially the same in both courts." From this language I cannot but infer that the learned chancellor was against the admissibility of the evidence, though he did not deem it necessary to decide the case on that point. His very able reporter (Mr. Johnson) has supposed differently, in his marginal note of the case; but I have been unable so to read the case.

§ 889. *There is no instance of a decree being made on parol evidence in favor of a party seeking to redeem.*

I have not in my researches found any other cases upon the point. And, what is very remarkable, there is no instance of a decree being made upon such parol evidence in favor of the party seeking to redeem. In the present case I am spared the necessity of deciding the general principle; for, admitting that parol evidence is admissible (which I am by no means prepared to decide, and I wish to reserve for further consideration), I am of opinion that the parol

evidence of the confessions and conversations of the mortgagee, testified to by the witnesses, is wholly unsatisfactory, too loose, and too equivocal, and too infirm in its reach and bearing and circumstances, to justify any decree in favor of a redemption. What is this evidence? Elisha Angell says that in 1828 (just twenty-one years after Aza Arnold had been in possession of the estate) he was employed by Aza Arnold in rebuilding a saw-mill on the Paget farm. Aza told him that he must charge it in a separate account different from any other charges against him; for the reason that his brothers' heirs had an interest in that estate, and that was a building he built on his own account. His other charges he had made against Aza. His work on the mill he charged, so much per day, for work on the saw-mill. Upon being interrogated by the plaintiff's counsel, as to the conversation, whether Aza named what heirs and what brothers were interested in the saw-mill, he answered that it was so long ago, and he had no interest in the business, that he could not be positive; that his words were, pretty much, that his brothers' heirs had an interest in that estate, and none in the mill; and that he could not say that he named any brother. Now, it is plain that every word of this statement may be true, and yet no reference whatever have been had to any supposed title in his brother Jonathan's heirs; for the children and heirs of his deceased brother, Welcome Arnold, had an undisputed title in one-third of the Paget farm.

§ 890. *Title to real estate not to be clouded by loose and indeterminate conversations.*

The other witness is Jonathan Arnold. He is one of the heirs of Jonathan Arnold, the mortgagor, and of course would be incompetent to give testimony in the case while he retained his interest as such heir. After the bill was brought, and indeed as late as August, 1836, he sold his interest to his son, John Randall Arnold, as he asserts, for \$50; and it cannot be disguised that, in all probability, the sole object of the conveyance, *pendente lite*, was to qualify himself as a witness in the cause. So much, then, for his position in the cause, as to his general credibility under such circumstances. He says that three or four years ago (that is to say, about one or two years before Aza Arnold's decease), he was at the Paget farm and had a conversation with Aza Arnold, who is his uncle. He asked his uncle if he had bought the right of his uncle Jonathan in the farm; and he told him he had got a deed of Thomas Arnold of his right, that is, Jonathan's right; that he had bought out the mortgage right of him; that he had a warranty deed, from Thomas Arnold, of Jonathan's interest in the farm; that he does not recollect any other particulars of the conversation, except what is above stated. Now, taking this conversation together, it may be true; and yet it establishes nothing beyond what the deed from Thomas to Aza Arnold upon its very face imports. It does not establish that the title that Aza then claimed in the premises was a mere mortgage title, or that any mortgage was then subsisting. And if it did, I must say that such loose and indeterminate conversations, which I cannot but suspect were designedly had with Aza, with a view to being used as testimony against him, would weigh with me very little in a case of this sort. No man would be safe, if upon such conversations his title to real estate, as an absolute owner, after twenty-five years of exclusive possession, could be thus cut down to that of a mere mortgagee.

This is the whole testimony to establish the right of redemption; for the testimony of Stephen Dexter was rejected by the court at the hearing, as the legal owner of the title, though a trustee for the benefit of the plaintiffs,

the *cestuis que trust*, in the premises in controversy. It is true that he is made a defendant in the bill; but he cannot be treated otherwise than as a substantial plaintiff, and, indeed, as the proper party to redeem. If, indeed, his testimony had been admissible, it would not, under the circumstances, have changed in the slightest manner, in my judgment, the posture of the case; for I think it impossible that the conversation which he states can, without straining (even if its credibility were fully admitted), be interpreted to amount to a clear and unequivocal admission by Aza Arnold, that he then held title to the farm as a mere mortgagee. Even the witness, though put by a cross-interrogatory to that very point, does not pretend to say that.

§ 891. *The answer of a defendant in another suit not good evidence against a co-defendant.*

The answer of Thomas Arnold in the former case of *Dexter v. Arnold*, 3 Mason, 284, in 1822, was offered in evidence in the present case, and objected to as evidence against all the defendants. Although I am clearly of opinion that nothing contained in that answer can be evidence against Aza Arnold or those who claim title under him to the Paget farm, yet it was allowed to be read, *de bene esse*, at the argument. I still retain the same opinion of its inadmissibility; but as, in my judgment, nothing contained in it can rightfully trench upon the title vested in Aza Arnold, under the deed of Thomas Arnold to him in 1807, I have not thought it necessary to enter upon any general argument to establish its incompetency.

Upon the whole, my opinion is that the bill ought to be dismissed, with costs.

FOX v. BLOSSOM.

(Circuit Court for Connecticut: 17 Blatchford, 352-356. 1879.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This is a bill in equity, by a mortgagee out of possession, against a prior mortgagee and the mortgagor in possession, praying that the prior mortgage may be decreed to be canceled, upon the ground that more than fifteen years prior to the date of the bill the mortgagor paid the notes secured by said mortgage, and that for more than fifteen years the mortgagee has had no equitable interest in the land conveyed by said deed, and that during all said term the mortgagor has been in full and exclusive possession of said land, adversely to said prior mortgagee, and paying no interest upon said mortgage notes. The bill was served October 30, 1877. Said prior mortgagee has brought a cross-bill, praying for a foreclosure of his mortgage.

On or about June 6, 1854, Orange D. Day executed and delivered to Frederick A. Blossom a mortgage of that date upon land in Killingly, in this state, correctly described in said bill, to secure five promissory notes of \$1,000 each, payable respectively in four, six, twelve, eighteen and twenty-four months from said date, with interest payable semi-annually. Said mortgage was duly recorded on July 14, 1854, in the town records of Killingly. No interest or principal has been paid upon said notes. In June, 1855, Day acknowledged an indebtedness to Blossom upon said notes. There was testimony, contradicted by Day, that in 1858 he also acknowledged an indebtedness to Blossom, but, since, 1855, Day has never admitted or acknowledged an existing liability to Blossom, and has never done any act recognizing the continued existence of the mortgage, or by which an acknowledgment of an existing liability could be inferred. In December, 1868, Blossom brought against Day a petition for

the foreclosure of said mortgage, returnable before the supreme court for Windham county, alleging the execution of the mortgage, and the delivery and non-payment of the notes. To this petition Day filed an answer, admitting the execution and delivery of said notes and mortgage on June 6, 1854, and that, before that date, he owed Blossom \$4,000, but averring that said notes were executed in pursuance of an usurious agreement in regard to the forbearance of said debt, and that said notes and mortgage were void, and denying all other allegations of said petition. The petition was withdrawn during the August term, 1870. Blossom was then in Europe, where he had been detained by sickness. Ever since 1854 Day has been in the exclusive, uninterrupted use and occupation of said land, and, since 1858 at least, has occupied said land adversely to any rights of Blossom, and has held the same, not recognizing any title, equitable or otherwise, existing in said Blossom. The mortgage deed to Blossom excepts from the covenant against incumbrances "a life lease to my" (the mortgagor's) "mother." There never was a lease to his mother, but he had executed a mortgage to William S. Day, upon condition that the mortgagor should provide or pay for his mother's (Amy Day's) support during her life. The consideration of said Blossom notes was a good consideration, and they were not usurious. Prior to June 6, 1854, said Blossom, Day, and one E. G. Reynolds, were partners in the city of New York, under the name of O. D. Day, but the remaining allegations of the answer to the cross-bill of Blossom, in regard to the purpose for which the notes were given, and the cancellation or payment thereof by set-off or otherwise, are not affirmatively found to be true. The testimony is contradictory and untrustworthy.

Said Day, on August 27, 1877, was justly indebted to John O. Fox, the plaintiff, in the sum of \$3,000, which indebtedness was evidenced by his promissory note, dated August 11, 1877, payable to said Fox three years from said date, with interest semi-annually, and, to secure the payment of said note, mortgaged, on said August 27, 1877, the lands described in the bill, and the same lands mortgaged to Blossom. Said mortgage was duly recorded. Fox did not examine the records, but was informed by Day, and believed, that the property was free from incumbrances, except the mortgage to William S. Day for the support of Amy Day. Nothing has been paid upon said note, either as interest or principal. Day is insolvent and there is no probability that he ever will pay the note.

§ 892. *The lapse of fifteen years bars a mortgagee's right to foreclose in Connecticut.*

By the law of Connecticut, the mortgagee's right of foreclosure, in a suit at law for the recovery of possession, is barred if the mortgagor has been "permitted to remain in possession of the premises for a period of fifteen years, at least, without payment during that time of any portion of the debt, or the performance of any act recognizing the continued existence of the mortgage." But an acknowledgment of the existence of the debt by the mortgagor during his ownership, and within fifteen years from the time of bringing the bill for foreclosure, is sufficient to remove the bar, for such recognition of the debt, as a subsisting debt, is a recognition of the mortgage as a security, and prevents "the time that had elapsed from being counted or considered as any part of the fifteen years' uninterrupted possession necessary in order to bar the mortgagee's right to bring ejectment or to foreclose the mortgage." *Hough v. Bailey*, 32 Conn., 288; *Jarvis v. Woodruff*, 22 Conn., 548; *Haskell v. Bailey*, 22 Conn., 569; *Hughes v. Edwards*, 9 Wheat., 489 (§§ 919-925, *infra*).

It is useless to say that Day's answer in the superior court foreclosure suit was an acknowledgment of the debt, for he expressly denied that it was an existing debt, and denied non-payment of the notes, and averred that the mortgage and notes were void.

§ 893. *A second mortgagee can by suit have a first mortgage canceled, if it has been barred by fifteen years' inaction.*

The defendant Blossom insists, as matter of law, that the plaintiff has no right to a decree, because he is out of possession, and is a mortgagee whose debt may be paid at maturity. When the mortgagee ascertains that there is an apparent but fictitious incumbrance upon the mortgaged land, and that the safety of his mortgage is important to the safety of his debt, he has the same right to have his lien protected by a court of equity and relieved from prior nominal incumbrances which have been paid or otherwise satisfied or extinguished, which the owner has to have his title relieved from a cloud. The suit is not prematurely brought because the principal of the debt is not due. *Lounsbury v. Purdy*, 18 N. Y., 515. The principle upon which courts of equity act in the cancellation of invalid deeds or other invalid instruments does not depend upon the particular interest or title which is to be protected. It is sufficient if the plaintiff has some interest in or title to the land which is clouded with an invalid lien, and that his interest or title is endangered thereby. *Chipman v. Hartford*, 21 Conn., 488; *Ward v. Chamberlain*, 2 Black, 430. The principle is familiar and is as clearly stated as anywhere in *Martin v. Graves*, 5 Allen, 601. "Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require."

The fact that the plaintiff is out of possession does not deprive him of the right to the benefit of a bill *quia timet*. *Martin v. Graves*, 5 Allen, 601; *Chipman v. Hartford*, 21 Conn., 488; *Lounsbury v. Purdy*, 18 N. Y., 515. There are, probably, instances where a claimant out of possession should not obtain the aid of a court of equity, by a bill *quia timet*, to establish his right to a legal title and to the possession, against a defendant in possession with an apparently valid legal title; but the case of a mortgagee who claims that another mortgage of record is *functus officio*, and has been extinguished, both parties being out of possession, is not of such a character. Let there be a decree that the mortgage to Blossom constitutes no lien upon the lands named therein, and that said lands are freed from said nominal incumbrance, and that the cross-bill is dismissed.

§ 894. Twenty years' possession by the mortgagee without an account or acknowledgment of the mortgage is a bar to redemption. *Dexter v. Arnold*, 1 Sumn., 109 (§§ 814-820). See §§ 885-891.

§ 895. Acknowledgments by the mortgagor after a sale by him do not affect purchasers under him. *Ibid*.

§ 896. An acknowledgment by the mortgagee in an answer to a bill in equity between other parties of a subsisting mortgage is a sufficient acknowledgment to allow a redemption. *Ibid*.

§ 897. Twenty years' possession.—A mortgagor cannot redeem after a lapse of twenty years after forfeiture and possession, no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. *Slicer v. Bank of Pittsburg*, * 16 How.,

571; *Amory v. Lawrence*, 3 Cliff., 523 (§§ 948-957); *Cromwell v. Bank of Pittsburg*,* 2 Wall. Jr., 569.

§ 898. A mortgagee will not be permitted, in equity, to set up an adverse possession to bar the title of his mortgagor, or of purchasers under him, to redeem, unless that possession has been for twenty years, and thus has constituted an equitable bar from lapse of time. *Gordon v. Hobart*, 2 Sumn., 408.

§ 899. The statute of limitations does not run in favor of a grantee in a deed absolute on its face, but intended to be a mortgage. His possession is not adverse. *Babcock v. Wyman*, 19 How., 289 (§§ 478-482); affirming *Wyman v. Babcock*,* 2 Curt., 886.

§ 900. After twenty years' possession by a mortgagee, the mortgagor's right of redemption is barred. *Brobst v. Brock*, 10 Wall., 519 (§§ 697-705).

§ 901. But as against a mortgagee in possession a lapse of more than twenty years raises no presumption that the mortgage has been paid and his rights extinguished. *Ibid.*

§ 902. Twenty years' possession under a *de facto* foreclosure is a bar to redemption, though the proceedings were irregular, unless the mortgagor shows circumstances which repel the presumption of title in the mortgagee. *Slicer v. Bank of Pittsburg*,* 16 How., 571.

XXII. WHEN THE RIGHT TO FORECLOSE IS BARRED.

SUMMARY—*Equity adopts statutes of limitations, §§ 903-908.—Presumption of release repelled by evidence of recognition of mortgage, § 907.—Purchaser with notice, §§ 908, 909.*

§ 903. Statutes of limitation have been adopted by courts of equity as fixing the time within which rights may be enforced in equity upon similar demands. *Cleveland Insurance Co. v. Reed*, §§ 910-918.

§ 904. State statutes of limitation are enforced in the United States courts as rules of property. *Ibid.*

§ 905. Statutes of limitation affect the remedy, not the contract. *Ibid.*

§ 906. A court of equity will refuse to lend its aid to stale demands. *Ibid.*

§ 907. While a mortgage is presumed to have been paid or released after the mortgagor has been allowed to retain possession for a length of time, yet this presumption may be repelled by circumstances showing a recognition of the mortgage by the mortgagor, such as payment of interest, a promise to pay, or an acknowledgment of the mortgage as an existing lien or the like. *Hughes v. Edwards*, §§ 919-925.

§ 908. A purchaser from the mortgagor with actual or constructive notice of the incumbrance stands in no better position than the mortgagor himself. *Ibid.*

§ 909. A purchaser of mortgaged lands, with notice, cannot have the value of his improvements first deducted from the proceeds of the sale. They are liable to the payment of the mortgage debt. *Ibid.*

[NOTES.—See §§ 926-935.]

CLEVELAND INSURANCE COMPANY v. REED.

(District Court for Wisconsin: 1 Bissell, 180-192. 1857.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—This is a bill filed in February, 1856, against George Reed and wife, James H. Rogers, and the Milwaukee & Mississippi Railroad Company, to foreclose a mortgage for \$22,000 executed by George Reed and wife to complainant, dated February 10, 1837, and recorded in April of the same year, covering certain lots in Finch's addition to Milwaukee, and thirty-six acres of land in the county of Milwaukee. Reed answers, admitting the execution of the mortgage, and that the same is due and unpaid, and pleads a discharge under the bankrupt law of the United States in December, 1842. Rogers, in his answer, says that he is the owner in fee-simple of the property in Finch's addition, and of which he had been in the full and actual possession as owner for nineteen years; that he has resided in Milwaukee constantly, where he could at all times be found; that he has been in the actual occupation of the land for more than ten years since the right of action on the mortgage accrued, and before the commencement of this suit, and that the right of action

is barred by the statute of limitations of this state. He further says that the property in Finch's addition was and still is the property of Curtis Reed, and that neither George Reed nor the complainant ever had any title to or equitable lien or claim upon it; that George Reed never had any business transactions with complainant, except through Edmund Clark, the president and owner of the controlling interest of the capital stock; that George Reed, on the 10th of February, 1837, as the attorney in fact of Curtis Reed, and by virtue of a power of attorney to sell and lease, dated June 23, 1836, conveyed the property by warranty deed to Clark, who at the same time reconveyed by quitclaim to George Reed for the nominal consideration of \$30,000, and he then executed these notes and mortgage to complainant; the whole being one transaction, in the absence of and without the knowledge or consent of Curtis Reed, and with intent to defraud him.

Rogers also sets forth that Curtis Reed, prior to the execution of above instruments, gave two mortgages upon these premises to one Nathaniel Finch, which were recorded prior to the mortgage to complainant, and assigned to him, Rogers, before maturity, and afterwards foreclosed in the territorial district court, and the land was sold to him, and the sale duly confirmed. He also claims title by deed from the assignee of George Reed, and under tax deeds, and insists that the cause of action is stale, and should not be enforced in equity; that it is nowhere stated in the bill that the money claimed to have been loaned was a part of the capital stock of the company, and that the charter of the company gave it no power to deal in real estate, or to loan money other than its corporate funds, for which reason the mortgage is void; that the company has long since ceased to exist; and that the transaction is usurious, and the conveyance and mortgage were a device to avoid the usury laws. Everything connected with the transaction excludes the idea that the mortgage is upon any land in that section but Curtis Reed's. The purchase by Rogers of George Reed's interest in the section of land, at his assignee's sale, does not affect this mortgage. George Reed's bankruptcy and the proceedings and sale under it have nothing whatever to do with this case, so far as Rogers is concerned. The return of this debt by George Reed, in the schedule annexed to his petition in bankruptcy, cannot in any way affect the interests or rights of Curtis Reed or Rogers in regard to the mortgage or the mortgaged premises. This mortgage was a security for money loaned, and the insurance company had authority by its charter to take security for money loaned, as part of its capital.

§ 910. *Usury, to be available as a defense, must be specially pleaded.*

Clark testifies that the amount paid Reed was entered on the books of the company, as paid by it; that he made the arrangements with Reed after consulting some of the directors; that \$11,000, part in cash and part in paper, was the true sum advanced, the other \$11,000 being simply a guaranty that the mortgaged premises would be worth the amount when the notes should become payable; that a private note of \$3,000 was given by Reed as a penalty to insure the punctual payment of the notes. The notes were given in Ohio, and were made payable in New York. The pleadings do not authorize the court to inquire into the subject of usury; they are altogether too indefinite and uncertain. Usury must be specially pleaded, and the evidence must sustain the plea.

§ 911. *A power of attorney to sell land cannot be used by the attorney so as to acquire title adverse to or exclusive of his principal.*

The whole transaction appears to have been a desperate device of George

Reed to make a raise of money, and an unwarrantable scheme of Clark to embarrass a customer. It is certain that George Reed could not use the power of attorney so as to acquire title adverse to or exclusive of his principal, Curtis Reed. The mortgage is in equity the mortgage of Curtis Reed, though the notes are at law George Reed's personal obligations.

§ 912. *Whether a power to sell includes the power to mortgage.*

A power to sell lands usually includes a power to mortgage, but a mortgage under such a power for a greater sum than is actually loaned may be repudiated by the principal. Curtis Reed might have required the cancellation of the conveyances and mortgage, at all events upon payment of the sum loaned. But Rogers is a stranger to the transaction, and he cannot make the objection to the validity of the mortgage. He can only cause inquiry to be made of its true consideration, if it is a lien on his land. *McCarty v. Van Dalfsen*, 5 Johns., 43; *Childs v. Digby*, 24 Penn. St., 23. Rogers became the assignee of the two mortgages of Curtis Reed to the Finches, dated in April, 1836. In pursuance of decrees of the district court for Milwaukee county, at the suit of Rogers against Curtis Reed, Edmund Clark and others, the mortgaged premises were sold in satisfaction of those mortgages to Rogers, and a deed was made to him of the premises by the master, according to the order of confirmation of the sales. Those mortgages being prior liens, Rogers became the purchaser of the legal title. The mortgage in suit is dated in February, 1837, and is of Curtis Reed's equity of redemption merely. An ejectment would not lie, at the suit of this mortgagee, against Rogers, the owner of the legal title. The only remedy of the complainant is by bill in equity for the sale of the mortgaged premises, which is this bill, or for redemption, and the subject-matter is of the peculiar and exclusive jurisdiction of a court of equity.

§ 913. *This court will administer statutes of limitation of the state as rules of property.*

At the date of this mortgage there was no statute limiting suits in equity. An act went into force in the month of January, 1839, that "bills for relief in case of the existence of a trust not cognizable in the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after." This limitation was continued in the state statutes of 1849, and is now in full force. This mortgage is dated February 10, 1837. The first note is payable in twelve months, the second in eighteen months, and the third in two years. When the act of limitations went into force the cause of action had accrued. This court will administer statutes of limitation of the state as rules of property. I shall proceed to inquire whether the statute is applicable to this case.

§ 914. *The Wisconsin statute of limitation applies to causes of action accrued at the time of its enactment.*

This case is one of the "cases not provided for" in the statute. If the word hereafter had been inserted in the statute (as in similar laws of some of the states) so that it would read "hereafter accrue," the question would be relieved of doubt. The statute seems to direct the attention to such causes of action as shall accrue, and not to those that have then accrued. The supreme court of this state has applied this statute to causes of action accrued at the time of its enactment. *Fullerton v. Spring*, 3 Wis., 667; *Parker v. Kane*, 4 Wis., 1. This statute was copied from the statute of the state of New York. In that state a contrary application of the statute was made in *Williamson v. Field*, 2 Sand. Ch., 533, and cases cited. In those cases the general rule is

announced, that no statute is to have a retrospect beyond the time of its commencement, and to affect vested rights, unless expressly so declared. But in the subsequent case of *Spoor v. Wells*, 3 Barb. Ch., 199, it is decided that an equitable claim, upon which a bill in chancery could have been filed previous to the time when the statute first took effect, and when the complainant was under no disability, is barred by the provisions of the statute at the expiration of ten years after the statute went into operation. The statute of the state of Massachusetts, in its general provisions as to claims that shall accrue, is the same as the statutes of New York and of Wisconsin, and a similar application is there made. *Smith v. Morrison*, 22 Pick., 430. The legislature of the state of Mississippi passed an act, in the month of February, 1844, that judgments rendered before the passage of the act in any other state of the Union should be barred, unless suit was brought thereon within two years after the passage of the act. In the case of the *Bank of Alabama v. Dalton*, 9 How., 522, it is decided by the supreme court of the United States that the act could be pleaded in bar to an action on a judgment rendered in the state of Alabama one year previous to its passage, and that the constitution of the United States did not prohibit that legislation as a law impairing the obligation of contracts. The time and manner of the operation of statutes of limitations generally depend on the sound discretion of the legislature. Cases, though, may occur where the provisions of a law may be so unreasonable as to amount to a denial of right, and call for the interposition of the court.

§ 915. *Construction of statutes of limitation; authorities cited and commented upon.*

A statute of limitations affects the remedy, not the contract, where a reasonable time is given for bringing suit on existing demands. *Jackson v. Lamphire*, 3 Pet., 280 (CONST., §§ 1845-48); *Sturges v. Crowninshield*, 4 Wheat., 122 (CONST., §§ 1937-39); *Bronson v. Kinzie*, 1 How., 311 (CONST., §§ 1650-55); *McCracken v. Hayward*, 2 How., 608 (CONST., §§ 1656-58); *Lewis v. Lewis*, 7 How., 776; *McElmoyle v. Cohen*, 13 Pet., 312; *Call v. Hagger*, 8 Mass., 423; *Holyoke v. Haskins*, 5 Pick., 20; *Smith v. Morrison*, 22 Pick., 430; *Morse v. Goold*, 1 Kern., 281. In *Ross v. Duval*, 13 Pet., 45, the court remarks: "It is a sound principle that where a statute of limitations prescribes the time within which suits shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act, and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases." From a careful examination of the case of *Murray v. Gibson*, 15 How., 421, it will appear that the decision does not conflict with the previous decisions of the court. The act of the state of Mississippi, passed in March, 1846, as an amendment to the limitation law of the state, provided that "no record of any judgment recovered in any court of record without the limits of the state against any person who was at the time of the commencement of the suit on which the judgment is founded, or at the time of the rendition of such judgment, a citizen of this state, shall be received as evidence to charge such citizen, after the expiration of three years from the time of the rendition of such judgment without the limits of this state." The declaration was in debt on a judgment rendered in the state of Louisiana, in the month of November, 1844. By the literal terms of the act the rights of a judgment creditor seem to be made dependent, not on his diligence in the institution or prosecution of his suit, but upon the trial of the action on his judgment, which is an event over which he has no control. The peculiar language of the act, if

taken in its literal acceptation, might suggest a serious doubt as to the compatibility of its provision with the principles of common right, or with the federal constitution. For these reasons the courts construed the law to relate to the time of bringing the suit and not to the time of offering the record in evidence at the trial, and also confined its operation to judgments rendered in other states after its date. In addition to these reasons the law of the same state as then existing, and on which the case of the Bank of Alabama *v.* Dalton was ruled, was applicable to the case of *Murray v. Gibson*, and would have barred it if pleaded. The court applied the law to judgments rendered after its date, to prevent the injustice intended by the legislature, of excluding judgment records at the trial. The court remarks, "That laws should be so construed as not to allow a retroactive operation where this is not required by express command, or by necessary or unavoidable implication. Especially should this rule of interpretation prevail when the effect and operation are designed apart from the intrinsic merits of the rights of parties to restrict the operation of those rights."

This bill was filed nineteen years after the date of the mortgage, seventeen years after the whole cause of action had accrued, and sixteen years and five months after the statute of limitations went into force. The complainant was under no legal disability, and might have brought suit before the ten years prescribed by the law had expired. I am of the opinion that this case should be considered as barred by the statute, but it is not essential to the proper disposition of the case that the bill be dismissed on this ground.

§ 916. *A court of equity will refuse to lend its aid to stale demands.*

In the year 1840 the sales to Rogers, in the foreclosure of the Finch mortgages, were confirmed, and deeds were executed and delivered when he went into possession. Clark testified that "I think I first began to look after his real estate in 1841 or '42. We got a man, who was going up there, to look into it and he came back with rather a poor story. I first learned that James H. Rogers was in possession of the property ten years ago, perhaps more. I wrote to some gentlemen in Milwaukee, and they wrote me that Rogers was in possession, claiming title. The information which John W. Allen gave us, whom we requested to look after our interests in Milwaukee, and who went there, was, that the thirty-six acres embraced in the mortgage had been foreclosed and sold on a previous mortgage, and that the twenty acres in Finch's addition, embraced in the same mortgage, had been sold at several tax sales, and that it was not then valued at over \$10 per acre. This statement was made in 1841 or '42. This Mr. Allen was the first president and a stockholder in the Cleveland Insurance Company." Rogers has continued in actual possession, and has paid the taxes mostly by suffering the property to be sold, and then taking deeds, and has made valuable improvements. The property has become very valuable, not from any labor, expenditure, or exertion of the complainant. It is the policy of this new state that titles should be quieted. The growth and improvement of the state requiring this policy, the legislature have wisely limited the time for bringing ejectments to ten years. Clark, the controlling officer of the insurance company, had notice by his agent and a stockholder of the company, that Rogers was in possession fifteen years before this bill was filed. From these facts this bill should not be maintained at this late day. From the delay in bringing suit after the notice that Rogers was in possession, claiming title to the land not considered worth the costs of a suit, the claim may be considered as abandoned or stale. In this respect this case

somewhat resembles the case of *McKnight v. Taylor*, 1 How., 161, in which it was remarked by the court: "In relation to this claim it appears that nineteen years and three months were suffered to lapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. . . . If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment, for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in the case of *Piatt v. Vattier*, 9 Pet., 405; and that nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence, and where these are wanting, the court is passive and does nothing, and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court." The demand is not to be favored, even for the amount actually loaned, on account of the circumstances attending the negotiations, and for the reason of the delay in either redeeming the land from Rogers, or instituting proceedings for such redemption. In this case, on the part of the complainant, there is a want of conscience, of good faith, and of reasonable diligence, and upon the principle and spirit of the statute of limitations, and also of the policy of the country, this claim should not, at this late day, be enforced in a court of equity against Rogers.

This suit was sought to be maintained, on the ground that the equity of redemption of the Cleveland Insurance Company was not barred by the foreclosure of the Finch mortgages, as it was not made a party defendant on the record of those cases. If this complainant had been nominally made a defendant in those cases, there would be no doubt of its foreclosure by those decrees of all equity of redemption as a subsequent mortgagee, even if the proceeding had been against it, by a newspaper publication of a rule to appear and plead, answer or demur, according to the statute. Why Edmund Clark was made a defendant and the Cleveland Insurance Company was omitted cannot be accounted for, unless from the nature of the several conveyances and the active agency of Clark in the negotiation it was supposed that the mortgage was taken nominally in the name of the company for his use. In the whole business the name of the company only appears as payee of the notes and as mortgagee. The business was transacted by Clark without authority from the directors of the company, by a vote of the corporate body. There is no pretense that the directors entered on the minutes or records of the corporation any resolution or order authorizing Clark to consummate the negotiation by those deeds to and from himself, and to take the mortgage in the name of the company for double the sum actually loaned. Clark swears "that he did not know whether it was the funds of the company or his own funds that were advanced to Reed, and also, that if the company would not advance the money he would." From

a subsequent examination of the books of the company and of memoranda, it may be inferred that the money advanced was the funds of the corporation. But be this as it may, Clark was the president of the company, the owner of the principal part of the stock, and the business man of the company. Under these circumstances, it was quite convenient for him to take a mortgage in the name of the corporation to secure a debt of his own, particularly in such an unconscientious transaction. He had the controlling power of the company. If he consulted the directors it was but mere matter of form. He was the company for all business purposes, and he testifies that he and the company had notice by their agent, one or two years after the sale to Rogers, that he, Rogers, was in possession of the mortgaged premises claiming title.

§ 917. *Effect of omission to insert a subsequent mortgagee as nominal defendant to a suit for the foreclosure of a prior mortgage.*

If Rogers was claiming title, either by virtue of his purchase under the decrees of foreclosure of the Finch mortgages, or by purchase at sales for taxes, it was the duty of the Cleveland Insurance Company, by its officers or agents, upon the receipt of the notice, to have redeemed the land from those sales. They at the same time had notice that the land was not considered worth over \$10 per acre, which would not warrant the expenses and disbursements required for redemption. Under these circumstances, it would not be equitable or just to decree, at this late day, after the land had become valuable, that Rogers' title and possession should be disturbed for the mere omission of the Cleveland Insurance Company as a nominal defendant in the bills and proceedings to foreclose prior mortgages. If the Finch mortgages had been foreclosed by a newspaper advertisement and sale, in pursuance of authority in the mortgages, the Cleveland Insurance Company would have been entitled by law to redeem within two years. By the law then in force, the mortgagor had two years' time to redeem from such sale, and "any person to whom a subsequent mortgage may have been executed shall be entitled to the same privilege of redemption to the mortgaged premises that the mortgagor might have had, or of satisfying the prior mortgage, and shall by such satisfaction acquire all the benefits to which such prior mortgagee was or might be entitled." And the law directs that if the mortgaged premises so sold shall not be redeemed, the officer making such sale shall make a deed to the purchaser. And if there is an overplus of purchase money on hand, it shall be retained for subsequent incumbrances.

§ 918. *In the absence of laws limiting suits in equity the laws of limitation as to similar demands in courts of law are considered as proper rules to be observed in courts of chancery.*

In the proceedings in court to foreclose the Finch mortgages, Clark, as a non-resident not served with process, was entitled by law to three years' time to come in and petition the court to open the decree as to him, for the use of the insurance company. But, by the law, if such application be not made, the decree shall be adjudged to be confirmed, which confirmation shall have relation to the time of making the decree. And by law, land sold under execution was redeemable by the owner within two years after the sale, and a creditor by judgment or decree could acquire the interest of the purchaser within three months after. These several laws are rules of property, strictly observed, as to time, in all cases, and they are also laws of limitation. They fully demonstrate the policy of the state in regard to sales of land for the payment of debts. In the absence of laws limiting suits and proceedings in equity, the laws of

limitation as to similar demands in courts of law are considered as rules proper to be observed in courts of chancery. From analogy to these laws, it is questionable whether a subsequent mortgagee, not named as a party in a bill to foreclose a prior mortgage, shall be allowed to redeem after two years. I am aware that the opinion prevails that such redemption cannot be denied, as the person claiming it was no party to the proceedings in court. The opinions of some courts favor this idea. But in several of the states a proceeding in court, and a decree against the prior mortgagor and *terre tenant* are sufficient to bar all subsequent incumbrances. The proceedings in court are open; the advertisement and sale are supposed to be known to all persons interested, who should attend the sale and bid up the property to cover their liens.

Every person is expected to look after his mortgages and liens within a reasonable time. But whether a subsequent mortgagee should be limited in equity to redeem within two years, by analogy to the statute referred to, I need not now determine. But that he should redeem within a reasonable time, there is no doubt. The company, through its officers and agents, had notice of Rogers' possession under claim of title, and the land should have been redeemed from the sale within the two years, or a reasonable time thereafter. The complainant was under no disability to proceed on its mortgage, nor has Rogers done any act to delay or prevent a redemption or sale of the land. The complainant has done no act to enhance the value of the land, while Rogers has. The complainant cannot be allowed to profit by the delay, at Rogers' expense. For these reasons the court will not order a decree on this bill that would disturb the possession or title of Rogers, or require him to pay the sum, with interest, advanced to George Reed. Rogers disclaims title to or interest in the property in Finch's addition; consequently there is no decree to be ordered against him as to that. George Reed was discharged from his debt under the late bankrupt law, and he is thereby released from all personal responsibility or liability on the notes and mortgage.

The Milwaukee & Mississippi Railroad Company, I presume, was made a defendant, as claiming the right of way through section thirty. There are no parties, then, against whom a decree could be made in regard to the thirty-six acres. But if that land was sold under a decree in the case of Increase A. Lapham, as set forth in Rogers' answer, I presume the complainant has no claim of lien against it. If so, the bill will be dismissed as to both tracts. Bill dismissed. (a)

HUGHES v. EDWARDS.

(9 Wheaton, 489-501. 1824.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This is an appeal from a decree in equity of the circuit court for the district of Kentucky. Edwards and wife, the plaintiffs in the court below, filed their bill in that court on the 8th of June, 1816, in which they charge that the female plaintiff, before her coverture, advanced, by way of loan, to James Hughes, her brother, the sum of 770*l.* 2*s.* 4*d.*, for which he gave his bond, bearing date the 10th of September, 1793, with condition to pay the same on the 12th of the same month; and for securing the said debt, she took from the said Hughes a mortgage upon sundry lots, situate in Lexington, in Kentucky, which are particularly described. It further charges

that the debt still remains due and unpaid; and that the defendant Hughes, subsequent to the execution of the mortgage deed, had sold part of the mortgaged premises to Gabriel Tandy, David and James M'Gowan, Robert Wilson, Samuel Patterson, James Wilson, and John Anderson, John Parker and William Bowman, all of whom are alleged to have purchased with legal notice of the plaintiff's lien on the said property, the deed having been duly recorded in the county court of Fayette, agreeably to law. The mortgagor, and the purchasers under him, all of whom are stated to be citizens of Kentucky, are prayed to be made defendants; and the prayer of the bill is, that the defendants may be decreed to pay the aforesaid debt, with interest, etc.; and on failure, that the equity of redemption of the defendants be foreclosed, and the mortgaged property decreed to be sold to satisfy the said debt, etc. The bill alleges the plaintiffs to be aliens, and subjects of the king of Great Britain. The deed of mortgage, dated the 14th of February, 1794, which (as well as the bond referred to in it) is made an exhibit, contains a defeasance that the mortgagor should pay the said sum of 770*l.* 2*s.* 4*d.*, with lawful interest thereon, according to the condition of the bond recited in it. It was duly proved and recorded in the county court of Fayette, on the 11th of March, 1794.

Tandy and Patterson severally answered this bill, each of them admitting himself to be in possession of certain parts of the mortgaged premises, under a *bona fide* conveyance, for valuable consideration paid, from the mortgagor, or others claiming under him, and without notice of the mortgage, other than the constructive notice given by the record of the same. They allege the continued possession of the mortgaged premises, from the date of the mortgage, by the said Hughes, or those claiming by purchase under him; and rely upon the length of time and uninterrupted possession as grounds for presuming that the debt has been paid, or released, in bar of the relief sought. M'Gowan and Hughes, the mortgagor, having died pending the suit, the guardians *ad litem* of their heirs and representatives severally answered, not admitting any of the charges in the bill, and relying upon the presumption of payment, or a release of the debt, from length of time. The bill was dismissed as to all the defendants except Hughes' heirs, Patterson and Tandy, upon their answers coming in; and after one or more interlocutory decrees, the court pronounced a final decree of foreclosure as to the above defendants; and in case the balance found to be due by the report of the commissioner should not be paid by a certain day, a sale of the mortgaged property in which the equity of redemption was foreclosed was decreed.

It was admitted by the parties that the defendants had made lasting and valuable improvements on the mortgaged property claimed by them; and that the female plaintiff, shortly after the date of the mortgage, left the United States, and that neither she, nor her husband, has been since within the United States. Amongst the exhibits filed in the cause are two letters from James Hughes, the mortgagor, to the female plaintiff, the one bearing date the 24th of February, 1803, and the other the 17th of December, 1808; in the former of which he recognizes distinctly the existence of the mortgage, and in both promises to make remittances as soon as it should be in his power.

The counsel for the appellants insist upon the following objections: 1. That the mortgage deed is a void instrument, the defeasance being to pay the money on the day it became due by the bond, namely, on the 12th of September, 1793, which was impossible, that day having already passed. 2. The plaintiffs,

being aliens, by their own showing, cannot hold lands in Kentucky, and, therefore, cannot maintain a bill to foreclose this mortgage. 3. The plaintiffs are barred of their right to foreclose by length of time. 4. That the mortgaged property ought not to have been made liable to the payment of this debt beyond its unimproved value.

§ 919. *Where a deed is made void by a subsequent condition, the happening of which is impossible, the condition is void and the deed is absolute.*

1. The first objection is well founded in point of fact; but, as to its legal consequences, it was in a great measure answered by the concession which the learned counsel who urged it was constrained to make. He admitted the law to be as it unquestionably is, that if a deed for land is to be made void by the happening of a subsequent condition, the performance of which is impossible at the time the deed is made, the condition only is void and the estate of the grantee becomes absolute. But the use which he endeavors to make of the objection was to turn the respondents out of the court of equity, and to leave them to their legal remedy, by ejectment, to recover the possession of the granted premises, in which it was supposed they might be successfully encountered by the statute of limitations. But in what respect the situation of a grantee in a deed without a defeasance, but which was intended by the parties to operate only as a security, differs from that of an ordinary mortgagee, in respect to jurisdiction and the act of limitations, is not perceived by the court. The latter may pursue his legal remedy by ejectment, and he may, at the same time, file his bill for the purpose of foreclosing the mortgagor of his equity of redemption. The objects of the two suits are totally distinct; and it is no objection to the remedy sought in equity that the plaintiff has another remedy which he may pursue at law. In the one, he seeks to obtain possession of the mortgaged premises; and in the other, to compel the mortgagor to pay the debt, for the security of which the mortgaged property was pledged. Whether the defendant could avail himself of the act of limitations, in the former case, whilst the equitable remedy of the plaintiff is subsisting, is a question which need not be decided in the present case, as the parties are now before a court of equity. The effect which length of time may have upon the plaintiff's rights in that court will be considered under another head.

§ 920. *Where a deed, absolute under the common law, was by the parties intended to be a mortgage, it will be treated as a mortgage in equity.*

The principles here laid down are not less applicable to the case of an absolute deed, which is intended by the parties to operate as a security for a debt, than they are to that of a common mortgage. A court of equity looks at the real object and intention of the conveyances; and when the grantor applies to redeem, upon an allegation that the deed was intended as a security for a debt, that court treats it precisely as it would an ordinary mortgage, provided the truth of the allegation is made out by the evidence. So, too, the grantee in such a deed may treat it as a mortgage, and, acknowledging it to be such, may apply to a court of equity to foreclose the equity of redemption, which will be decreed in like manner as if an unexceptionable defeasance were attached to the deed. That court directs its attention to the real object of the deed and the intention of the parties, and will compel a fulfillment of both. Now what was the object of the present deed? It is admitted by all the parties to this cause that it was to secure a debt due by James Hughes, the grantor, to Martha Hughes, the grantee; and it is apparent from the instrument itself, exclusive of the condition, that the debt to be secured was that of which the bond recited

in the deed was the evidence, which was payable on the 12th day of September, 1793, with interest from the date of the bond. This, then, being the contract of the parties, it ought to be carried into execution, unless there should be objections to such a decree other than the one which has been just disposed of.

§ 921. *Under the treaty with Great Britain of 1794, possession was not necessary for British subjects to retain their lands in this country.*

2. The next objection relied upon is the alienage of the respondents. This objection would not, we think, avail the appellants, even if the object of this suit was the recovery of the land itself, since the remedies as well as the rights of these aliens are completely protected by the treaty of 1794 (8 Stats. at Large, 116), which declares "that British subjects, who now hold lands in the territories of the United States, etc., shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." In the cases of *Harden v. Fisher*, 1 Wheat., 300, and *Orr v. Hodgson*, 4 Wheat., 463, it was decided that under this treaty it was not necessary for the alien to show that he was in the actual possession or seizin of the land at the time of the treaty, because the treaty applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. Now it is unquestionable that at the time this treaty was made the female plaintiff was entitled to assert a legal claim to the possession of this land, or to foreclose the equity of redemption, unless the debt with which it was charged was paid, in which case equity would have considered her as a mere trustee for the mortgagor.

§ 922. *An alien mortgagee may foreclose his mortgage in our courts, the proceeding being for the recovery of his debt and not for the possession of the land.*

But the objection is deprived of all its weight, and would be so independent of the treaty in a case where the mortgagee, instead of seeking to obtain possession of the land, prays to have his debt paid, and the property pledged for its security sold for the purpose of raising the money. Under this aspect, the demand is in reality a personal one, the debt being considered as the principal and the land merely as an incident; and consequently, the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him.

§ 923. *Where the mortgagor is permitted to retain possession, the mortgage will, after a length of time, be presumed paid or released, unless circumstances be shown to repel such presumption.*

3. It is objected in the third place that the respondents are barred of their right to foreclose by length of time. It is not alleged or pretended that there is any statute of limitations in the state of Kentucky which bars the right of foreclosure or redemption, and the counsel for the appellants placed this point entirely upon those general principles which have been adopted by courts of equity in relation to this subject. In the case of a mortgagor coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years' adverse possession, fixed upon that as the period after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee who is seeking to foreclose the

equity of redemption, the general rule is that where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. Now, this case seems to be strictly within the terms of this rule. The two letters from the mortgagor to the female plaintiff, in 1803 and 1808, admit that the mortgage was then subsisting, that the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were indorsed on the bond for payments acknowledged to have been made, which, though blank, the court below ascertained to have been made on the 15th of January, 1798, the 15th of May, 1803, and the 2d of August, 1808. The mortgagor, then, cannot rely upon length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit.

But it is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants who purchased from him parts of the mortgaged premises for a valuable consideration. The conclusive answer to this argument is, that they were purchasers with notice of this incumbrance. It must be admitted that it was but constructive notice; but for every purpose essential to the protection of the mortgagee against the effect of these alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser, with notice, can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee without paying the debt or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts or one of them. The court is, therefore, of opinion that this objection cannot be sustained by either of the appellants.

§ 924. *A purchaser of mortgaged lands, with notice, cannot have the value of his improvements first deducted from the proceeds of the sale. They are liable to the payment of the mortgage debt.*

4. The last objection is, that the mortgaged property ought not to have been made liable to the payment of this debt beyond its unimproved value. The object of this suit is to recover a debt and to have the property pledged for its security sold for the purpose of paying it. The debt, as was before observed, is the principal, and the land is only as a collateral security for the payment of it. The mortgagee seeks not to obtain the possession of the land, and to deprive the mortgagor or the purchaser of the improvements they have made upon it; and even if he did, the question would not be materially changed. If by means of these improvements the value of the land has been increased, the mortgagor or purchasers are permitted to enjoy all the benefit of such increase by paying the debt charged upon the land. If he will not do this, but submits rather to a sale of the property, he has all the benefit of its increased

value by receiving the overplus raised by the sale after the debt is discharged. His improvements were made upon property which he knew was pledged for the payment of this debt and he made them solely with a view to his own interest. The land was in reality his own, subject only to the lien; so much his own, that he is not accountable to the mortgagee for the rents and profits received by him during the continuance of his possession, even although the land when sold should be insufficient to pay the debt. Neither is the purchaser accountable for any part of the debt beyond the amount for which the land may be sold, although it should have been deteriorated by waste, dilapidation or other mismanagement. The claim, therefore, of a purchaser with notice, to have the value of the improvements which may have been made from the fruits of the property itself deducted from the price at which the property may be sold, seems to the court too unreasonable to admit of a serious argument in its support. No case was cited, nor has this court met with one, which affords it the slightest countenance. We must, therefore, overrule this objection.

§ 925. *The mortgagee of lands has the right to have the whole sold to satisfy the mortgage, and cannot be compelled to apportion the debt among the different purchasers of the mortgaged lands.*

Before concluding this opinion, it may be proper to notice a point which was made by the counsel for the appellants, although it was not much insisted upon; it was that the balance due upon this mortgage ought to have been apportioned upon all the purchasers from Hughes. The bill was properly dismissed as to all the defendants, except the heirs and representatives of Hughes, Tandy and Patterson, upon their answers denying the equity of the bill; and from these decrees no appeal was taken. As to Tandy and Patterson, who acknowledge themselves to be purchasers with notice, they stand precisely in the situation of the mortgagor, and the mortgagees have nothing to do with their relative rights to contribution amongst themselves. They are entitled to be paid the debt due to them and to call for a foreclosure and sale of all the mortgaged property, whether it be in the possession of the mortgagor or of others to whom he has sold it. If either of these defendants should pay more than his proportion of the debt, according to the relative value of the property they possess, that is a matter to be settled amongst themselves. But it would be most unreasonable to force the mortgagees into the delay and expense incident to the adjustment of those differences between persons with whom they have no concern. The conveyances by the mortgagor to them are void, as to the mortgagees, against whom they have no right, except that of redeeming, upon payment of the mortgage debt and interest.

Decree affirmed, with costs.

§ 926. *The mortgagor's right to plead the statute of limitations is a personal privilege and cannot be availed of by subsequent incumbrancers.* Wild v. Stephens,* 1 Wyom. T'y, 366.

§ 927. *Instituting foreclosure suit.—Lapse of time will not raise the presumption that a mortgage has been paid, if it is proved that proceedings had been instituted to foreclose it.* Kibbe v. Thompson,* 5 Biss., 226.

§ 928. *The fact that the note secured by a mortgage is barred by the statute of limitations, does not prevent the mortgagee from foreclosing the mortgage.* Wild v. Stephens,* 1 Wyom. T'y, 366.

§ 929. *The fact that a note secured by a mortgage is barred by the statute of limitations so as to prevent a recovery on that does not estop the mortgagee from enforcing his mortgage lien in equity.* The statute of limitations does not destroy the original debt. Sparks v. Pico, 1 McAL., 497.

§ 930. A statute of limitation which cannot be pleaded against a note cannot be pleaded against a mortgage securing it. *Daggs v. Ewell*,* 8 Woods, 844.

§ 931. Cancellation of mortgage that is barred.—A junior mortgagee may, by bill in equity, have a prior mortgage canceled after it is barred by the statute of limitations. *For v. Blossom*, 17 Blatch., 852 (§§ 892, 893).

§ 932. In Oregon a suit to foreclose a mortgage was not a suit for "the determination of any right or claim to or interest in real property" which might be brought within twenty years; but is only a suit upon a sealed instrument, the mortgage, for the "collection of a debt charged upon specific property," and is barred in ten years. *Eubanks v. Leveridge*, 4 Saw., 274.

§ 933. Such a suit is simply in effect a proceeding, not against the person of the mortgagor or his assigns, but *in rem* against the property mortgaged; and therefore the qualification concerning the absence from the state of a person against whom a cause of action accrues, does not apply to such a suit. *Ibid*.

§ 934. Minnesota.—An action to reform and foreclose a mortgage is not barred in Minnesota under ten years. *Reeves v. Vinacke*, 1 McC., 217 (§§ 633-636).

§ 935. The confiscation of an estate under mortgage does not operate to defeat the mortgagee's rights, and confiscate the mortgage, for the debt is not confiscated, and while the debt remains the mortgage remains also. *Higginson v. Mein*, 4 Cranch, 415.

XXIII. REMEDIES FOR ENFORCING A MORTGAGE.

SUMMARY—*Judgment on debt does not bar foreclosure proceedings; remedies are concurrent*, §§ 936, 937.—*Deficiency after foreclosure sale*, § 938.—*Suit for deficiency when whole debt becomes due on any default*, 939.—*Title of bankrupt owner good except as against his assignee*, § 940.

§ 936. Upon recovery of judgment upon a mortgage note it is merged in the judgment. But the judgment does not, without payment, take the debt out of the mortgage or bar proceedings to foreclose. *Connecticut Mutual Life Ins. Co. v. Jones*, §§ 941-944.

§ 937. A sale under a deed of trust is valid, although there is at the time an execution in the hands of the marshal for the same debt. *Ibid*.

§ 938. A suit may be maintained for a deficiency after a foreclosure sale when the proceeds of the sale are insufficient to pay the mortgage debt. *Omalv v. Swan*, § 945.

§ 939. If the mortgage provides that the whole debt shall become due upon default in the payment of any instalment of principal or interest, a suit at law may be maintained for the balance due upon the mortgage note after foreclosure, though the note by its terms be not due. *Gregory v. Marks*, §§ 946, 947.

§ 940. An assignee in bankruptcy is not required to take onerous property. If he does not take it the title remains in the bankrupt. If he does not elect to take possession of the property within a reasonable time, he is deemed to have elected to abandon it. The title of the bankrupt to the equity of redemption is good against all the world except the assignee, as the presumption is that the property was regarded as onerous, and that the assignee elected not to take it into possession. *Amory v. Lawrence*, §§ 948-957.

[NOTES.—See §§ 958-979.]

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. JONES.

(Circuit Court for Missouri: 1 McCrary, 888-892. 1879.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—On the 7th day of November, 1867, the defendant borrowed from plaintiff \$6,000, for which he executed his promissory note, to secure which he and his wife joined in the execution of a deed of trust by which they conveyed the real estate in question (a lot in the city of St. Louis) to one Albert Todd, as trustee. On the 19th day of April, 1879, the plaintiff recovered in this court a judgment at law upon said promissory note for \$6,226, upon which execution was issued, and a small sum collected by levy upon and sale of personal property was duly credited upon the judgment. The property covered by the deed of trust is the homestead of the defendant. The deed of trust contained a provision in the usual form authorizing the trustee, upon default in

payment of the note, to proceed to sell the property, after notice, to the highest bidder for cash. The judgment rendered upon the note being unsatisfied (except as to the small sum made upon general execution), the plaintiff procured the trustee to sell under the deed of trust after due notice. The sale took place on the 1st day of July, 1879, and the plaintiff was the purchaser for the sum of \$6,000. A deed from the trustee to the plaintiff was duly executed, and to obtain possession under this purchase the present suit was brought. Upon trial before a jury there was verdict and judgment for the plaintiff.

§ 941. *A note is merged in a judgment rendered upon it.*

Defendant moves to set aside the verdict and for new trial, upon grounds which will now be stated and considered.

1. It is insisted that the *note* should have been produced and offered in evidence in connection with the deed of trust. We are of the opinion, however, that the production of the note was not necessary. It had been merged in the judgment, and the latter had become the evidence of the debt secured by the deed of trust. It is well settled that where judgment is rendered upon a note it ceases to be, and the judgment becomes the evidence, and the only evidence, of the debt. *Wyman v. Cochrane*, 35 Ill., 154; *Oher v. Gallagher*, 93 U. S., 206; *Hagg v. Charlton*, 26 Penn. St., 202; *Freeman on Judgments*, 180, 181.

§ 942. *Suit on a note does not waive its lien under a mortgage.*

It does not, however, follow, as contended by defendant's counsel, that the plaintiff lost or waived any rights under the deed of trust by attempting to collect the debt due from defendant by means of a judgment at law and a general execution. A deed of trust under the laws of Missouri is simply a mortgage with power of sale, and it is very clear that a change in the form of the debt from that of a promissory note into a judgment did not in anywise affect the rights or obligations of the parties under the deed of trust. The debt remained unsatisfied, and the deed of trust given to secure it continued in full force. *Jones on Mortgages*, secs. 1215, 1220, 1221; *Lichty v. McMartin*, 11 Kan., 565; *Van Sant v. Allmon*, 23 Ill., 30; *Dunkley v. Van Buren*, 3 Johns. Ch., 330.

§ 943. *A wife is not a necessary party to a suit involving the homestead, which she has mortgaged jointly with her husband.*

2. It is also insisted that the court erred in refusing the application of the wife of defendant to become a party to this suit, and to be heard as such. It is very earnestly contended by counsel, that, inasmuch as the property in question was the homestead of defendant and his family, that therefore the wife of the defendant has, under the homestead law of this state, a present right of possession in her own right, independently of her husband, and that she is, therefore, a necessary party to the present action of ejectment. The law of Missouri relating to homestead exemptions contains no provision limiting in any way the power of the husband and wife to alienate their homestead by deed of conveyance, either with or without conditions. The power of the owner of a homestead to convey or mortgage the same is not restricted, except by the regulations applicable to conveyances of real estate in general. The statute is not framed with a view to interfere with the right of the owner of homestead property to dispose of it by deed, but to protect it from sale under execution during the life-time of the owner, and to secure it to his widow and children as a home after his death. Such property, within a certain valuation, is exempt from sale under execution, and upon the death of the owner is vested by law in the surviving members of his family. But there is nothing in the statute, and cer-

tainly nothing outside of the statute, to support the proposition that the wife of the owner, during his life-time, has any right of possession or claim of any kind in the homestead that may not be divested by a conveyance in which she joins. Nor is there any force in the suggestion of counsel that the wife in this case released her dower interest only, and not her homestead right; she joined in the deed and must be held to have conveyed all her interest. Where the legal title to a lot occupied as a homestead is in the husband, he and his wife, by joining in an absolute conveyance thereof, may undoubtedly make the purchaser a good title, and their right to make a conditional sale, to execute a mortgage or deed of trust, is equally clear, unless the same is prohibited by statute. *In re Cox*, 2 Dill., 320; *Babcock v. Hoey*, 11 Ia., 375; *Pfeiffer v. Rhein*, 16 Cal., 643. It is conceded that, in general, the wife is not a proper party to an action of ejectment for property in the possession of the husband, and in which she holds no separate estate in her own name. The possession of the husband is the possession of the wife. *Bledsoe v. Simms*, 53 Mo., 305. But it is insisted that because the property here is a homestead a different rule should prevail. We have already seen that, as against her own deed, the wife can have no separate present right of possession, and we are therefore constrained to hold that the general rule is applicable to this case, and that she is not a proper party.

§ 944. *A sale under a deed of trust is valid, although there is at the time an execution in the hands of the marshal for the same debt.*

3. It is said that the sale under the deed of trust was void, because the general execution was still in the hands of the marshal, and the defendant had until the 15th of September, the return day of the writ, in which to satisfy the same by payment. It is true that the execution remained in force, and was not necessarily returned prior to that date; but it is not true that the defendant had the right to postpone the sale under the deed of trust until the expiration of that period. He could deprive plaintiff of its rights under the deed of trust only by payment of the debt. The plaintiff's remedies were concurrent, and it had the right to pursue both or either, provided one satisfaction only was received. *Jones on Mortgages*, sec. 1215 *et seq.*; *Gilman v. Telegraph Co.*, 91 U. S., 603 (§§ 1264-67, *infra*). The motion is overruled.

OMALY v. SWAN.

(Circuit Court for Massachusetts: 8 Mason, 474, 475. 1824.)

STATEMENT OF FACTS.—This suit was brought to recover the balance due upon a mortgage, after the application upon the debt of the amount obtained by the sale of the mortgaged property.

§ 945. *A mortgagor has a right to recover the balance due upon a mortgage after the application thereon of money obtained from the sale of the mortgaged property.*

Opinion by STORY, J.

This question has been long since settled by the local law. In *Amory v. Fairbanks*, 3 Mass., 562, the supreme court of this state affirmed the right; and this court afterwards, in *Hatch v. White*, 2 Gall., 152, 161 (§§ 769, 770, *supra*), recognized the same doctrine. It is too late now to controvert it.

Judgment for the plaintiff.

GREGORY v. MARKS.

(Circuit Court for Illinois: 8 Bissell, 44-47. 1877.)

STATEMENT OF FACTS.—A note payable at the end of five years, with interest payable semi-annually, was given and at the same time secured by a trust deed, in which it was stipulated that if any of the interest instalments should not be paid the whole note should thereupon become due. The note was assigned to plaintiff; there was a default in the payment of interest; the trust deed was foreclosed, the property sold, and the proceeds failing to pay the debt and interest, this personal action was brought on the note not yet due.

§ 946. *Where two contracts relating to the same subject-matter are made at the same time, they form but one contract and are to be construed together.*

Opinion by BLODGETT, J.

The only question in the case is whether the party can maintain a suit at law for this balance upon this note. The note, on its face, is not yet due; but by the terms of the trust deed, the indebtedness secured by the note was to become wholly due and payable in case of default in the payment of interest. This stipulation is found in the trust deed, which was contemporaneous with the note, and must be deemed a part of the same contract with the note. Something like a year ago I had a kindred question to this before me, and having in mind a Missouri case which I had read a few months before that, upon the same question, I refused to render judgment at first, although subsequently, as there was no defense made, I allowed the plaintiff to take judgment. On looking up the Missouri case, which was in my mind, I find, however, that so much of the case as appeared to bear on this case is really *obiter*.

The case there was this: A. made a mortgage upon certain real estate, or rather gave his note, and to secure the payment of the note gave a mortgage upon certain real estate, and in the mortgage covenanted that in case of default in the payment of interest the whole debt should become due and payable. A. sold and conveyed the mortgaged premises to B. Default was made in the payment of the indebtedness, and B. being in possession of the mortgaged premises, the mortgagee filed a bill against A., the original mortgagor, and B., the grantee of the mortgagor, making them both parties to the foreclosure proceeding, and the court rendered a judgment of foreclosure, and ordered the premises to be sold, and on the coming in of the report of the commissioner making the sale, there being a deficiency, rendered a personal judgment against the purchaser of the equity of redemption as well as against the original mortgagor and the promisor in the note which was given. On error to the supreme court, taken in behalf of the purchaser, B., this opinion was given, to which I have referred; and in the course of its discussion of the question the supreme court say: "The clause in the trust deed is only put there for the purpose of marshaling the security, and not for the purpose of maturing the note for any other purpose than that of applying the securities." It was not necessary that the court of Missouri should decide that point, for the purpose of disposing of the case before it, because the only question there was whether they had the right to take a personal judgment against the purchaser. The law is well settled in this state, that where two contracts, relating to the same subject-matter, are made at the same time, they form but one contract, and are to be construed together; and I know of no reason why any exception to the rule should be applied to the case before me.

§ 947. *Suit upon note before it is due, when mortgage makes whole debt due upon any default.*

The question is, does this note and trust deed, when taken together, make the note become due at an earlier day, in the happening of certain contingencies, than the note alone upon its face requires, or would allow; and I am of opinion that it does; that the two contracts are to be construed together, and that when construed together, if default is made in the payment of interest, the whole indebtedness becomes due, and that the holder of the note may pursue the maker of the note by a personal judgment, after exhausting the securities. I shall, therefore, render judgment in favor of the plaintiff.

AMORY v. LAWRENCE

(Circuit Court for Massachusetts: 8 Clifford, 523-537. 1873.)

STATEMENT OF FACTS.—J. Amory, in 1831, being indebted to Isaac Coffin in the sum of \$10,000, conveyed to Otis certain real and personal property, including his reversionary interest in his mother's dower. This conveyance was made upon an agreement with William Appleton that he would pay the Coffin debt, take the property, and after paying himself would account to Amory for the remainder. Soon afterwards, Amory removed to New York, remained there ten years, became bankrupt and took the benefit of the bankrupt law of 1841, and returned to Massachusetts in 1842. In 1853 he received his discharge in bankruptcy, and until 1860 he did not know whether Appleton had paid himself out of the property in his hands or not. In that year he procured an assignment of the claim from his assignee in bankruptcy, and, as he alleged, repeatedly tried to get a settlement with Appleton, but without success. It appeared that in 1862 Appleton conveyed to Thomas Amory the reversionary interest of J. Amory in his mother's dower, and in 1862 William Appleton died. J. Amory filed this bill against the heirs and executors of William Appleton, and against Thomas Amory, and they all demurred to the bill.

Opinion by CLIFFORD, J.

Admitted as the matters well pleaded in the bill of complaint are by the demurrers, the only question is as to their legal effect. Several objections are taken to the right of the complainant to a decree, which will be briefly considered in the following order: That the claim is within the statute of frauds, as the trust was not created or declared by an instrument in writing signed by the party creating or declaring the same, as it is settled law in this state that no trust can be created or declared except by such an instrument. That the claim is barred by the statute of limitations which enacts that all actions of contract founded upon any contract or liability not under seal, express or implied, with certain exceptions not material to be noticed, shall be commenced within six years next after the cause of action accrues and not afterwards. Mass. Gen. Stat., 777. That if the claim is not barred by the statute of limitations, still it is barred by the laches of the complainant and those through whom he claims. That the bill of complaint fails to show that the complainant is entitled to any relief, because it is not alleged that he acquired a good title from his assignees in bankruptcy. That the cause of action is barred by the two years' limitation in the bankrupt act, under which the certificate of discharge was obtained. That the bill of complaint is demurrable because the complainant attempted to deprive the respondents of their right to answer under oath, contrary to the rules and practice of the court existing at the time of filing the bill.

§ 948. *Oral evidence is admissible to show that a deed absolute on its face is a mortgage.*

Much discussion of the first question is unnecessary, as it depends at this day entirely upon authority. Undoubtedly the objection would prevail before the supreme court of the state, but the rule in equity is different in the federal courts, as appears by numerous decided cases. Whether oral evidence is admissible for the purpose of showing that a deed, absolute on its face, was intended as a mortgage, was directly presented in the case of *Wyman v. Babcock*, 2 Curt., 398, and the decision of the court was that such evidence is admissible for that purpose; and that the statute of frauds is no bar to the admission of the evidence where it is offered to show that such a deed was intended as a mortgage. Twenty years earlier Judge Story decided the question the same way in the case of *Taylor v. Luther*, 2 Sumn., 232; holding that there is nothing in the statute of frauds rendering parol evidence inadmissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake, or omitted by design upon mutual confidence between the parties. He examined the question upon principle and authority and gave his reasons for the conclusion, and ten years later, in the case of *Jenkins v. Eldredge*, 3 Story, 293, he reaffirmed the same position after giving the question a very elaborate consideration. Repeated decisions of the supreme court have affirmed the same rule, and it may now be regarded as settled in all the federal courts. *Conway v. Alexander*, 7 Cranch, 238 (§ 457, *supra*); *Spriggs v. Bank of Mount Pleasant*, 14 Pet., 201; *Morris v. Nixon*, 1 How., 126 (§ 483, *supra*); *Russell v. Southard*, 12 How., 139 (§§ 491-509, *supra*); *Babcock v. Wyman*, 19 How., 299 (§§ 478-482, *supra*).

§ 949. *A deed absolute on its face that is held to be a mortgage.*

Two questions are involved in the second proposition of the defense which, inasmuch as separate demurrers are filed, must be separately considered.

1. Whether the claim of the complainant against the executors of the trustee, for the income and receipts from the sale of the trust property in the life-time of the trustee, other than the undivided parcel conveyed to the last-named respondent, is or is not barred as assumed by the executors in their demurrer.
2. Whether the right to redeem the undivided seventh part of the property conveyed by the trustee to the last-named respondent is not also barred by lapse of time, as assumed by that respondent.

Before examining those questions, however, it becomes necessary to ascertain more definitely what was the real nature of the original transaction, and for that purpose reference need only be made to the bill of complaint, as all the well pleaded allegations of the same are admitted by the several demurrers. Schedules of the property, as the complainant alleges, were prepared under the direction of the trustee, it being agreed that he, the complainant, should not part with any of his property until the trustee had made the arrangement to pay the \$10,000 to the complainant's creditor; that he made the transfer of his entire property as agreed, it being clearly and distinctly understood between him and the trustee that the latter was to hold the property simply as security for the \$10,000 to be advanced by the trustee, and that he, the trustee, was to account for the balance as soon as he should be repaid the amount advanced, with interest. Payment was accordingly made to the creditor, the property conveyed to the person designated, and ultimately transferred to the trustee, and the whole transaction perfected as agreed between the complainant and the trustee. Viewed in the light of the decisions of the federal courts, the conveyance, beyond all doubt, though

absolute on its face, was a mortgage. *Wyman v. Babcock*, 2 Curt., 398; *Babcock v. Wyman*, 19 How., 299 (§§ 478-482, *supra*).

§ 950. *Where a trustee, holding in his hands the property of his debtor, has been, by its rents and profits, fully paid, the subsequent rents and profits constitute a debt from him.*

Assume the allegations of both to be correct, and it appears that the trustee was fully paid prior to 1860, and the complainant admits that in that year it came to his knowledge not only that the trustee was fully paid, but that he had in his hands a large balance derived from receipts for the property sold, and the rents and profits of the property which was due to the complainant. Whatever that balance was beyond the sum advanced and interest was a debt or liability not under seal for which the trustee was responsible to the complainant, and as such constituted a good cause for an action of contract or a suit in equity. *Wyman v. Babcock*, 2 Curt., 401; S. C., 19 How., 300.

§ 951. *Massachusetts statutes of limitations.*

Such actions are barred by the six years' limitation, and the court is of the opinion that the claim against the executors is barred by that limitation. Mass. Gen. Stat., 777. State statutes of limitation and the construction of the same as given by the courts of the state furnish the rule of decision in the federal courts in cases where they apply. *Leffingwell v. Warren*, 2 Black., 599. Courts of equity in this state apply the statute of limitations in such cases in suits in equity to the same effect as they are applied in actions at law. *Farnham v. Brooks*, 9 Pick., 212; *Dodge v. Insurance Co.*, 12 Gray, 71. Rights concealed by the trustee are not subject to such a rule of limitation; but it appears that the complainant knew what his rights were in that regard twelve years before the bill was filed, as well as he knew what they were when the bill was framed, and it is clear that the statute commenced to run, so far as respects the balance in the hands of the trustee, arising from the sale of the property, or from the rents and profits collected beyond the amount advanced, and interest, when the party seeking relief became fully acquainted with the facts, and knew what his rights were in the premises. *Perry on Trusts*, § 230; *Pritchard v. Chandler*, 2 Curt., 488; *Angell on Lim.* (2d ed.), 176; *Kane v. Bloodgood*, 7 Johns. Ch., 90; *Hallett v. Collins*, 10 How., 174; *Boone v. Chilea*, 10 Pet., 177; *Finney v. Cochran*, 1 Watts & S., 118. Governed by these considerations, the court is of the opinion that the claim against the executors for the balance in the hands of the trustee for moneys collected in execution of the trust beyond the amount advanced, and interest, is barred by the statute of limitations, and having come to that conclusion, it follows that the claim against the devisees of the decedent trustee is without any foundation. Attempt is made to show that the limitation of six years should not be applied in this case, as the trustee died in 1862, but that suggestion cannot relieve the complainant from the bar, as the case is controlled by section 10 of the state limitation act, which in that state of the case only extends the time for bringing the action for the period of two years next after the grant of letters testamentary or of administration. Mass. Gen. Stat., 778. Suggestion is also made that the bill may be sustained against the executors as a mere naked bill of discovery; but the court is of a different opinion, for two reasons. 1. Because the executors, in the further prosecution of the bill against the other respondent of the decree, or for the complainant, are competent witnesses for either party. 2. Because the complainant has been guilty of laches in bringing his bill, which may well be taken into the account in determining that question.

§ 952. *Where an absolute deed is intended for a mortgage, a subsequent purchaser with notice is taken as an equitable mortgagee.*

Besides the money demand against the executors and devisees of the trustee, the complainant also claims to redeem the mortgaged premises so far as respects the undivided seventh part of the dower estate which the trustee in his life-time conveyed to the last-named respondent. Evidently that claim rests upon entirely different principles from the money demand against the other respondents, as the property exists in specie without change, and is held by the grantee of the trustee who made the purchase and took the conveyance of the property with full knowledge of the trust and of the rights of the complainant under the original arrangement whereby the title of his grantor was acquired. Where an absolute deed is intended as a mortgage, a subsequent purchaser with notice stands in the place of the equitable mortgagee. *Williams v. Thorn*, 11 Paige, 459; *Vattier v. Hinde*, 7 Pet., 253; *Everett v. Stone*, 3 Story, 446.

§ 953. *A claim to redeem a mortgage cannot be barred under twenty years.*

Six years is no bar to a claim to redeem a mortgage, nor is the plea of laches any defense to the suit unless it is shown to have extended to a period of twenty years. In the case of a mortgagor coming to redeem, courts of equity have, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years' adverse possession, fixed upon that term as the period after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. *Hughes v. Edwards*, 9 Wheat., 497 (§§ 919-925, *supra*); *Wyman v. Babcock*, 2 Curt., 398; *Dexter v. Arnold*, 3 Sumn., 155 (§§ 885-891, *supra*); *Elmendorf v. Taylor*, 10 Wheat., 168; 4 Kent. Com. (11th ed.), 187; *Demarest v. Wynkoop*, 3 Johns. Ch., 129. Twenty years without a recognition of the rights of the complainant is not shown in this case. Numerous allegations of the bill contradict any such theory, and show that such a defense in the present state of the pleadings cannot be sustained, as the bill alleges that in 1847 the trustee constantly recognized the rights of the complainant, and told him, in substance, that it was impossible to say what the receipts would be until his share in his father's estate was all sold; that he also recognized her right to an account, but would not agree definitely to give it, intimating that the property would not amount to more than enough to pay him what he advanced; that in 1850 he agreed to pay him \$600 annually, which has ever since been paid; that in 1856 he paid \$1,600, and \$600 in 1858, which must be understood as a sum in addition to annual payment under the prior agreement. Examined in the light of the declarations of the trustee and these several payments, especially the payment at one time of the sum of \$1,600, it is impossible to adopt the theory that the rights of the complainant were not recognized by the trustee within the period covered by those several allegations. Sixteen years only have elapsed since the large payment of \$1,600 was made by the trustee. Sufficient has already been remarked in disposing of the second objection of the respondent to show that the third objection cannot be sustained, and it is accordingly overruled.

§ 954. *An assignee in bankruptcy is not required to take onerous property. If he does not take it the title remains in the bankrupt.*

Objection is also made that the allegations of the bill are not sufficient to show that the complainant acquired a good title to the property from his as-

signees in bankruptcy. All the bill alleges upon the subject is that he was advised to purchase from his assignees in bankruptcy his claim against the trustee, and that he accordingly procured an assignment. Express provision was made by section 9 of the bankrupt act of the 19th of August, 1841, that all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy, and the supreme court of Massachusetts decided, in the case of *Osborn v. Basterral*, 4 Cush., 406, that the sale of a bankrupt's real estate under an order of the district court, in which no time or place of sale was fixed by the court, is irregular and void. In general, when a sale is made under a statute power, said Shaw, Ch. J., it must appear that the requisitions of the statute as conditions precedent to the operation of the power to pass the estate have been complied with. When the title to real estate is solely through a power, it must, in order to be sustainable, be proved that such power was duly executed. *Cleveland v. Boorum*, 27 Barb., 254. Title was claimed, it will be seen, in both of those cases under purchases by strangers to the proceedings in bankruptcy, and consequently their claim of title rested solely upon the assumption that the power to sell was duly executed by the assignee. Unlike what occurred in those cases, the purchase in the case before the court was made by the bankrupt, whose title, in the case of onerous property, where the assignee elects not to take it into possession, is good against all the world, except the assignee or some one to whom he conveyed the property. *Smith v. Gordon*, 6 Law Rep., 317. All the property and rights of property belonging to the bankrupt unquestionably pass by force of the decree of bankruptcy to the assignee by operation of law, and become vested in him as soon as he is appointed. But though the legal title passes to the assignee, he is not bound, said Judge Ware, to take possession of all the property. Leasehold estates pass to the assignee under the English bankrupt laws, but the assignee is not bound to take the lease and charge the estate with the payment of the rent, as the rent may be greater than the value of the lease, and thus the estate may be burdened instead of being benefited, and in such a case the claim may be abandoned by the assignee. He is not bound in such a case to take the property into his possession, and, if he elects not to take the property, it remains in the bankrupt, and no one certainly, except the assignee, has a right to dispute his possession. *Copeland v. Stephens*, 1 Barn. & Ald., 603; *Fowler v. Down*, 1 Bos. & Pull., 44.

§ 955. — *after the lapse of years a presumption arises that the assignee elected not to take the property.*

Years have elapsed since the proceedings in bankruptcy were closed, and the irresistible conclusion from all the averments of the bill is, that the assignee never elected to take possession of this property, or made any claim whatever upon the trustee for the same. Assignees may refuse to take possession of onerous properties, or such as will be a burden instead of a profit, and the clear presumption from the bill, as admitted by the demurrer, is that the claim against the trustee was regarded in that light by the assignee. Robeson says it has long been a recognized principle of the bankrupt law that the assignees of a bankrupt are not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit. They are, on that subject, regarded as being in a very different position from that of the executors of a deceased testator, as the former take the property by operation

of law, while the latter claim title through their testator, and are bound to perform his obligations to the extent of his assets. *Rubeson*, Bankruptcy, 322. Where the assignee elects not to take the right of the bankrupt and charge the estate with the burden of an uncertain litigation, the right, whatever it is, survives in the bankrupt, and some of the authorities hold that it may be pursued by any creditor not a party to the proceedings in bankruptcy. *Smith v. Gordon*, 6 Law Rep., 317. Persons acting as assignees in such a case are required to elect within a reasonable time, and the rule is, that, if they refuse to elect when required to do so, it is deemed an election to reject the estate. *Lawrence v. Knowles*, 5 Bing. (N. C.), 150; *Carter v. Warne*, 4 Car. & P., 336; *Graham v. Van Dieman Land Co.*, 11 Exch., 101; *Ex parte Blandy*, 1 Dea., 286; *Tuck v. Fyson*, 6 Bing., 321.

§ 956. *Reasonable presumptions are admitted by a demurrer.*

Doubtless the complainant, in such a case, must allege or prove enough to show that the assignee is estopped to set up any right in opposition to his claim, and the court is of the opinion that enough is alleged in this case to satisfy that requirement. Reasonable presumptions are admitted by the demurrer as well as the matters expressly alleged. Pursuant to advice which the complainant received to purchase from his assignees his claim against the trustee, the allegation is that he procured an assignment of the same, which must be understood in this award as a transfer of all the property and estate embraced in the claim which he was advised to purchase by an appropriate legal instrument. Suppose that is so, still the argument is that the allegation was not sufficient, because it is not alleged that the sale was made by the order of the bankrupt court; but the opinion of the court is that such a prior order was not necessary, under the circumstances of this case, to give validity to the sale, or if it was, that the reasonable presumption, from the allegation of the bill, is that the assignment was made in pursuance of such an order of court. Independent of the assignment, his title, under the circumstances of that case, was good against all the world except the assignee, as the presumption is that the property was regarded as onerous, and that the assignee elected not to take it into possession or to prosecute the claim.

The next objection is that the cause of action is barred by the two years' limitation in the bankrupt law under which the complainant was adjudged a bankrupt. Suffice it to say that the limitation does not apply to the case of an assignee, which is all that need be said upon the subject in the present case. *Banks v. Ogden*, 2 Wall., 69.

§ 957. *The waiver of the oath of defendant to his answer in a bill does not amount to anything, unless it is accepted by the defendant.*

It is also objected that the complainant attempted to deprive the respondents of their right to an answer under oath; but the controlling answer to the objection is, that it can have no such effect, as the waiver amounts to nothing unless the respondents accept it. *Heath v. Erie R'y Co.*, 8 Blatch., 412; *Story Eq. Plea.*, § 874. Bill dismissed as to the executors and devisees. Decree for complainant against Thomas C. Amory.

§ 958. *When the right to enforce a mortgage accrues.*—Under a deed of trust authorizing a sale upon default in the payment of interest, a sale upon such default is authorized although the deed does not show when the interest is payable or what the rate of it is, except by reference to the note secured. *Richards v. Holmes*, 18 How., 143 (§§ 1175-79).

§ 959. *Whole debt due upon default.*—A provision in a mortgage or bond, that upon the maturity of an instalment without payment the whole debt shall become due, is valid and may be enforced. *Olcott v. Bynum*, 17 Wall., 44, 62.

§ 960. An option to declare the principal due upon default in payment of interest must be declared within a short and reasonable time after the right to do so has accrued; and after a delay of six weeks it has been held to be too late to give an effectual notice. *Wilson v. Winter*, 6 Fed. R., 16 (§§ 637-640).

§ 961. An agreement to extend the time of the payment of mortgage notes takes the mortgage out of the operation of the statute of limitations as between the original parties only, and not as between the mortgagee and innocent purchasers, who had no notice of such extension. *Wyman v. Russell*,* 4 Biss., 807.

§ 962. Proceedings at law and equity at same time.—An election to sue at law upon a note secured by mortgage does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage. He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained. *Ober v. Gallagher*, 8 Otto, 199, 208.

§ 963. The holder of a note secured by mortgage may proceed at law or in equity or both at the same time. Upon obtaining a judgment upon the note, this is merged in the judgment, but the mortgage lien is not merged. This is transferred from the note to the judgment. *Ibid.*

§ 964. Attachment of equity of redemption.—In Maine an attachment of the right, title and interest of a debtor in lands binds his equity of redemption in mortgaged land, and this can be levied on as such only by sale at auction. If an execution be extended upon mortgaged land it binds the fee subject to the mortgage, but in such case the title dates from the seizure on execution and not from the attachment. *Cogswell v. Warren*, 1 Curt., 223.

§ 965. In this state an execution for the same debt secured by the mortgage may be levied on the mortgaged land. *Ibid.*

§ 966. Execution upon mortgage debt.—At common law an equity of redemption cannot be sold on execution obtained upon the mortgage debt. *Hill v. Smith*,* 2 McL., 446.

§ 967. A discharge in bankruptcy of the mortgagor does not prevent a foreclosure of the mortgage by an action *in rem* or by a bill in equity. The proceeding in such a suit does not compel the bankrupt to pay the debt for which the mortgage was given, but simply forecloses his right to redeem, unless he shall voluntarily pay the debt. It acts, therefore, not at all *in personam*, but solely *in rem*. *In re Bellows*, 8 Story, 439.

§ 968. Mortgage to surety enforced for principal creditor.—A mortgage to a surety to indemnify him for securing debts of the mortgagor will inure to the benefit of the creditors to whom the surety has become bound, and upon the bankruptcy of the mortgagor, a court of bankruptcy, or a court of equity, will enforce the mortgage for their benefit. *In re Pierce*, 2 Low., 343, 344.

§ 969. Where a state court has acquired jurisdiction of the subject-matter of a cause, its decree is a bar to an action for the same cause in a federal court. *Stout v. Lye*, 13 Otto, 66 (§§ 1001-1003).

§ 970. After a court of bankruptcy has taken jurisdiction by ordering a sale of the mortgaged premises discharged of liens, a state court has no jurisdiction to foreclose the mortgage. *In re Devore*,* 16 N. B. R., 56.

§ 971. State court not ousted by petition in bankruptcy.—The filing of a petition in bankruptcy in a federal court and the adjudication of bankruptcy therein does not divest a state court of jurisdiction over a pending suit on a mortgage of the bankrupt's property, nor deprive the plaintiff in the foreclosure suit of his right to execute the decree of foreclosure by a sale of the property. *In re Irving*, 8 Ben., 463, 468.

§ 972. A decree of foreclosure in the state court and a sale thereunder, made after the filing of a petition in bankruptcy of the mortgagor, are a bar to any right of the assignee to set aside the foreclosure sale by suit in a federal court, or to raise the question of usury in the mortgage. *Cutter v. Dingee*, 8 Ben., 469.

§ 973. Foreclosure by *seire facias* under the statute of Illinois is only allowed where the mortgage has been duly executed and recorded; and a mortgage is not duly acknowledged if the notary public has failed to affix his seal to the certificate of acknowledgment. *Kenneths R. Co. v. Sperry*,* 3 Biss., 309.

§ 974. In Kansas any suit for the sale of mortgaged property must be brought within the county in which such property is situated. But a judgment may be rendered on a note (secured by mortgage) in a county in which the mortgaged property does not lie. *App v. Bridge*,* 1 McCahon, 118.

§ 975. In Louisiana, in order to make a valid sale of land under a foreclosure of a mortgage, it is indispensably necessary, in all parishes except Jefferson and Orleans, that there should be an actual seizure of the land; not, perhaps, an actual turning out of the party in possession, but some taking possession of it by the sheriff, not merely constructively. *Watson v. Bondurant*,* 21 Wall., 123.

§ 976. The pact *de non alienando* does not relieve a mortgagee from the necessity of pursuing the forms of law in making a sale. *Ibid.*

§ 977. The facts in regard to a sheriff's sale may be inquired into where the sheriff's return is incomplete. *Ibid.*

§ 978. In Louisiana a mortgage by public act, although it imports a confession of judgment, may be enforced in the United States courts by suit in equity. *Benjamin v. Cavaroc*, 2 Woods, 168, 171.

§ 979. Where a lien exists on property in Louisiana by special mortgage, and upon the mortgagor's death the property passes with the lien attached into the hands of a curator, the circuit court of the United States has jurisdiction to enforce a sale. *Erwin v. Lowry*, 7 How., 172, 180.

XXIV. FORECLOSURE BY ENTRY AND POSSESSION AND BY WRIT OF ENTRY.

§ 980. Entry for condition broken in presence of two witnesses.—In Massachusetts, under statutes of 1788, ch. 22, and of 1798, ch. 77, it was necessary not only that the mortgagee should enter after condition broken in the presence of two witnesses, but also that the entry should be known by them to be for condition broken and to foreclose the mortgage. *Gordon v. Lewis*,* 1 Sumn., 525.

§ 981. Entry upon one of several lots.—An entry upon one of several distinct and detached parcels of land in the same county, mortgaged in one deed for the performance of the same condition, and in possession of the same person, is a good entry upon all. *Shapley v. Rangeley*, 1 Woodb. & M., 218, 218.

§ 982. Assignment by mortgagee after completed foreclosure.—Where a mortgagee, having made entry upon land and completed a foreclosure by possession, receives from a third person, with the assent of the mortgagor, the mortgage debt, and assigns his interest to that person, the latter holds an absolute estate, and the transaction is not a mere discharge of the mortgage. *Ibid.*

§ 983. A writ of entry to foreclose a mortgage may be well maintained against a tenant in possession under the mortgage. *Fales v. Gibbs*,* 5 Mason, 462.

§ 984. In a writ of entry to foreclose a mortgage, the declaration should allege the seizure to be in mortgage and should show that a foreclosure is desired, rather than possession for the purpose of taking profits. *Fiedler v. Carpenter*, 2 Woodb. & M., 211.

§ 985. The fact that a mortgage contains a power of sale is no objection to a foreclosure by writ of entry. The power of sale is merely a cumulative remedy which does not interfere with a foreclosure by action, or by entry and possession. *Furbish v. Sears*,* 2 Cliff., 454.

§ 986. A judgment in a writ of entry, to foreclose a mortgage, operates only as between the parties to the suit. A judgment of foreclosure against the mortgagor, rendered long subsequent to the assignment by him of his right to redeem, cannot operate against the assignee. *Gordon v. Hobart*, 2 Sumn., 406.

XXV. PARTIES TO EQUITABLE SUITS FOR FORECLOSURE.

SUMMARY.—*Mortgagor after conveying not a necessary party*, § 987.—*When mortgagor's wife not a necessary party by reason of homestead right*, § 988.—*Attaching creditor a proper party*, § 989.—*Judgment pendente lite*, § 990.

§ 987. A mortgagor who has conveyed his equity of redemption is not a necessary party to a foreclosure bill. *Townsend Savings Bank v. Epping* §§ 991-998.

§ 988. If for any reason the mortgage is paramount to the right of homestead, the mortgagor's wife is not a necessary though a proper party, by reason of such right. *Ibid.*

§ 989. An attaching creditor is a proper party to foreclosure proceedings. If his attachment is made before the inception of such proceedings, he is not bound, and has a right to redeem unless made a party. *Dickinson v. Lamoille County Nat. Bank*, §§ 992, 1000.

§ 990. A creditor obtaining a judgment pending a suit to foreclose a mortgage of the debtor's property is bound by the decree. A mortgagor in a foreclosure suit represents all who *pendente lite* acquire any claim through him. *Stout v. Lye*, §§ 1001-1003.

[NOTES.—See §§ 1004-1024.]

TOWNSEND SAVINGS BANK v. EPPING.;

(Circuit Court for Georgia: 8 Woods, 890-897. 1877.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—The defendant Aiken, and one Goodrich, being in partnership and about to run a steam saw-mill on Herd Island, near the mouth of the river Altamaha, in September, 1866, borrowed of the bank corporation, complainant, the sum of \$15,000, and, to secure the payment thereof, executed and delivered to the said bank their three promissory notes for \$5,000 each, payable on demand, with interest half-yearly in advance, and a mortgage upon the whole tract comprised on Herd's Island, including the saw-mill thereon, with the engines, machinery, etc. The other complainants joined in the notes as sureties. The constitution of Georgia, adopted in 1868, secured to every head of a family a homestead of realty to the value of \$2,000, and personal property to the value of \$1,000, to be exempt from execution and sale. The legislature afterwards prescribed the mode of setting apart and securing such homestead and property to the sole use and benefit of the family of the party claiming the same. The legislature of Georgia also, in 1868, passed a law giving to employees employed in any steam saw-mill, and to any person furnishing any steam saw-mill with timber, saw logs or provisions, or with anything necessary to carry on the work of said mill, a lien of the highest dignity upon said mill for any debts, dues, wages or demands against the owner for such service, timber or other necessities, and prescribed the method of executing said lien.

Goodrich having sold out his interest in the saw-mill and property to Aiken, the latter, in 1870, took the requisite proceedings for having set off, as homestead, a large part of Herd's Island (not including the saw-mill), but including for personal property, to be exempt from execution, portions of the machinery of the mill. Carl Epping, one of the defendants, in 1870, placed a lien on the mill for timber furnished thereto, and took out an execution to sell the same for a debt of about \$5,000. John Strickland placed another lien upon the mill for about \$130. Under the latter the mill was put up to sale, and sold to Epping for \$5,100—against the protest of the complainant corporation. Epping claims to hold the whole amount of his bid by virtue of his lien and that of Strickland's as paramount claims to that of the complainant under its mortgage. The complainants in the present suit seek a decree to foreclose the mortgage given to the bank complainant (which has never been paid), and to set aside as null and void the sale under the lien of Strickland, and to declare the said lien, as well as that of Epping, subordinate to the said mortgage, and for a sale of the property under and by virtue of the mortgage, free and clear of said liens; or, if this cannot be done, that the purchase money bid by Epping at the lien sale may be declared to belong to the complainant. The complainants also seek to be relieved against Aiken's claim to a homestead.

§ 991. *Homestead exemptions are subordinate to antecedent liens.*

The decision of the supreme court of the United States in the case of *Gunn v. Barry*, 15 Wall., 610, has disposed of the question relating to the claim of homestead. That court held that the homestead exemption secured by the constitution of Georgia, adopted in 1868, does not affect liens created prior to that time, and cannot be set up in derogation thereof; and accordingly, in view of this decision, the counsel for the defendants very properly abandoned that defense.

§ 992. *An act giving a lien for materials furnished to a saw-mill cannot give the holder of such lien precedence over that of a senior mortgage.*

It is difficult to perceive any difference in principle between the claim grounded on the lien law referred to and that grounded on the homestead law. The former, as well as the latter, if attempted to be carried out as against debts which became a lien on particular property before the passage of the law, would be obnoxious to the objection of impairing the validity of contracts. To give to a person furnishing timber to a saw-mill a lien for the price, paramount to that of prior judgments, mortgages and other prior liens on the mill, would simply amount to a subversion of those liens *pro tanto*, without adding any corresponding value to the property. Such a lien has not the merit of a mechanic's lien, which is usually given for materials furnished and work done to a building, and presumably increasing its value to the amount of the claim. Indeed, the defendant's counsel does not insist that any claim can be set up against the mortgage by virtue of the lien given by the law of 1868. But he bases the lien upon which the defense rests upon a prior law, passed in 1842 (Cobb's Dig., 428), amendatory of a steamboat lien law passed in 1841. By the second section of the law of 1842 it was declared that all the provisions of the steamboat lien law should apply to all steam saw-mills, at or near any of the water-courses in the state, in behalf of all and every person or persons who might be employed by the owner for services rendered, or for timber or pine wood, provisions or supplies delivered to any such saw-mill. If this law was in force in 1870, when the timber in this case was furnished by Epping and Strickland, the liens claimed were valid ones, unless liable to some of the other objections which have been urged against them.

§ 993. *Construction of Georgia statutes.*

But the complainant contends that the second section of the act of 1842 was not in force in 1870, but had been repealed in 1857, in respect of the territory in which the mortgaged premises are situated. Laws of 1857, 225. The repealing act referred to, which was passed December 16, 1857, enacts that the second section in question, so far as it relates to all the saw-mills upon the several mouths of the Altamaha river, be and is repealed; and that the term "mouths of the Altamaha river," includes all the mills within ten miles, in a straight line, of Darien. It is conceded that the saw-mill in question is within ten miles, in a straight line, of Darien; but the defendant's counsel insists that it is not on one of the mouths of the Altamaha river. The state map shows, however, that Herd's Island is embraced within the network of channels which extend along the coast at that point, and which connect directly with the main channel of the Altamaha. Indeed, the description of the island in the mortgage bounds it on the south and east by the Altamaha river. But the positive language of the act, defining what is intended by the expression, "mouths of the Altamaha river," is controlling; and I do not see how it is possible to evade its force.

§ 994. *Priority of liens.*

In my judgment, the act of 1857 did repeal the second section of the act of 1842, so far as relates to the territory embracing the premises in question, and that no law existed in 1866, when the mortgage was executed, giving any such lien upon the mill in question as that claimed by the defendants; and as the subsequent act of 1868 cannot be invoked to derogate from the validity of the mortgage, neither Epping nor Strickland had any lien which could affect it. Therefore the sale under Strickland's lien must be considered as made subject

to the lien of the complainant's mortgage. That sale could only affect the rights of Aiken. Epping, the purchaser, holds the property as Aiken held it, and has only the equity of redemption.

§ 995. *A mortgagor who has conveyed his equity of redemption is not a necessary party to a foreclosure bill.*

The defendants, however, raise an objection to the bill for want of proper parties. They contend that Goodrich, one of the joint makers of the mortgage notes, is a necessary party. Proper parties are not always necessary parties. It is laid down by Mr. Justice Story, in his work on Equity Pleading, that neither prior nor subsequent incumbrancers are necessary, though they are proper parties in a bill to foreclose. If not made parties, they are not bound by the decree. Section 193 and note. And he says distinctly that where the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill. Section 197. Goodrich conveyed his equity of redemption in the mortgaged premises to Aiken, and the latter is made a party. If Goodrich has any interest at all in the controversy, it arises from the fact that he may be resorted to ultimately as one of the makers of the notes if the property mortgaged does not bring enough to pay them. This may possibly entitle him to redeem, if he has to pay anything. Not being made a party, this right will not be extinguished. But without being a party he will be bound by the account taken as the amount due, unless he can show collusion. See *Haines v. Beach*, 3 Johns. Ch., 459.

§ 996. *Courts of equity are unwilling to throw a case out for a defect of parties.*

Courts of equity are always unwilling to turn a complainant out of court on the objection for want of parties, made at the final hearing. If they deem it essential that a person should be a party who has not been made such, they will generally allow the cause to stand over in order that he may be brought in. I do not consider that to be necessary in this case. The objection is overruled.

§ 997. *Where the mortgage is superior to the homestead the wife of the mortgagor is not a necessary party.*

It is also objected that Mrs. Aiken, the wife of the defendant Aiken, should have been made a party, because the suit seeks to subvert the claim of homestead in the mortgaged premises. The mortgage, as we have seen, is paramount to the right of homestead. The latter is to be viewed in the light of a subsequent incumbrance only. The wife, like the joint maker of the note, is only interested that the mortgage shall not absorb more than the just amount due thereon shall require. As to the amount due, the husband, Aiken, being primarily liable therefor, is the only party necessary to be present at the taking of the account; and such account will be binding on persons only collaterally liable, unless collusion be shown. And as to the right of such persons to resort to the mortgaged premises and redeem the same in case they are called upon to bear any part of the debt, we have seen that it is not taken away if they are not made parties. The wife stands in this respect in the same attitude as the joint obligor. She is a proper party, but not a necessary one. The complainants omit her at their peril. Not being made a party, her right to redeem by paying the mortgage debt is not cut off. In this case I see no reason for holding the cause over in order to make the wife a party. It is apparent from the evidence in the cause that the property is insufficient to pay the debt, and as Aiken, the principal debtor, is insolvent, no good would be accomplished by bringing the wife into the litigation.

§ 998. Demand; bringing of suit sufficient.

The objection that no demand of payment of the notes was made before filing the bill is not sustained by the evidence; and besides this, the bringing of suit is itself a sufficient demand, even in an action at law. The view which I have taken of the case renders it unnecessary to consider various other questions which were discussed on the argument. A decree must be entered for the complainants, that the corporation complainant is entitled to have the mortgaged premises sold to raise and satisfy the amount due for principal and interest on the several promissory notes secured by the mortgage, and also the costs of suit, free and clear of the claim for homestead and of any exemption of property under the constitution of 1868, or laws made in pursuance thereof; and free and clear of any claim under the liens set up by defendants for furnishing timber or otherwise, and of all and any sale or sales made by virtue of such liens or either of the same; and that it be referred to a master to ascertain and report the amount due the corporation complainant on said notes and mortgage; and that the defendants be foreclosed of all equity of redemption and claim in and to the mortgaged premises that may be sold to pay the said debt.

DICKINSON v. LAMOILLE COUNTY NATIONAL BANK.

(Circuit Court for Vermont: 12 Federal Reporter, 747-749. 1893.)

Opinion by WHEELER, D. J.

STATEMENT OF FACTS.—This cause has been submitted on bill, answers, replication, proofs, admission of facts and briefs. From the pleadings, proofs and admission it appears that the orator was the owner of a note against one Griswold, on which suit was brought in the name of the defendant Heath; and among other real estate of Griswold a farm was attached subject to a mortgage to one Wheelock, then being foreclosed; that subsequent to the attachment a final decree of foreclosure was entered that unless the mortgage debt should be paid in instalments, at certain times fixed, Griswold and all persons claiming under him should be foreclosed and forever barred of all equity of redemption in the premises; that afterwards Griswold became largely indebted to the defendant bank, and after paying all the instalments of the foreclosure but the last two, executed a mortgage to the bank of all the real estate to secure that indebtedness; that at the solicitation of Griswold, and for the purpose of aiding him, the bank entered into an agreement in writing with him, by the terms of which, in consideration of certain payments made and to be made at specified times by him, the bank agreed to assign all its claims and securities to the attorney of Griswold, and in case it should become the owner of Wheelock's decree to assign that also, on payment of what the bank should pay for it, with interest, and that in case the several sums should not be paid by the time stated, the bank assumed no obligation by the contract; that the bank paid the amount of the instalments due to Wheelock and took the decree. The first payment to be made by Griswold under the agreement was after the expiration of the time of redemption in the decree. Griswold made a part of the payments, but not all of them, and finally the bank took possession of all the premises and sold them to the defendant Hendee, who sold one-half and afterwards the other to the defendant Paige, who paid a large part of the purchase money, and more than the amount of the Wheelock decree paid by the bank, without any notice or knowledge of the agreement between the bank and Griswold. Judgment was recovered in the suit in the name of Heath

against Griswold, and the land covered by the decree was levied upon subject to the Wheelock mortgage, appraised at the amount due on the last two instalments, and set out to the creditor in satisfaction in part of the judgment. This bill is brought by the orator as equitable owner of the judgment, and of the right to the land set off to satisfy it to redeem the land from the Wheelock mortgage. There is no question about the regularity of the foreclosure proceedings, or of the judgment, or of the proceedings in levying upon and setting out the land to the creditors, nor as to the right of the orator to the judgment and its avails. The sole question is as to the right to redeem.

§ 999. *An attaching creditor is a proper party to foreclosure proceedings.*

As the foreclosure proceedings were pending against Griswold when his right was attached, Heath and the orator, in whose right the attachment was made, were affected by them the same as if they had been made parties to them. Story, Eq., §§ 405, 406. The attaching creditor, if the attachment had been made before the commencement of the proceedings to foreclose, would have been a proper party to the proceedings, and would not have been bound by the decree without being made a party. *Chandler v. Dyer*, 37 Vt., 345; Gen. St. Vt., 1878, p. 841. The proceeding by attachment was *in invitum*, and by it the orator, through Heath, acquired a right independent of Griswold to redeem the mortgage, and by the decree he became bound to redeem it according to the decree, if he would save his right to the equity of redemption acquired by the attachment. Griswold had the right to redeem or not as he might be able or see fit; the orator had the right to redeem or not as he might see fit. If either redeemed it would be redeemed, and respective rights would take place accordingly; and if neither redeemed both would be foreclosed. Neither did redeem, and their respective rights became affected accordingly, except as varied by other circumstances. It is claimed by the orator that the agreement to take what the decree cost, after its expiration, opened the decree as to all parties. It is probably true that it did open the decree as to Griswold. It substituted a new agreement of the parties in place of the decree. By that agreement, if he paid, he was to have the premises. That was like the agreement in the original mortgage, by which, if he paid, he was to have the premises. The original mortgage had to be foreclosed to cut off his right to redeem that, notwithstanding his failure to pay, and this agreement might have to be foreclosed anew to cut off his right to redeem, notwithstanding his failure to pay according to that. *Cooper v. Cole*, 38 Vt., 185.

§ 1000. *As to the right to redeem.*

The question remains, however, whether this agreement made with Griswold would open the decree as to the orator, who had no part in making the agreement. Had Griswold redeemed, the mortgage would have been removed from the estate and left it free as to that for the orator to levy upon; but that result would have followed from the fact of the redemption and not from the force of the agreement. Had the orator redeemed the decree, he could have stood upon it in his own right. *Wheeler v. Willard*, 44 Vt., 640. As no one redeemed it, he lost his right; it was foreclosed as to him. As a further foreclosure was made necessary only by the agreement, it would only be necessary as against the parties to the agreement. The new agreement was made with Griswold for his own benefit; the orator had nothing to do with it, and shows no ground for claiming that it was for his benefit, or for claiming the benefit of it. And further, if it could be said that as the orator is bound by the decree under Griswold, he should be entitled to the benefits of the agreements of Griswold affect-

ing the decree, it would have to be said still further that, if he would take Griswold's agreement to stand upon, he must take it in all its parts as Griswold made it. Griswold was foreclosed, except for the effect of the agreement. He acquired no right to redeem except by the terms of the agreement. Should he bring a bill to redeem, it would have to be founded on the agreement. The orator can have no greater right than that. But he has not brought his bill, and does not by it offer to redeem according to that. He claims the right to redeem that parcel of the whole, and to have the benefit of that part of the agreement and let the rest go. Such a result would be highly inequitable. Still further, this purely equitable right to redeem cannot in equity be enforced against the purchasers of the legal estate without notice. The bank had the full legal title appearing of record, and had possession at the time of Hendee's purchase. This agreement did not appear of record. The proof not only fails to show that Hendee had heard of it, but shows affirmatively that he had not heard of it. The orator, therefore, has no right to redeem against him and his grantee. Let a decree be entered dismissing the bill, with costs.

STOUT v. LYE.

(13 Otto, 66-71. 1880.)

APPEAL from U. S. Circuit Court, Northern District of Ohio.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This record discloses the following facts: On the 10th of November, 1873, Francis J. Lye executed to the First National Bank of Delphos a mortgage on certain real estate situate in the village of Delphos, Allen county, and within the northern judicial district of the United States in the state of Ohio, to secure his note to the bank for \$6,000, dated November 1, 1873, and payable January 1, 1874, which was given to take up in part his old note to the bank then past due. The mortgage was duly recorded in the records of the county, November 10, at which time, under the laws of the state, it took effect. Rev. Stat. Ohio (1880), sec. 4133.

On the 29th of December, 1875, the present appellants, John W. and Jacob O. Stout, brought suit in the circuit court of the United States for the northern district of Ohio, against Lye and Philip Walsh, who were partners, to recover a judgment for \$5,106.36 and interest. The first day of the January term, 1876, of that court was January 4, and process was served on Lye & Walsh, in the suit of the Stouts, January 3. On the 15th of January, 1876, the bank commenced suit against Lye in the court of common pleas of Allen county to foreclose its mortgage. Process was served on Lye in that action January 20. The Stouts were not made parties, the bank having then no actual notice of the pendency of their suit in the circuit court. On the 31st of January the Stouts recovered judgment in their action in the circuit court against Lye & Walsh for the full amount of their claim and costs, and on the same day caused an execution to be issued, which was, on the 1st day of February, duly levied on the lands covered by the bank mortgage. The effect of the judgment, without this levy, was to bind the lands of the defendant for the satisfaction thereof from the first day of the term of the court at which it was rendered, January 4. *Id.*, sec. 5375. On the 23d of February the Stouts commenced this suit in the circuit court of the United States for the northern district of Ohio, making the bank a defendant, in which they sought to set aside the mortgage as illegal for want of authority to take it, or if that could not be

done, to have certain alleged payments of usurious interest applied to reduce the debt. The bank was served with subpoena on the 25th of February, and required to appear on the first Monday in April. The February term of the court of common pleas of Allen county began on the 7th of February, and on the 7th of March, during that term, a judgment was rendered in the suit of the bank against Lye for the full amount of his note and interest, and for a foreclosure of the mortgage by a sale of the mortgaged property. The bank answered the suit of the Stouts, setting up the foregoing facts, which being proved by the agreed statement of the parties, the bill was dismissed. From that decree this appeal was taken.

§ 1001. *Where a state court has acquired jurisdiction of the subject-matter of a cause its decree is a bar to an action for the same cause in a federal court.*

The first question to be decided is whether the appellants are concluded by the judgment of the state court finding the amount due the bank and establishing the lien of its mortgage. If they are, they concede that the decree below is right. There cannot be a doubt that the state court had jurisdiction of the suit instituted by the bank, and as was said by Mr. Justice Grier, speaking for the court in *Peck v. Jenness*, "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." 7 How., 612, 624. The mere fact, therefore, that the Stouts commenced this suit in the circuit court before judgment was rendered in the state court in favor of the bank is of no importance. The point to be decided is whether the judgment in the state court binds the Stouts, they not having been parties to the suit in which it was rendered. The rule is, that where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the others.

§ 1002. *Rights acquired pendente lite.*

It is also an elementary rule that "if, pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee or assignee of the equity of redemption." Mitf., p. 73; Story, Eq. Pl., sec. 351. Acting on this rule in *Eyster v. Gaff*, 91 U. S., 521, we held that an assignee in bankruptcy, appointed pending a foreclosure suit, was barred by a decree against the mortgagor. In this we may have gone somewhat beyond the rulings of the English courts, and of Chancellor Walworth in an anonymous case (10 Paige (N. Y.), 20), but to our minds, under the late bankrupt law, an assignee stands as any other grantee of the mortgagor would stand who acquired title after the commencement of the suit to foreclose the mortgage.

§ 1003. *Creditor obtaining judgment pending a foreclosure suit.*

That the suit of the bank was one to foreclose a mortgage, and that it was actually pending when the judgment lien of the Stouts was acquired, are conceded facts. When the suit was begun, Lye, the mortgagor, represented the entire equity of redemption. He had parted with no portion of it voluntarily; and if the Stouts had failed to get their judgment during the January term,

1876, of the circuit court, no one would claim they were not bound by the decree of foreclosure, although not parties to the suit. Neither could it with any propriety be claimed, we think, that they would not be bound if their lien had only taken effect from the date of their judgment. It is true the lien followed by operation of law from a judgment in an adversary proceeding against the mortgagor, and was not created directly by his own voluntary act, but it was the legitimate result of his failure to pay a debt he had incurred, and reached only the equity of redemption that was being foreclosed in the pending suit. It was in legal effect no more and no less than an incumbrance of the equity of redemption by the mortgagor under the operation of the judicial proceedings which had been instituted against him to enforce the payment of a debt he owed. As this incumbrance was created *pendente lite*, there can be no question that it comes within the rule just stated as governing such transfers, unless the rights of the parties are changed because the lien, when created, bound the property from January 4 as against other liens and conveyances made by the mortgagor. The inquiry is not as to the extent or validity of the lien, but whether the holder is any less an incumbrancer *pendente lite*, because, although his incumbrance was actually created while the suit was pending, it bound the land, for certain purposes, from an earlier date. Confessedly the lien of the bank, if its mortgage was valid, was in any event superior to that of the judgment. The only point in controversy is as to the necessity of making such an incumbrancer a party to a pending suit in order to cut off by a foreclosure his interest thus acquired in an equity of redemption. No doubt the Stouts, as soon as their judgment was rendered, had a lien on the mortgaged property, which for some purposes antedated the foreclosure suit; but until they had secured their lien they would not have been heard to contest the validity of the bank's mortgage, or the amount that was due on the mortgage debt. If they had been made parties when the suit was begun, they could have done nothing by way of defense to the action until they had acquired some specific interest in the mortgaged property. As creditors at large they were powerless in respect to the foreclosure proceedings, but when they obtained their judgment, not before, they were in a position to contest in all legitimate ways the validity and extent of the superior lien which the bank asserted on the property, in which, by the judgment, they had acquired a specific interest. They might have appeared in the common pleas and asked to be admitted to defend the bank's suit, or for some other appropriate relief, or they might do what they in fact did,—commence this suit in the circuit court in aid of their execution. By this suit, however, they could not deprive the common pleas of the jurisdiction it had acquired in the bank's suit, nor take away from the bank its right to prosecute that suit to the end. The two suits related to the same subject-matter, and were in fact pending at the same time in two courts of concurrent jurisdiction. The parties also were in legal effect the same, because in the state court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring a separate suit the Stouts voluntarily took the risk of getting a decision in the circuit court before the state court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the state court. That was a judgment on the merits of the identical matter now in question, and it concluded the "parties and those in privity with them, not only as to every matter which was offered and re-

ceived to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U. S., 351, 352. It is true the mortgagor did not set up as a defense that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so, he is now concluded as to all such defenses, and so are his privies.

Decree affirmed.

§ 1004. *Incumbrances pendente lite.*— It is not within the power of the mortgagor, pending a foreclosure suit, by contract with a mechanic, and without the consent of the mortgagee, to create an incumbrance upon the property which could in anywise affect the rights of the mortgagee as they might be declared by the final decree. *Hards v. Conn. Mut. L. Ins. Co.*,* 8 Biss., 234.

§ 1005. So a contract made and work done after the institution of a suit to foreclose will not confer a mechanic's lien superior to the rights of the mortgagee. *Ibid.*

§ 1006. An assignee of an equitable mortgage, who has taken the assignment merely as collateral security, cannot maintain a bill to foreclose it after the debt for which he held it as security has been paid. *Wilbur v. Almy*,* 12 How., 180.

§ 1007. In a suit by a married woman to foreclose a mortgage payable to her, where the bonds and mortgage are in possession of her husband, who is living apart from her and beyond the jurisdiction of the court, the husband should be made a party to the suit; but if there have been laches and delay on his part he should not be allowed to come in and defend except upon terms. *Ruckman v. Stephens*,* 11 Fed. R., 798.

§ 1008. *Parties defendant.*— One in possession of mortgaged premises claiming them, who is not made a party to a bill for foreclosure, is not bound by the decree. *Noyes v. Hall*, 7 Otto, 34 (§§ 627, 628).

§ 1009. All parties holding the equity of redemption of mortgaged lands are necessary parties to a bill to foreclose. *Wyman v. Russell*,* 4 Biss., 307.

§ 1010. The rights of any one interested in the equity of redemption who is not made a party to a bill are not affected by the decree of foreclosure and the sale under it, but he may redeem as before the sale. *Clark v. Reyburn*, 8 Wall., 318 (§§ 1047-49).

§ 1011. *Beneficiaries.*— The foreclosure of a mortgage by a bill in which known beneficiaries are not made parties is void as to them. *Oliver v. Piatt*, 3 How., 333, 407.

§ 1012. The trustee in a deed of trust is a necessary party to a foreclosure suit, because he holds the legal title. *Gardner v. Brown*,* 21 Wall., 86.

§ 1013. This is so although the trustee has failed to give a bond for the faithful discharge of his duties, for such failure does not prevent the vesting of the legal title in him. *Ibid.*

§ 1014. *Trustee and beneficiaries.*— After a conveyance of lands subject to mortgage in trust for the benefit of children, both those in being and those to be born, all the children *in esse* at the time of the filing of a bill of foreclosure should be made parties. A decree against the trustee alone does not take away their right to redeem. *Clark v. Reyburn*, 8 Wall., 318 (§§ 1047-49).

§ 1015. *Parties through whom a fraudulent title has passed*, but who have no interest in the property and who will not be affected by the decree, need not be made parties in a foreclosure suit. *Union Bank of Louisiana v. Stafford*,* 12 How., 327. Affirmed in *New Orleans Canal & Banking Co. v. Stafford*,* 12 How., 343.

§ 1016. *Executor with power of sale.*— A discretionary power of sale for reinvestment, given to an executor during the minority of a devisee, does not vest the executor with the fee so as to make him a necessary party to the suit. An executor with such a power cannot bind a devisee not made a party to the suit by a ratification of the foreclosure. *Chew v. Hyman*,* 7 Fed. R., 7.

§ 1017. A wife who has joined in a mortgage releasing her homestead rights is not a necessary party to a foreclosure suit by reason of such homestead. *Connecticut Mut. Life Ins. Co. v. Jones*, 1 McC., 388 (§§ 941-944).

§ 1018. Where the wife is made defendant in a bill for the foreclosure of a mortgage of her separate property, she being in possession of the property, and the husband is beyond the jurisdiction of the court and is not made a party, the bill will not be dismissed for want of parties. *New Orleans Canal & Banking Co. v. Stafford*,* 12 How., 343.

§ 1019. *Subsequent incumbrancers.*— By the Oregon code a suit to enforce the lien of a mortgage should embrace, as parties to it, all subsequent incumbrancers, so that a decree thereunder, directing the premises to be sold and the proceeds applied to the satisfaction of

the liens held by the mortgagees, shall have the effect of extinguishing such liens as to the right to redeem from the purchaser at the sale. *Lauriat v. Stratton*,* 6 Saw., 339.

§ 1020. Where a mortgage is made to secure the note of a third person, the maker of such note should be made a party to a bill to foreclose such mortgage, especially if it is sought to hold him responsible for any balance which the sale of the mortgaged premises might not satisfy. *Matcalm v. Smith*, 6 McL., 416.

§ 1021. Decree not opened to let in new parties.— After a decree of foreclosure has been executed by a sale of the property and payment of the purchase money, it will not be opened and the suit reinstated, in order to make a prior mortgagee a party defendant, who ought regularly to have been made a party, unless this is necessary to prevent irremediable mischief. *Finley v. Bank of the United States*, 11 Wheat., 304; *Hagan v. Walker*, 14 How., 29, 87. (Judge Curtis explains and limits the statement of Marshall, C. J., in the above case, that the prior mortgagee is the necessary party.)

§ 1022. Joint tenants with mortgagor.— A deed of trust by one of four joint tenants, purporting to cover the whole tract of land, passes only the grantor's interest in it, and the other joint tenants are not necessary or proper parties to a bill to foreclose the mortgage. *Stephen v. Beall*, 22 Wall., 329 (§§ 1186-89).

§ 1023. Infant heirs of mortgagor.— A decree of foreclosure affects the equity of redemption of infant heirs of the mortgagor, not made parties to the suit, only to the extent that they must assert their right to redeem within one year after becoming of age. *Kibbe v. Thompson*,* 5 Bias., 226; *Kibbe v. Dunn*,* 5 Bias., 233.

§ 1024. United States owner of equity of redemption.— A mortgagee may have an effectual decree of foreclosure where the United States is the owner of the equity of redemption on a notice given in such manner as the court may prescribe, if the land be not held for government purposes. *Elliot v. Van Voorst*, 3 Wall. Jr., 299. See *Meier v. Kansas Pacific R'y*, 4 Dill., 378. See §§ 1029-30.

XXVI. FORECLOSURE BY EQUITABLE SUIT.

SUMMARY — *Mortgagee's title cannot be questioned in defense*, § 1025.

§ 1025. The mortgagee's title cannot be questioned in defense to a bill for foreclosure. This can only be investigated at law. *Chapin v. Walker*, §§ 1026, 1027.

[NOTES.— See §§ 1028-1038.]

CHAPIN v. WALKER.

(Circuit Court for Arkansas: 6 Federal Reporter, 794-796. 1881.)

STATEMENT OF FACTS.— Bill to foreclose a mortgage. Defendant Brookway in his answer contests the mortgagor's title to the property, and sets up title in a third person under whom he claims a lien, holding a mortgage executed by that person.

§ 1026. *Affirmative relief by a defendant must be sought by a cross-bill, not by an answer.*

Opinion by McCrary, J.

There are several objections to granting the relief sought by the respondent.

1. In the first place, if he were entitled in this case to that relief, it would be necessary for him to seek it by a cross-bill. It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never be granted upon the facts stated in the answer. *Story's Equity Pleading* (Redfield's ed.), § 398a; *McConnell v. Smith*, 23 Ill., 611; *Armstrong v. Pierson*, 5 Ia., 317.

§ 1027. *Mortgagee's title cannot be questioned in a suit for foreclosure. That must be by suit at law.*

2. It is also well settled, that, according to the practice which prevails in the federal courts in a suit to foreclose a mortgage, the mortgagee's title cannot be questioned. The question of title must be investigated at law. In a foreclosure proceeding the court will not inquire what interest the mortgagee has in the

mortgaged premises. 2 Jones on Mortgages, § 1482; Bull v. Meloney, 27 Conn., 560; Palmer v. Mead, 7 Conn., 149; Hill v. Meeker, 23 Conn., 592; Williams v. Robinson, 16 Conn., 517; Dial v. Reynolds, 96 U. S., 340. In the last-named case the supreme court, per Swayne, J., say: "It is well settled that in a foreclosure proceeding the complainant cannot make a person, who claims adversely to both the mortgagor and mortgagee, a party, and litigate and settle his right in that case. Barbour, Parties in Equity, 493, and the cases there cited." In Hill v. Meeker, *supra*, it appeared that the title of the mortgagee to one of several tracts of land embraced in the mortgage was denied. The case was exactly analogous to the one at bar, and the court held that the complainant could take the decree of foreclosure, leaving the parties at liberty to litigate the title in an action at law. The decree in this case will be modified so as to provide that said decree, and the sale thereunder, shall be without prejudice to the right of the respondent Brockway, by proper legal proceedings to contest the legal title to the land described in the answer as claimed by him.

§ 1028. Jurisdiction of equitable suit.—The debt secured by a mortgage is the principal thing, and the mortgage only an incident. The debt being a chose in action, where the mortgagor and mortgagee reside in the same state the assignment of a mortgage to a citizen of another state does not confer jurisdiction of a foreclosure suit upon the United States circuit court. Sheldon v. Sill, 8 How., 441.

§ 1029. When the United States is a party.—A mortgagee may have his remedy by decree of foreclosure and sale in a case where the United States, as a partner in a trading corporation, such as the United States Bank, holds the equity of redemption, upon giving such notice as the court may prescribe. Elliot v. Van Voorst, 8 Wall. Jr., 299, 308.

§ 1030. The United States not holding the land for national uses cannot claim the immunities of a sovereign. And a court having jurisdiction over the land may make a valid decree and sale of it. *Ibid.* See § 1024.

§ 1031. In Louisiana, although there may be a statutory remedy on a mortgage, the jurisdiction of the courts of the United States to enforce it in equity is not ousted. Benjamin v. Cavaroc, 2 Woods, 172.

§ 1032. Notes to beneficiaries in evidence.—In an action by trustees to foreclose a deed of trust, the notes secured by the deed may be read in evidence to the jury, though they are made payable to the beneficiaries, and have not been assigned by the payees to the trustees. Wilcox v. Hunt, 13 Pet., 378, 380.

§ 1033. Parts of mortgaged property that have been sold under a prior mortgage may be omitted in the foreclosure. Sedam v. Williams, 4 McL., 51, 55.

§ 1034. Where no time of payment is specified.—A mortgage which secures a debt already due and specifies no time of payment may be foreclosed at any time. Wright v. Shumway, 1 Biss., 23 (§§ 435-439).

§ 1035. The mortgagor may be estopped by his declarations or agreements from setting up a defense otherwise valid; he may be estopped from taking advantage of a sale made without proper authority in the officer to sell, because no judgment of foreclosure had been entered on the mortgage; his admission that the debt was due; his acts at the sale in forwarding it and waiving matters of form; his delivery of possession to the purchaser, and his standing by and suffering purchasers to improve the property, are sufficient for this purpose. Cromwell v. Bank of Pittsburgh, * 2 Wall. Jr., 569.

§ 1036. No set-off in favor of subsequent mortgagee.—A subsequent mortgagee who is made party to a foreclosure suit for the purpose of cutting off his interests cannot set up a personal claim which he may have against the plaintiff, but he must bring a separate action for that purpose. Bybee v. Hawckett, 13 Fed. R., 649, 656.

§ 1037. Decree for deficiency.—Federal courts, upon ordering a sale for the foreclosure of a mortgage, do not decree the payment by the mortgagor of the balance of the mortgage debt. Noonan v. Lee, * 2 Black, 500.

§ 1038. Fraud in the sale of one of several tracts of land under one contract, but conveyed by separate deeds, cannot be set up as a defense in a suit to foreclose a purchase-money mortgage upon another of such tracts. Hicks v. Jennings, * 4 Fed. R., 855.

XXVII. APPOINTMENT OF A RECEIVER.

SUMMARY — *Grounds for appointment*, § 1039.

§ 1039. A receiver should not be appointed at the instance of a mortgagee, except upon the showing of some very strong special reason for it. The exercise of the power must depend upon sound discretion, and be governed to a great extent by the circumstances of the case. *Morrison v. Buckner*, § 1040.

[NOTES.— See §§ 1041–1045.]

MORRISON v. BUCKNER.

(Circuit Court for Arkansas: *Hempstead*, 442–444. 1843.)

Opinion by the COURT.

STATEMENT OF FACTS.— This is a motion by the complainant to direct the marshal or a receiver to hire out the slaves mentioned in the bill and in the mortgage, on the ground that the mortgaged property is wholly insufficient to pay the debt due the complainant. Substantially the application is for the appointment of a receiver before the hearing; and in such cases the court always reluctantly interferes, and upon some pressing necessity which does not appear to exist on the present occasion.

§ 1040. *Appointment of receiver.*

It seems to be well settled by the English chancery practice that in a case like this a receiver will not be appointed. Lord Chancellor Eldon, in *Berney v. Sewell*, 1 Jac. & Walk., 647, uses the following language: "The rule about receivers is very clear; if a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but take possession." And Chancellor Kent says, "the mortgagee may at any time enter and take possession of the land mortgaged by ejectment or writ of entry." 4 Kent, 164. And Coote, in his *Treatise on Mortgages*, 518, correctly asserts that a mortgagee may at the same time resort to and proceed on all his remedies at law and in equity; he may, for example, at the same moment bring his ejectment, file his bill to foreclose the mortgage, and proceed on the bond and other collateral securities. Dougl., 417; 2 Ves. Sr., 678; 2 Atk., 343, 344. The English cases clearly sustain that doctrine; and to the same effect is the case of *Jackson v. Hull*, 10 Johns., 482. Coote, above referred to (18 Law Lib., 256), also says that, "if the mortgagee having the legal estate neglect to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he cannot obtain such appointment by order of the court, but must proceed to eject the mortgagor." Now without adopting this rule to its fullest extent, it is proper to observe generally, that receivers in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt (*Shotwell v. Smith*, 3 Edw. Ch., 588), or that there is imminent danger of the waste, removal or destruction of the property. There must be some very strong special reason for it. 16 Ves. Jr., 59; 1 Powell on Mortgages, 295, 296, and cases there cited. The exercise of this power must depend upon sound discretion, and be governed to a great extent by the circumstances of each particular case (*Verplank v. Caines*, 1 Johns. Ch., 58); but I find no difficulty in saying that such an appointment should not be made where there is, as in this instance, another adequate remedy already pointed out, and where imperative reasons do not exist for this summary interference before the hearing of a cause. There is not such a showing here as would justify this sort of interference, and the motion is, therefore, denied.

§ 1041. When premises are already in hands of a receiver.— A receiver, already appointed on the application of a junior mortgagee, will not be interfered with while such mortgagee is in actual possession and administering the property under the directions of that court, in proceedings by a prior mortgagee commenced in another court. *Young v. Montgomery & Eufaula R. Co.*, 3 Woods, 606, 620.

§ 1042. No appointment before answer or default.— A receiver will not be appointed in a suit to foreclose a legal mortgage until an answer has been filed, unless the defendant is in default for not answering. *Oliver v. Decatur*, 4 Cr. C. C., 458.

§ 1043. After appointment of assignee.— An assignee in bankruptcy is entitled to collect the rents and profits of mortgaged land until the mortgagee takes possession. A rent so collected they hold for the benefit of the general or unsecured creditors. *In re Bennett*,* 12 N. B. R., 257; *Foster v. Rhodes*,* 10 N. B. R., 523.

§ 1044. Receiver to collect rents and pay interest.— Under some circumstances a receiver may be appointed to receive the rents and to keep down the interest on an incumbrance. *Latimer v. Moore*,* 4 McL., 110.

§ 1045. A purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by order of the court, it would, in that case, pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale. He can make a valid sale or mortgage of the premises to another. *Koontz v. Northern Bank*, 16 Wall., 196, 201. See RECEIVERS.

XXVIII. STRICT FORECLOSURE.

SUMMARY — *Must allow time for redemption*, § 1046.

§ 1046. A time for redemption is always allowed in a decree for a strict foreclosure. A decree which does not find the amount due nor allow any time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot be sustained unless authorized by statute. Although the usual time of redemption allowed is six months, yet it is really within the discretion of the court as to the length of it; but the discretion does not extend to withholding it entirely. *Clark v. Reyburn*, §§ 1047-1049.

[NOTES.— See §§ 1050-1053.]

CLARK v. REYBURN.

(8 Wallace, 818-824. 1868.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— This is an appeal in equity. Reyburn is the complainant. Florinda Clark and Few only were made defendants by the original bill. She answered. Few filed a plea and demurred. On the 5th of May, 1862, leave was given to the complainant to amend his bill, and leave was given to Mrs. Clark to withdraw her answer. It had been filed as her answer in a former case, and was refiled in this case. The court ordered it to be restored to the files from which it had been taken. The complainant thereupon filed an amended bill whereby Jeremiah Clark was brought into the case as a defendant.

The amended bill states the following case: That on the 30th of April, 1859, Jeremiah Clark executed to the complainant his promissory note for \$5,250, payable twelve months from date, with interest after maturity at the rate of twenty-five per cent. per annum. On the same day Clark and wife executed to the complainant a mortgage upon the real estate therein described conditioned to secure the payment of the note. The mortgage was acknowledged

by the grantors and duly recorded. Clark failed to pay the note at maturity. The complainant, on the 5th of October, 1861, filed his bill of foreclosure against the same parties who are defendants in this suit. Before the hearing the bill was dismissed as to Mrs. Clark and Few. It was adjudged and decreed that there was due from Jeremiah Clark \$8,565.77; that he should be forever barred and foreclosed of any interest in the mortgaged premises, and that they should be sold by the marshal and the proceeds applied to the payment of the amount found due. On the 27th of December, 1861, the marshal sold the premises to the complainant for \$7,000, and on the 23d of that month executed to him a deed for the property. That there was still due to the complainant upon the decree the sum of \$1,884.25, for the payment of which the interest of Florinda Clark in the mortgaged premises is chargeable. That the defendant Few, under a deed from Clark and wife to him in trust, claims to have the interest of a trustee in the property, which interest accrued subsequently to that of the complainant, and is inferior and subject to his mortgage. The prayer of the bill is for a decree of foreclosure as to the interest of Florinda Clark and Few in the mortgaged premises and for general relief.

Few filed an answer which sets forth that about the 12th of January, 1860, Clark and wife executed to him, in trust, a deed for the same premises described in the mortgage; that the persons for whose benefit the deed was made were Florinda Clark, the wife of Jeremiah Clark, and their children, then born or thereafter to be born, and the lawful heirs of such children, with certain limitations as to the further disposition of the property as set forth in the deed, a copy of which it is stated is annexed to the answer of Mrs. Clark to the amended bill in this case. As to all the other matters set forth in the bill, he avers that he has no knowledge, and he disclaims all interest in the matter in controversy, except as such trustee. He prays that the court will adjudge fairly between the parties in interest and that he may be dismissed with costs. Clark and wife failed to answer. The trust deed referred to in the answer of Few, as made a part of the answer of Mrs. Clark, is not in the record. No replication was filed by the complainant, and no testimony was taken upon either side. The bill was taken *pro confesso* as to Clark and wife, and the case stood upon the bill and answer as to Few. The court decreed that all the defendants should be forever barred and foreclosed of their right of redemption in the mortgaged premises. The decree does not find either the fact or the amount of the alleged indebtedness. It is silent upon the subject. The record shows no proceeding in relation to it. No time was given either to Mrs. Clark or her trustee within which to pay and redeem. The foreclosure was unconditional, and was made absolute at once. The appeal is prosecuted to reverse the decree.

§ 1047. *The sale of mortgaged land under foreclosure does not affect the equity of redemption when held by other persons who are not parties to the suit.*

In our view of the case it will be sufficient to consider one of the numerous objections insisted upon by the counsel for the appellants. The sale and conveyance by the marshal transferred the entire interest of Jeremiah Clark in the mortgaged premises to Reyburn, but did not in anywise affect the equity of redemption which had been vested in Few by the trust deed of Clark and wife to him. *Childs v. Childs*, 10 Ohio St., 339. The equity of redemption would have been barred and extinguished by the decree which ordered the premises to be sold if the proper parties had been before the court when it was made. The bill in that case having been dismissed as to Mrs. Clark and

Few, the proceedings left their rights in full force. They were before the court in the case now under consideration, and the trust estate was then for the first time liable to be affected by its action. If there was a balance of the debt secured by the mortgage still unpaid, they were properly proceeded against, and the complainant was entitled to relief. The question to be considered relates to the character of the decree.

§ 1048. *A decree of strict foreclosure in the first instance cannot be permitted unless it is allowed by special statute.*

Can a decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained? The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable and alienable like other interests in real property. 1 Powell on Mortgages, 252; 2 Greenl. Cruise, 128. As between the parties to the mortgage, the law protects it with jealous vigilance. It not only applies the maxim, "once a mortgage always a mortgage," but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. 2 Greenl. Cruise, 77, 78; Spence's Eq. Jur., 601-603. After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute.

In this country the proceeding in most of the states, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract," within the meaning of the provision of the constitution upon the subject. *Bronson v. Kinzie*, 1 How., 311 (Consr., §§ 1650-55); *Williamson v. Doe*, 7 Blackf., 13. At the date of the execution of this mortgage the act of the territorial legislature of Kansas of 1855, "concerning mortgages," was in force. It directed that in suits upon mortgages the mortgagee should recover a judgment for the amount of his debt, "to be levied of the mortgaged property," and that the premises should be sold under a special *fiери facias*. But it also provided that nothing contained in the act should be so construed as to "prevent a mortgagee or his assignee, or the representative of either, from proceeding in a court of chancery to foreclose a mortgage according to the course of proceeding in chancery in such cases." Stats. of Kansas of 1855, p. 509. This gave to the complainant in the case before us the option to proceed in either way. He elected to file a bill in equity. No rule of practice bearing upon

the subject, established by the court below, has been brought to our attention.

The ninetieth rule of equity practice adopted by the supreme court directs that where no rule prescribed by this court or by the circuit court is applicable, the practice of the circuit court shall be regulated by the practice of the high court of chancery in England, so far as it can be applied consistently with the local circumstances and convenience of the district where the court is held. The equity spoken of in the process act of 1792 is the equity of the English chancery system. *Robinson v. Campbell*, 3 Wheat., 212; *Boyle v. Zacharie*, 6 Pet., 648. Spence says: "At length, in the reign of Charles I., it was established that in all cases of mortgages, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, *unless payment were made by a short day to be named.*" Equity Jur., 603. The settled English practice is for the decree to order the amount due to be ascertained and the costs to be taxed; and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but in default of payment within the time limited, "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises." 2 Daniel's Ch. Prac., 1016; 1 Seton on Decrees, 346. We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent, with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the chancellor, and to be regulated by the circumstances of the particular case; but he nowhere intimates that such an allowance could be entirely withheld. *Perine v. Dunn*, 4 Johns. Ch., 140. The practice in Illinois is in conformity to these views. *Johnson v. Donnell*, 15 Ill., 97. In the light of these authorities we are constrained to hold the decree in the case before us fatally defective.

§ 1049. *A decree of foreclosure against the trustee does not bar the cestuis que trust.*

There is another point upon which we deem it proper to remark before closing this opinion. It was urged by the counsel for the appellants, as a further ground of reversal, that the children of Clark and wife, who are alleged to be beneficiaries under the trust deed, were not before the court. It does not appear by anything in the case that there were such children *in esse*. If the facts were as alleged, it is clear that they should have been made parties. Otherwise their right to redeem could not be taken away by the decree. A decree against the trustee alone does not, in such a case as this, bind the *cestuis que trust*. *Collins v. Lofftus*, 10 Leigh, 5; *Calvert on Parties*, 121.

The decree is reversed, and the cause will be remanded to the court below for further proceedings in conformity to this opinion.

§ 1050. *Illinois.*—The practice of strict foreclosure does not prevail in Illinois; whether the foreclosure be at law or in equity, the practice is to order a sale. *Russell v. Topping*, 5 McL., 194.

§ 1051. *Sale where strict foreclosure is asked for.*—It is competent for a court of equity to decree a foreclosure sale although a strict foreclosure be prayed for. Any appropriate relief not specifically prayed for may be granted under the prayer for general relief. *Sage v. Central R. Co.*, 9 Otto, 334 (§§ 1874-80).

§ 1052. *Whether debt is extinguished.*—A foreclosure of a mortgage on land, without a sale of the land, that is, what is called a strict foreclosure, is an extinguishment of the debt,

provided the premises are of sufficient value to pay the debt. But this doctrine only applies to a case of strict foreclosure. It does not apply to a case where the mortgagee, instead of entering into possession of the premises by way of strict foreclosure, either on a decree of strict foreclosure, or by virtue of a power in the mortgage to that effect, enters for the purpose of sale. *Sagory v. Wissman*, 2 Ben., 240, 247.

XXIX. DECREE OF SALE.

§ 1053. **Void for indefiniteness.**—A decree of foreclosure will be held void for indefiniteness where it cannot be ascertained to what land it refers. *Kibbe v. Thompson*, *5 Biss., 226.

§ 1054. **Presumption of jurisdiction.**—Wherever a judgment is given by a court having jurisdiction of the parties and of the subject-matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved. *Erwin v. Lowry*, 7 How., 172, 181.

§ 1055. **Judgment attacked collaterally.**—Where a foreclosure suit is one which falls within the cognizance of a court of general jurisdiction, and a petition or bill calling for the exercise of the power of the court is filed, and service of process made, which the court finds or holds sufficient, and renders judgment, such judgment, though it may be reversed on error or appeal, is not void when attacked collaterally, for reason of defects in the petition or the mode of service or return of the officer. *Salisbury v. Sands*, 2 Dill., 270, 277.

§ 1056. Where a decree of foreclosure is rendered, and a sale of property has been made thereunder, it cannot be attacked collaterally, and the title thus acquired overthrown, except on the ground that the court rendering the decree had no jurisdiction. If it had jurisdiction, no irregularity and no error in the exercise of such jurisdiction can affect the title of a purchaser under the decree, even though the error or irregularity may be such that a revisory court on appeal would have reversed the decree. *Smith v. Pomeroy*, 2 Dill., 414, 419.

§ 1057. **A decree of foreclosure and sale is final upon the merits.**—Subsequent proceedings executing the decree are a mere mode of enforcing the rights of the creditor. If a sale be made under such decree, the defendant not having appealed from it, the title of the purchaser would not be overthrown or invalidated even by a reversal of the decree. *Whiting v. Bank of United States*, 13 Pet., 6, 15.

§ 1058. **Where a statute requires notice to non-residents to be given by publication, and a judgment or decree is passed affecting the property subject to the jurisdiction of the court, without the publication of the required notice, the decree or judgment, though erroneous, is not void; for, of itself, notice to non-residents contributes nothing to the court's jurisdiction.** A purchaser at a sale under such a decree would take a valid title, although the decree or judgment might afterwards be reversed for its errors in a higher court, and notwithstanding the errors of the court might be palpable upon the record. *Fraser v. Prather*, *1 MacArth., 206, 215.

§ 1059. **Recital of service.**—A recital in a decree of foreclosure that service had been made upon a defendant must, after the lapse of thirty years, stand as true unless there is something upon the face of the record which shows that such was not the fact. *Riggs v. Collins*, 2 Biss., 268.

§ 1060. **Presumption of jurisdiction after long time.**—After a long lapse of time since the decree was made, the court will presume, against parties calling the decree in question, that every act and thing was done, necessary to give jurisdiction and authority to the court pronouncing the decree, which the record does not show was not done—particularly when the record produced shows that all of the record and proceedings have not been produced. *Kibbe v. Dunn*, *5 Biss., 283.

§ 1061. **If the mortgagee has received payments upon collateral securities or rents and profits from the mortgaged premises, an accounting to ascertain the sum due should precede the decree.** *Parlin v. Stone*, 1 McC., 443 (§§ 390-392).

§ 1062. **Election to consider whole debt due.**—When by the terms of the mortgage the mortgagee may, upon a default, elect to consider the entire amount of the mortgage debt as due, and he notifies the mortgagor of his election so to consider it before filing a bill for foreclosure, he is entitled to a decree for the full amount, although only a part of the debt is due. *Noonan v. Lee*, *2 Black, 500.

§ 1063. **Final decree.**—A decree of sale under a mortgage is such a final decree that an appeal will lie. *Ray v. Law*, 3 Cr., 179.

§ 1064. **A stipulation in a mortgage for attorneys' fees is neither a penalty nor a forfeiture.** A reasonable attorney's fee will be enforced, but the amount should be left to the determination of the court upon competent evidence, so that the allowance should in all cases be reasonable. *Danforth v. Charles*, *1 Dak. T'y, 235.

XXX. FORECLOSURE SALES UNDER DECREES OF COURT.

SUMMARY—*Inverse order of sales*, §§ 1065, 1066.—*Confirmation of sale*, § 1067.—*Understanding in fraud of third persons that mortgagor might redeem*, § 1068.—*Effect of setting aside sale*, § 1069.

§ 1065. In Illinois, where successive conveyances of distinct parcels of mortgaged lands have been made to different persons, the rule is that the mortgagee upon a foreclosure shall sell such parcels in the inverse order of the mortgagor's conveyances. *Orvis v. Powell*, §§ 1070-1072.

§ 1066. The courts of the United States follow the decisions of the state courts on this question. *Ibid*.

§ 1067. No time passes until the sale is confirmed. But when the sale is confirmed, if there are no equitable circumstances, and no statute to change the general rule, the rights of the purchaser relate back to the date of the sale, so as to entitle him to the rents and profits for the intermediate period. *Lathrop v. Nelson*, §§ 1073, 1074.

§ 1068. A foreclosure sale will not be set aside, at the instance of the mortgagor, for the reason that there was an understanding between him and the purchaser in fraud of third persons that the mortgagor might redeem from the sale. *Randall v. Howard*, §§ 1075, 1076.

§ 1069. When a foreclosure sale is set aside the satisfaction of the mortgage debt brought about by the sale is vacated. *Fort v. Roush*, § 1077.

[NOTES.— See §§ 1078-1090.]

ORVIS v. POWELL

(8 Otto, 176-179. 1878.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is a suit in chancery to foreclose a mortgage executed by Henry H. Walker and Samuel I. Walker to Nathan Powell, the appellee, covering forty acres of land in Cook county, Illinois. The mortgage was given April 8, 1869, to secure the payment of the sum of \$40,500. The amount due at the date of the decree had been reduced by payments to \$14,853.33. As they were made, releases had been executed as to part of the land; and before the suit was brought, all the land had been conveyed, in distinct parcels, at different times, to various parties, and among them to Emerson G. Orvis, the appellant. The court, in its decree, ordered that these parcels should be sold separately, and in the inverse order of the dates of the conveyances made by the Walkers, until the amount due, as ascertained by the decree, was satisfied, so that the parcels first sold should be the last subjected to the satisfaction of the debt. The decree made no provision for redemption after sale, as required by the statute of Illinois.

Three principal errors are assigned here: 1. That the decree should have subjected all the property on which the mortgage was a lien equally, and without regard to priority of conveyances by the mortgagors. 2. That the court erred in determining the order of these priorities. 3. That the decree made no provision for redemption after sale.

§ 1070. *Rule of inverse order of sales in Illinois.*

As regards the question raised by the first of these assignments, we are relieved from any discussion of what is the true equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the state where the land lies. In a case where no statute of the state makes provision on the subject, and no decisions of the state court have established a rule, it would be our duty to inquire what is the doctrine of the equity courts on the subject.

§ 1071. *It is proper for a circuit court to follow the decisions of the courts of the state on questions affecting the title to lands in those states.*

The supreme court of the state of Illinois having, in *Iglehart v. Crane*, 42 Ill., 261, announced on very full consideration the rule which was followed by the circuit court, there was no error in that court in following it. In regard to the order in which the parcels of the land are subjected to sale, it is to be observed that no one can complain but Orvis, because he is the only party who has appealed from the decree.

So far as Orvis is concerned, the only error assigned which seems worthy of notice is that block 18 should have been subjected to plaintiff's debt first, because Walker, the mortgagor, was still owner of an equitable interest in it. This does not appear by any written instrument, but so far as it is established at all, it is by Walker's parol testimony. It thus appears, however, that Colbaugh and Powell held the title in trust to secure money advanced by them on a sale which had been rescinded, and it was by virtue of this rescission that Walker had any interest in it. What the amount of the sum is for which Colbaugh and Powell held it is not shown, nor is the value of the lot. But appellant's witness, Walker, states that the debt due these parties is more than the lot is worth, after paying some liens on it prior to theirs. As the title of Walker had passed from him to this lot long before that claimed by Orvis, we do not believe that the court was bound to prosecute an inquiry, through all the ramifications of Walker's dealing with this lot, dependent solely on conflicting oral testimony, to ascertain if Walker had a possible ultimate interest in it. Nor does it consist with the general course of equity practice to order a public sale of a very doubtful contingent interest, the value of which is incapable of estimation, and where any price given might do great injustice to the purchaser or to the party whose interest is sold, and which would lead to further expensive litigation. Besides, if in the end appellant has to pay any part of this mortgage, there is nothing to prevent his pursuing this equity of Walker's so far as may be necessary to indemnify him in an independent suit, where that matter may be fully investigated without further delaying the present plaintiff. On the whole, we see no error to the prejudice of appellant in the order of sale adopted by the decree.

§ 1072. *In Illinois time must be allowed for redemption in cases of a sale by foreclosure of a mortgage.*

But we decided in *Brine v. Insurance Co.*, 96 U. S., 627 (§§ 800-804, *supra*), that a decree of foreclosure in the circuit court of the United States for the district of Illinois, which gave no time for redemption after the sale, was erroneous and must be reversed. The larger part of the briefs of several counsel in this case is devoted to a consideration of the question there decided. It is sufficient to say that we are satisfied with the soundness of the opinion given in that case, and it must govern the one now before us. The result of those considerations is, that the decree of the circuit court ascertaining the sum due the plaintiff, and fixing the order in which the various parcels of land shall be sold, and in fact all of said decree, will be affirmed, except so far as it fails to give a time for redemption; and the case will be remanded to that court with directions to amend the decree so as to allow redemption of each parcel which may be sold, as provided by the statute of Illinois on that subject. As appellant had to take this appeal to obtain correction of the error in this respect, he must recover costs. (a)

LATHROP v. NELSON.

(Circuit Court for Missouri: 4 Dillon, 194-199. 1877.)

STATEMENT OF FACTS.—Nelson held a note on a bankrupt for \$8,000, which was secured by mortgage. The property was sold under the direction of the district court, the assignee in bankruptcy and the trustee acting in concert, and was bought by Nelson for \$6,200, which was credited on his mortgage debt. The assignee collected \$952.55 rents of the property, which accrued after the sale and before its confirmation by the court. This suit was brought by Nelson, claiming these intermediate rents, against the assignee, who brought up the case by writ of error after an adverse decision.

Opinion by DILLON, J.

The question presented is, which of the parties, under the circumstances, is entitled to the rents and profits of the estate for the period intervening between the date of the sale and the date of the confirmation? The order of sale was silent in this respect. The contest is between the mortgagees, who afterwards became purchasers of the mortgaged property for less than their debt, and the assignee in bankruptcy, representing the unsecured creditors of the bankrupt. It is not shown that the delay in the confirmation is attributable to the acts or conduct of the plaintiffs below.

§ 1073. *No title passes until the sale is confirmed, but its confirmation relates back to the sale.*

It is true that no title passes until the sale is confirmed. *Williamson v. Berry*, 8 How., 546; *In re O'Fallon*, 2 Dill., 548. But when the sale is confirmed, if there are no equitable circumstances, and no statute to change the general rule, the rights of the purchaser relate back to the date of the sale, so as to entitle him to the rents and profits for the intermediate period. Such is the settled doctrine of the English courts. The state of the decisions in England on this subject is well shown by the judgment of Lord Chancellor Sugden, in *Vesey v. Elwood*, 2 Dru. & War., 74. He attempts to reconcile what has been sometimes supposed to be a conflict in Lord Eldon's views, in *Ex parte Minor*, 11 Ves. Jr., 559, and in *Anson v. Towgood*, 1 Jac. & Walk., 617, and adds: "It appears to me that these cases are fairly distinguishable; and if not, that *Ex parte Minor* is not the case which ought to be followed." . . . "The court has great power over these contracts [sales by masters under decrees], and it might feel itself at liberty to throw a loss by fire, before the confirmation of the report, upon the sellers," as in *Ex parte Minor*. Such a power is not inconsistent with the doctrine that when the chancellor's power to open a sale is not exercised and the sale is confirmed, that the rights of the purchaser relate back to the time of the bidding. *Trefusis v. Lord Clinton*, 2 Sim., 359. Usually, the doctrine of relation back works justly and equitably. The bidder must be ready at all times to keep his bid good. Frequently he must pay the amount thereof at the time the bid is made, and when this is the case he loses, of course, the use of his money. The time of the confirmation is uncertain. If he loses interest or the advantageous use of his money, he should have the rents and profits as compensation. The application of this rule does not, in such cases, injure the owner, as it will enhance the price which purchaser can afford to pay. There may be cases where the application of the general rule above stated would be inequitable. In such an event, the rights of the parties in interest can be settled on some other basis.

The English doctrine on this subject seems to be supported by the weight of

American authority (Taylor v. Cooper, 10 Leigh, 317; Wagner v. Cohen, 6 Gill (Md.), 102); but the decisions are conflicting. Armstrong v. McClure, 4 Heisk. (Tenn.), 80; *In re* Bledsoe, 12 N. B. R., 402, affirmed by the circuit court, January, 1875. Without intending to assert that there is any invariable rule on this subject which will apply in all cases, my judgment is that, under the facts here presented, and as between these parties, the doctrine of relation back is just in its operation, and the plaintiffs below are entitled, as against the assignee in bankruptcy, to the rents which accrued intermediate the sale and the confirmation.

§ 1074. *The law of Missouri on the subject of judicial sales and intermediate rents and profits.*

This conclusion is not in conflict with any statute of the state of Missouri. On the contrary, the statutes of Missouri, prior to the act of May 15, 1877, give no redemption from sales by a trustee under a power in the deed of trust. The trustee alone might have made the sale, and no confirmation by the bankruptcy court would have been necessary. In this event the purchaser would have been entitled to immediate possession. As the mortgaged estate was not worth the debt secured by the mortgage, the bankruptcy court, or the assignee, as it turned out, had no real concern in the matter; and their intervention should not have the effect to deprive the mortgagee of substantial rights given him by the mortgage and the laws of the state. "The assignee in bankruptcy is not required," says the supreme court of the United States, "to take measures for the sale of mortgaged property unless its value is greater than the incumbrance. His duties relate chiefly to the unsecured creditors, and he need not trouble himself about incumbered property unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the general estate." *McHenry v. La Societe Francaise*, October term, 1877 (5 Otto, 58). The judgment below is affirmed.

RANDALL v. HOWARD.

(2 Black, 585-590. 18C2.)

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—This is a bill in equity filed in the circuit court of the United States for the district of Maryland by the appellants against the appellee, who interposed a demurrer, which was sustained by the court below, and an appeal was taken to this court. The bill states substantially that the complainant, John Randall, Jr., was, on the 6th of April, 1854, largely indebted to the defendant, to secure which indebtedness both of the complainants executed a mortgage on lands in Cecil county, Maryland, which lands were held in trust for the complainant Letitia's benefit for life. That soon after the mortgage matured the defendant filed his bill in the Cecil county circuit court for foreclosure and sale; and, on answer filed, a decree was passed on the 15th of October, 1855, for the sale of the mortgaged lands, time being given until 9th of October, 1856, to bring the money into court. That in April, 1856, in order to defeat an attempt (charged to be fraudulent) by other parties to obtain possession of part of the lands mortgaged, it was agreed that the defendant, with the assent of the complainants, should petition the court for an immediate sale, which was done and the time for sale changed, and a friendly arrangement was made with the defendant that he was to buy the property ostensibly for himself, but was really to hold it in security for the decreed indebtedness, upon

the satisfaction of which the purchase was to inure to the benefit of the complainant Letitia. That the sale took place on 14th October, 1856, and the defendant was the purchaser (the "friendly arrangement" continuing), and that the property sold for less than its value on account of the general understanding that the sale was merely a formal one, and not meant to divest the estate of the complainants. That the sale was ratified without objection from the complainants, under the assurance from the defendant that the property should, notwithstanding the ratification, stand as a security for the amount decreed, which was to be paid by instalments. That, to perfect the form of sale and to make it conform to the ostensible title of the purchaser, the complainants rented the property of the defendant. That, having obtained an apparent title, the defendant has fraudulently determined to act as if he was the real owner, and is claiming the right to sell, and that, through threats, he extorted an agreement from the complainants, which was framed and meant to involve them in the recognition of his title. That the defendant, in furtherance of his object to oppress, has, by legal, though irregular, process, through the sheriff of Cecil county, dispossessed the complainants. The prayer of the bill is to restrain the defendant from disposing of the lands, and for the sale of so much of said lands as may be necessary to pay off the defendant according to the understanding prior to the purchase, and that the residue of the lands be conveyed to Mrs. Randall. There is also a prayer for general relief.

There are two questions presented by this record: 1. Upon the facts stated in this bill, are the complainants entitled in equity to the relief prayed for? 2. Has this court jurisdiction?

§ 1075. *Understanding in fraud of third persons that the sale should not be conclusive. Agreement within the statute of frauds.*

The statements of this bill are vague and uncertain, frequently argumentative, and very rarely plain and direct. The whole bill lacks definitiveness. Agreements, friendly arrangements, understandings and fraudulent devices are freely spoken of, but the character of the agreements and the nature of the devices we do not learn. The bill seeks to establish a trust for the benefit of Mrs. Randall, growing out of certain proceedings in the circuit court of Cecil county, Maryland. Are the complainants in a situation to enforce the trust, if one is established? We think not.

The following allegations contain the charges relied on in the bill to establish the trust: "And your orator and oratrix state and charge that, about April, in the year 1856, in consequence of a fraud being attempted against your complainants, through devices involving the possession of part of the land mortgaged as aforesaid, it was deemed proper, for counteracting said fraud, that, on a petition to be filed by said Howard in the case of said decree, your complainants should assent to a sale (under friendly arrangements between said Howard, and then rendering such sale merely formal and nominal), taking place forthwith, instead of being deferred to the period (the next October) provided by the decree. And your complainants aver that, under their answer to such petition, which was filed, the time for the sale was, by decree, thus changed, and under the friendly arrangement and understanding aforesaid, and which was to the effect that said Howard was to become purchaser of said mortgaged property at a sale under the decree, but really to only hold it for securing the payment of the mortgage and decreed indebtedness as aforesaid, upon satisfying which the property, it was understood, should inure, as provided by the terms of the said trust, for the benefit of your oratrix."

These allegations, stripped of their indefiniteness and vagueness, mean simply this: that the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgage lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property. A fraudulent agreement was entered into to defeat, as is charged, "a fraud attempted against the complainants." If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it. A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim "*in pari delicto potior est conditio defendentis*" must prevail. It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Story's Eq., vol. 1, sec. 298; Balt. v. Rogers, 2 Paige, 156; Wilson v. Watts, 9 Gill, 356.

There are several other grounds decisive against the relief prayed for. We will, however, notice but one other. There is no averment in the bill that the defendant ever agreed in writing to hold the lands in trust for Mrs. Randall. In fact it is manifest from the whole bill that the agreement was a mere matter of conversation between the parties, and that no memorandum in writing was ever made. Inasmuch as it concerns an interest in lands, and is in parol, it is void by the statute of frauds, and appearing as it does on the face of the bill, the defense of the statute of frauds may be taken advantage of on demurrer. Walker v. Locke, 5 Cushing, 90.

§ 1076. *The United States circuit court has not jurisdiction to set aside a sale made by a state court in a suit between the same parties.*

2. Has this court jurisdiction? A conflict of jurisdiction is always to be avoided. Mr. Justice Grier, in Peck v. Jenness, 7 How., 624, says: "That it is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one if they dare to proceed in the other." The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil county circuit court, a court of general jurisdiction, having complete control of the parties and of the subject-matter of controversy. It seeks to annul a sale of lands made by virtue of a decree of the Cecil court, sitting as a court of equity in a cause depending between these same parties; to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession; to invalidate his title, and to have the mortgaged property resold. This is a direct and positive interference with the rightful authority of the state court. If there was error in the proceedings of the court, a review can be had in the appellate tribunals of the state. If, as is charged, the decree is sought to be perverted and made the medium of consummating a wrong, then the court, on petition or supplemental bill, can prevent it. If, as appears by the proceedings, the surplus money arising from the

sale is still undisposed of, then the whole case is under the control of the court, and no supplemental bill even is needed to prevent the wrong. The decree dismissing the bill is affirmed.

FORT *v.* ROUSH.

(14 Otto, 142-145. 1881.)

APPEAL from the Supreme Court of the Territory of Montana.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This record shows that, in 1871, Fort, the appellant, sued the appellees in the district court of Lewis and Clarke county, Montana territory, to foreclose a mortgage executed by them to him, and obtained a decree finding that there was due on the mortgage debt \$2,895, and ordering a sale of the property. Under this decree an order of sale was issued and the property sold, part to Isaac W. Stoner, part to Frederick Reece, and the remainder to Fort himself. After this sale, the appellees filed the present bill in the same court to set aside the sales on account of alleged fraudulent conduct of Fort. Under this bill the sales to Stoner and Reece were in all respects confirmed, but that to Fort set aside. Roush and wife then filed an amended and supplemental bill, in which they sought to charge Fort with the value of the use and occupation of the property whereof he was in possession under his purchase, and with alleged damages for waste. In this bill the claim is stated as follows: "And the said plaintiffs say that by reason of the premises the said Fort is chargeable with the damage done to said premises, with the value of the foregoing use and occupation, and the amount of said rents and profits, and that the same should be set off against any balance that may be due upon the said decree."

Fort in his answer set forth the amount he claimed to be due on his decree after the amount paid by Stoner and Reece had been credited thereon, and asked that, as the sale to him had been set aside, he might have a revival of his decree for the balance that should be found his due. On motion of Roush and wife, this part of the answer was stricken out, and leave was refused Fort to make such amendments as seemed to be necessary to meet that part of his case. The case was then sent to a referee to ascertain and report the amount for which Fort was chargeable on account of his use and occupation, and for damages by waste while in possession. His request to have the referee directed to ascertain the amount due him on his decree was refused. The referee reported, and exceptions were taken by Fort. These exceptions were in part sustained and in part overruled, the result being a personal judgment against Fort and in favor of the appellees for \$1,836.31, with interest from June 30, 1877. The case was then taken to the supreme court of the territory on appeal, where the judgment of the district court was modified by striking therefrom the sum of \$618.51, but in all other respects affirmed. From this action of the supreme court the present appeal has been taken. The amount with which Fort was charged by the supreme court was exclusively for the value of the use and occupation of the property purchased by him while he was in possession under the sale, and a small amount for damages done to the freehold. While the amount charged seems to us to be somewhat large, we have on the whole concluded not to disturb the judgment on that account. Another reference might reduce the amount somewhat, but the error in that particular is not so manifest as to make it proper for us to interfere with what has been

done by two courts below. The refusal of the court, however, to apply the amount found due towards the satisfaction of the mortgage debt, we think, was erroneous. The very object of the bill of Roush and wife, as amended, was to have that done. If we understand correctly the position of the court below upon this part of the case, it is that, as Fort had not proceeded under section 286 of the Codified Statutes of Montana, and caused his decree to be revived after the sale to him had been set aside, the satisfaction growing out of the sale still remained in force, and there was no outstanding mortgage debt on which the application could be made. This we do not think is the law. The statute referred to is as follows:

"Sec. 286. If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid; and any other or after-acquired property, rents, issues or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt: *Provided*, that no property of such debtor sold *bona fide* before the filing of such petition shall be subject to lien of said judgment: *And provided further*, that notice of the filing of such petition shall be made by filing a notice thereof in the recorder's office of the county where such property may be situated, and that said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest."

§ 1077. *When a judicial sale is set aside the satisfaction of a judgment affected by it is vacated.*

The question here is not whether Fort shall have execution of his decree by a resale of the property bought by him, but whether the mortgage debt, as a debt, still remains satisfied by reason of the former sale. When the sale was set aside, and Roush and wife got back their land, the satisfaction of the debt caused by the sale was vacated. Fort received no money on account of his purchase. He simply took the land as and for money. So long as he kept the land the satisfaction was effectual, but when the sale was set aside and he was compelled to give back the land, the case stood, in respect to the satisfaction of the debt, precisely as it would if Roush had demanded back money he had once handed Fort to be applied on the debt, and Fort had acceded to his request. We do not decide whether, if Fort asks execution of his decree for any balance that may remain his due, he may not be compelled to proceed under the statute, and get his decree revived; but we are clearly of the opinion that, for all the purposes of this suit, the satisfaction of the mortgage debt, brought about by the sale to Fort, was vacated when the sale was set aside, and that Roush and wife cannot in this suit have a personal judgment against Fort, except for any balance that may be found due them for rents, etc., after the mortgage debt has been satisfied.

We are unable to determine from this record what amount is actually due on the original decree. The personal judgment against Fort will, therefore, be set aside and reversed, and the cause remanded with instructions to take an account of the amount due Fort on his original decree, and apply the amount which has been ascertained to be due from him for rents, profits and damages towards the satisfaction thereof, rendering a personal judgment against him only for any balance of the ascertained rents that may remain after the mortgage debt and costs in the original suit for foreclosure have been actually satisfied.

§ 1078. *Effect on notice of change of name of newspaper.*—Where a decree directed notice of a sale to be published in a certain newspaper, which was, after the decree and before the notice, merged in another paper and its name changed, and on application to the judge at chambers he directed the sale to be advertised in the paper called by its new name, the publication of the notice in that paper in accordance with such order was held valid and sufficient. *Sage v. Central R. Co.*, 9 Otto, 834 (§§ 1674-80).

§ 1079. *Provision for payment of earnest money.*—It is proper to provide in a decree, that, in case any other person than the mortgagee becomes purchaser at the sale, he shall be required to pay at once, in cash, a part of the bid as earnest money; and no objection can be taken that the same requirement is not made of the mortgagee. *Ibid.*

§ 1080. *Mill property must be sold as a unit.*—Generally land and buildings used as a mill, with the machinery therein and the water-power connected with the same, constitute a unit, and under a mortgage covering such property the whole should be sold together without any special provision therefor, because the parts could not be sold separately without a large depreciation. *Hill v. National Bank*,* 7 Otto, 450.

§ 1081. *Right to have the whole sold.*—The mortgagee of lands has the right to have the whole sold to satisfy the mortgage, and cannot be compelled to apportion the debt among the different purchasers of the mortgaged lands. *Hughes v. Edwards*, 9 Wheat., 439 (§§ 919-23).

§ 1082. *Where two persons have a lien on the same property to secure different debts, and one of them has, also, a lien upon other property, a court of chancery will direct such property first to be sold in satisfaction of the separate lien before that which is common to both liens.* *Russell v. Howard*,* 2 McL., 439.

§ 1083. *Adjournment of sale.*—The officer making the sale may, in the exercise of a sound discretion, subject to the control of the court, adjourn the sale from time to time. *Blossom v. Railroad Co.*, 3 Wall., 196.

§ 1084. *A bidder at a foreclosure sale whose bid has never been accepted, the sale having been adjourned and a settlement made so that a sale became unnecessary, cannot ask for a confirmation of the sale to him. The bid, though it be the highest, does not amount to a contract until it is accepted.* *Ibid.*

§ 1085. *Purchaser entitled to possession.*—The foreclosure of a mortgage will cut off subsequent judgment liens, and the purchaser at the mortgage sale is entitled to possession as against a receiver appointed in a proceeding to enforce the judgment liens. *Howard v. La Crosse & Milwaukee R. Co.*, Woolw., 49, 56.

§ 1086. *Writ of assistance against parties and privies.*—It is a rule in equity that the power of a court of chancery to put a purchaser of mortgaged premises into possession by summary process extends only to the parties to the suit, and those coming into possession under the parties to the suit, subsequent to the commencement of the action, and not to mere strangers. *Thompson v. Smith*,* 1 Dill., 458.

§ 1037. *A writ of assistance can only be issued against parties bound by the decree which it is intended to enforce.* *Terrell v. Allison*,* 21 Wall., 289.

§ 1096. *Where a mortgagor conveyed his interest in the mortgaged property to C., and put him into possession, and after the sale the mortgagee instituted a suit of foreclosure, to which he made only the mortgagor and wife parties, and thereafter C. conveyed his interest to E., who conveyed part of his interest to F., it was held that E. and F. were not bound by the decree in said suit, and could not be put out of possession upon a writ of assistance.* *Ibid.*

§ 1089. *Setting aside sale—Jurisdiction.*—The United States circuit court has not jurisdiction to set aside a sale made by a state court, in a suit between the same parties. *Randall v. Howard*, 2 Black, 585 (§§ 1075, 1076).

§ 1090. *The fact that one of the mortgage notes has become barred by the statute of limitations since the sale does not affect the right of the holder to share in the proceeds, or the rights of holders of similar notes against the property or purchaser.* *Weaver v. Alter*,* 3 Woods, 152.

XXXI. JUDGMENT IN EQUITABLE SUIT FOR DEFICIENCY.

SUMMARY—*Court of equity may give judgment for deficiency, § 1001.—In District of Columbia, § 1002.—In New York when there is no personal obligation, §§ 1003, 1004.*

§ 1001. A court of equity having obtained jurisdiction to foreclose a mortgage may proceed to give a personal judgment on the indebtedness after the foreclosure has become impossible, the property having been exhausted by a prior mortgage. *Hayden v. Snow*, §§ 1005-1007.

§ 1002. In the District of Columbia, under R. S., § 803, a decree *in personam* may be rendered against a mortgagor. *Dodge v. Freedman's Savings and Trust Co.*, §§ 1008, 1009.

§ 1003. The statute of New York, providing that no mortgage shall be construed as implying a covenant for the payment of the sum secured, confines the relief of the mortgagee to the land in the absence of a separate personal obligation. *Demond v. Crary*, §§ 1100, 1101.

§ 1004. The statute is aimed against sustaining an action for a debt secured by mortgage merely by the production of the mortgage, when it contains no express covenant to pay the debt. It is not construed to mean that a personal action cannot be maintained for the debt when proved by competent evidence, whether in writing or parol. *Ibid.*

[NOTES.—See §§ 1102, 1103.]

HAYDEN v. SNOW.

(Circuit Court for Illinois: 9 Bissell, 511-520. 1880.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—The bill in this case was filed to foreclose a mortgage dated July 28, 1875, given by Solomon Snow and wife to secure the payments of two notes, of even date with the mortgage, for \$6,000 each, payable in two and three years, respectively, to the order of the maker, and by him indorsed to J. E. Lockwood, said mortgage being subject to a prior incumbrance by trust deed to E. C. Larned, as trustee, to secure the payment of \$28,000. The bill alleged that Solomon Snow, after the making of the mortgage in question, on the 14th day of December, 1875, sold and conveyed the mortgaged premises to William C. Snow, subject to the said two incumbrances, and that William C. Snow, on the 28th day of January, 1876, conveyed the premises to Isaac M. Daggett, subject to the same incumbrances, and that Daggett, on the 12th day of April, 1876, conveyed the premises to the defendant William Drury, subject to the said two incumbrances; and by the deed from Daggett to Drury the latter agreed to assume and pay the said incumbrances; and that the said incumbrances formed a part of the consideration or the purchase price for the said premises, which agreement was in the following words:

"Subject to a certain trust deed, executed by Solomon Snow, and Elizabeth L., his wife, to E. C. Larned, trustee, to secure the payment of \$28,000, dated July 28, 1875, due in five years from date, with interest at ten per cent. per annum, payable semi-annually, and also subject to another trust deed, executed by Solomon Snow and wife to R. B. Bacon, to secure the payment of \$12,000, dated July 28, 1875, due two and three years from date, with interest at eight per cent. per annum, payable semi-annually, both of which said incumbrances the party of the second part herein agrees to assume and pay."

The bill further alleges a default in the payment of the interest due on the notes, which fell due April 28, 1877, which default, by the terms of said mortgage, allowed the holder of said notes to elect to declare the whole principal sum thereby secured, and the interest thereon, due and payable at once, and that such election has been made.

The bill further charged that the said Joseph E. Lockwood, to whom Solomon Snow indorsed said notes, on the 1st of November, 1876, for a valuable consideration to him in hand paid, assigned and transferred said two notes to the complainant, who is now the legal owner and holder thereof.

In the original bill the complainant prayed for a foreclosure of the mortgage and sale of the mortgaged premises, and in case the proceeds should not be sufficient to satisfy the amount due, then for a personal decree for the deficiency against the said defendant Drury.

Drury answered, admitting the making of the notes and the mortgage, the conveyance of the mortgaged premises from the mortgagor to William O. Snow, and from Snow to Daggett, and from Daggett to himself, and that the deed from Daggett to himself contained the clause of assumption as set out in the bill, but denied that there was any agreement between himself and Daggett that he should assume and pay the said incumbrances; and that it was not the intention of the parties to the deed that he should assume said incumbrances, and that the clause in said deed expressing such agreement was inserted therein by the mistake of the scrivener who drew the same; and that he (Drury) accepted said deed without the knowledge that it contained said clause, and did not become aware of the fact that it did contain said clause until some time in July, 1877, when Daggett, for the purpose of correcting the mistakes of the scrivener, and effectuating the intention of the parties to the deed, executed and delivered an instrument, under seal, releasing the defendant (Drury) from the obligations to pay the said incumbrances.

On February 17, 1880, complainant filed a supplemental bill, stating, in substance, that, since the filing of the original bill, a bill had been filed in this court against the said Drury and others by Robert E. Kelly, the holder of the indebtedness secured by the first mortgage for \$28,000, and that such proceedings had been had in said cause, that on the 27th day of June, 1878, a decree of foreclosure had been entered upon the said mortgage, and that upon the 26th day of July, 1878, the mortgaged premises were sold for the satisfaction thereof, and that no redemption had been had from said sale, and a deed had been made to the purchaser by the master in chancery on the 30th day of October, 1879, and prayed that the amount found due by the master in this cause be entered by this court against the defendant William Drury, in accordance with the assumption of the said indebtedness.

Drury's answer to the supplemental bill admits the exhaustion of the proceeds of the mortgaged premises by the foreclosure of the first mortgage, and refers to his answer to the original bill, which he prays may be taken as a part of his answer to the supplemental bill.

The proof in this cause is mainly applicable to the questions of the fact whether or not the defendant Drury, in the purchase of the equity of redemption of the mortgaged premises, agreed, as part of the transaction, to assume and pay these two mortgage debts, and whether or not the clause of assumption in the deed from Daggett to Drury truly expressed the contract between the parties as to the payment of the said indebtedness.

From a careful consideration of the testimony I have come to the conclusion that it was not the agreement or intention of Daggett and Drury that Drury should assume and agree to pay the indebtedness secured by these two mortgages, and that the clause in the deed to him, whereby he was made to assume and agree to pay them, was inserted without his knowledge, and by mistake of the attorney who prepared the deed.

My reasons for this conclusion are:

First. That the preponderance of evidence on the question is largely in favor of the defendant. The testimony of Daggett, Whipple and the defendant Drury on this point is so full and circumstantial as to leave almost no room for doubt on the question. They all testify unequivocally that it was expressly understood that Drury was not to assume the incumbrances, or either of them, and Drury said that he had no knowledge of the assumption clause in the deed to him until his attention was called to it by Mr. E. C. Larned in April, 1877.

Second. There was no motive or inducement for Daggett to exact such terms from Drury, his grantee, as Daggett had not assumed or agreed to pay the indebtedness. There was, therefore, no reason why he should gratuitously interest himself in securing a contract from Drury for the benefit of the mortgagee.

Third. The nature of the transaction weighs heavily against the probability that any sane business man would have assumed such a liability. The proof shows that Drury exchanged a farm in Mercer county, this state, for this and two other pieces of heavily incumbered Chicago real estate; that the transaction took place in 1876, and that on the 25th of July, 1878, only a little over two years afterwards, the property in question was sold under the decree of foreclosure on the first mortgage for \$23,000, and that no surplus was obtained by such sale to apply on this mortgage. This circumstance, in my mind, tends strongly to corroborate the testimony of Daggett, Whipple and Drury, that Drury only intended to purchase the equity, but did not intend to assume the prior indebtedness. He might have been willing to give his farm for the chance that all these three pieces of property would realize something over and above incumbrances, but it is hardly reasonable to believe, in view of what must have been its then value, that he would have assumed so grave a responsibility as to make himself personally liable for this heavy prior indebtedness. It is true that Mr. Hutchinson, who drew the deed from Daggett to Drury, testifies that he must, from the course of business, have drawn the deed according to instructions, and would not have inserted this assumption clause unless directed to do so, but his directions may have come from some one who had no authority in the premises, or who was acting under a mistake or misunderstanding as to the terms of the contract.

Two questions of law arise upon the facts in this case as I now find them:

First. Can the complainant maintain this bill solely for the purpose of obtaining a personal decree against the defendant Drury, assuming that he did agree to pay the mortgage debt held by the complainant?

Second. It appearing as an admitted fact in the case, as it is alleged in the bill and not denied in the answer, that the complainant purchased the notes secured by this mortgage in November, 1876, for value before any default or maturity thereof, and after the defendant Drury had by the deed to him which then appeared of record apparently assumed to pay this mortgage debt, can he now be heard to say, as against this complainant, that he did not assume such payment? In other words, must the court presume that the complainant purchased these notes upon the faith of Drury's assumption and agreement to pay the same?

§ 1095. *A court having obtained jurisdiction in a foreclosure suit may give personal judgment, though foreclosure is impossible.*

As to the first question, it is an established rule that when a court of equity has once obtained jurisdiction of the parties and subject-matter, it will retain it for the purpose of doing complete justice between the parties.

The bill in this cause was filed for a foreclosure of the mortgage in question; the citizenship of the parties brought the subject-matter within the jurisdiction of the court, the relief prayed was such as the court was adequate to give; it could not only award a decree of foreclosure and sell the mortgaged property, but could, under the ninety-second rule in equity, award a personal judgment against whoever was liable for any deficiency after the application of the proceeds of the sale, and it seems quite clear to me it does not lose that jurisdiction by the fact that the subject-matter of the mortgage has been sold by another decree to satisfy a prior incumbrance. The court can now, if it were deemed necessary, enter a decree of foreclosure and direct a sale of the mortgaged premises, and, after a sale for a nominal amount, could give a personal judgment for the deficiency; but for my part I do not deem it necessary to go through an empty form of foreclosure and sale to ascertain what the court knows judicially already, that the mortgaged property will furnish no fund to satisfy this mortgage debt.

There is, however, another aspect of this cause upon which the jurisdiction of the court to enter a decree on the merits of this cause may be retained.

The complainant seeks by his bill to make a remote grantee of the mortgagor personally liable for this indebtedness. In a number of cases like this, where the assumption and agreement to pay the mortgage debt was declared to be a part of the purchase money or consideration for the deed of the mortgaged premises, the courts have held the grantee in the deed liable, on the ground that he, by his deed, acknowledged himself to hold so much money for the use of the mortgagee. And in those cases, it has been said, a suit at law could be maintained by the mortgagee against the grantee of the mortgagor. *Burr v. Beers*, 24 N. Y., 178; *Thompson v. Thompson*, 4 Ohio St., 333; *Sanford v. Hays*, 19 Conn., 594. But in this case there is no admission that the assumption of the mortgage debt is a part of the consideration. The recital in the deed to Drury is to the effect that he assumes and agrees to pay this incumbrance. He does not admit nor declare that a part of the purchase money is to be paid by him (Drury) in payment of this mortgage indebtedness, as was the contract in many of the cases I have cited, so that this case is brought by its facts more directly within the rule of the cases adjudicated in New Jersey and Massachusetts, which hold that the liability of the grantee of the mortgagor, who has assumed the mortgage debt, can be enforced in equity by an application of the principle of equitable subrogation. From these various considerations I have, therefore, no difficulty in reaching the conclusion that the court still has jurisdiction to pass upon the question of Drury's liability and to render a personal decree against him if justified by the law and facts.

§ 1096. *An innocent purchaser for value of mortgage notes has a right to rely upon recitals in a deed from the mortgagor to his subsequent grantee by which the latter assumes the mortgage debt.*

As to the second question, it appears from allegations in the bill which are not denied by the answer, and are admitted, that the complainant purchased the notes secured by this mortgage for a valuable consideration, before due, in November, 1876, and after the deed from Daggett to Drury had been made; and by the well settled law of this state, where this transaction took place, and all the parties resided, the assumption of this indebtedness by Drury inured to the benefit of the mortgagee and could be enforced by him either at law or in equity. The mortgagor in this case was the holder of these notes; that is, these notes were given to be negotiated, made payable to the order of the

mortgagor, and the mortgage passed with the notes as an incident, free of the equities between the original parties.

The case of *Carpenter v. Longan*, 16 Wall., 271, sustains fully the doctrine which I have laid down here, that the parties to a mortgage cannot set up a mistake as against the purchaser of the notes and the holder of the mortgage debt.

The same doctrine was affirmed in the case of the New Orleans Canal & Banking Co. *v. Montgomery*, 95 U. S., 16.

The court must therefore presume that when the complainant purchased these notes she took them with knowledge of the fact that the defendant Drury had assumed and agreed to pay them, and that the obligation could be enforced by the holder of the notes. The defendant Drury had by this deed made himself, apparently at least, a *quasi* party to the notes. He had agreed to assume and pay these notes, and thereby had given them, the court must presume, currency in the market. The mortgagee—that is, the *bona fide* holder of these notes—is to the extent of this mortgage a purchaser of the mortgaged premises. Jones on Mortgages, section 710, 1st ed.

In *Pierce v. Faunce*, 47 Me., 507, the court says: “A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage without notice is on the same footing with a *bona fide* mortgagee in all cases. The reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects.”

§ 1097. *When a mortgage will have a right in equity to recover the amount of his mortgage debt against a subsequent grantee.*

In this case the defendant Drury seeks to avoid the effect of the assumption of the debt on the ground of mistake, and the case seems to me to stand on precisely the same ground that it would occupy if he had filed a bill in equity to reform the deed upon the ground that the assumption clause was inserted in it by mistake; and the rule is well settled that such a mistake cannot be rectified to the prejudice of an innocent purchaser for value (*Story's Eq. Jur.*, sec. 105; *Sickmen v. Wood*, 69 Ill., 329); and if Drury could not be allowed to reform the deed by direct proceedings for that purpose as against the *bona fide* holder of this mortgage and notes, who has purchased them on the faith of this assumption appearing on the record, it is equally clear that he cannot be allowed to set up that defense in this cause.

I therefore conclude that while, as between Drury and Daggett, this clause of assumption was wrongfully inserted, or at least improperly inserted, in the deed, yet such mistake cannot be set up against the complainant, who has purchased these notes on the faith of Drury's apparent assumption of them, which then appeared of record; and I also hold that the release deed made by Daggett to Drury from this assumption must be deemed inoperative as against complainant, and the decree will be for the complainant against Drury for the amount of the mortgage debt.

The case shows that there has been a reference to the master and a report made on it some time in November last of the amount due, as stated by the master, and I give a personal judgment for the amount and interest from the date of the master's report.

DODGE v. FREEDMAN'S SAVINGS AND TRUST COMPANY.

(16 Otto, 445, 446. 1882.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—A mortgage on lands of Dodge to secure notes held by the Freedman's Savings and Trust Company was foreclosed, and a personal judgment was rendered against Dodge for the balance of the debt remaining unpaid.

§ 1098. *Statutory provision.*

Opinion by WAITE, C. J.

Section 808 of the Revised Statutes, relating to the District of Columbia, is as follows: "Sec. 808. The proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law."

§ 1099. *Decree in personam may be rendered against a mortgagor.*

This statute applies to suits for the foreclosure of deeds of trust in the nature of mortgages to secure the payment of money, and authorizes a decree in favor of the plaintiff against the debtor defendant for the payment of the balance of the debt that may remain due after the application thereto of the proceeds of the sale of the trust property, and an order for execution thereof as at law. This is such a decree in such a suit, and it is consequently affirmed.

DEMOND v. CRARY

(Circuit Court for New York: 9 Federal Reporter, 750-752. 1882.)

Opinion by WHEELER, D. J.

STATEMENT OF FACTS.—This cause has been heard upon the motion of the defendant to set aside the verdict for the plaintiff, and for a new trial. The plaintiff was surety for the defendant on an appeal bond in the state courts of New York. The judgment appealed from was affirmed and the condition of the bond broken. The plaintiff paid the judgment, and the defendant, by a deed absolute on its face, conveyed an interest in some lands and houses situated in New York to the plaintiff to secure repayment of the sum paid. The verdict is for the amount due of that sum. The defendant claimed at the trial that this conveyance was in reality a mortgage, and that the plaintiff could not recover for this money on account of a provision in the statutes of New York — vol. 1, p. 738, § 139; vol. 3 (6th ed.), p. 1119, § 160 — which declares that no mortgage shall be construed as implying a covenant for the payment of the money; and that if there be no express covenant for such payment in the mortgage, and no bond or other separate instrument to secure payment, the remedy of the mortgagee shall be confined to the land. The evidence was equivocal as to whether the plaintiff paid the judgment compulsorily, in discharge of his own obligation, and took the security afterwards, or furnished it by way of a voluntary loan to the defendant, made upon that security; and the court submitted that question to the jury, with directions to return a verdict for the plaintiff if they found the former, and for the defendant if they found the latter to be the case. The decision of the motion depends upon the correctness of this instruction. The diligence of counsel has brought to notice but very few cases bearing upon the construction of this statute. The statute

appears to have been designed to remove doubts of construction, and to declare the law rather than to restrict rights; and this seems to be the view taken of it by Chancellor Kent. There had been cases in which it had been held that the condition in a mortgage, if the mortgagor shall pay, etc., implied a covenant that the debt existed, and that the mortgagor would pay, making the mortgage deed not only proof of the mortgage but proof of the debt also, although it contained no express promise or covenant to pay the debt. *King v. King*, 3 P. Wms., 358. And in *Ancaster v. Mayer*, 1 Bro. Ch. Cas., 454, at 464, Lord Chancellor Thurlow had said: "A man mortgages his estate without covenant, yet because the money was borrowed the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security, and if there is a bond or a covenant, then there is a collateral security of a higher species, but no higher by means of the mortgage merely."

§ 1100. *A mortgage without express covenant raises no liability to pay the debt except out of the land.*

In the text of Kent's Commentaries it was laid down that "The covenant must be an express one, for no action of covenant will lie on the proviso or condition in the mortgage; and the remedy of the mortgagee, for non-payment of the money according to the proviso, would seem to be confined to the land, where the mortgage is without any express covenant or separate instrument." In a note to the third edition, referring to this statement, he said: "This doctrine has been made a statute provision in the New York Revised Statutes," and referred to this statute. Then he referred to the intimation of Lord Thurlow, and added: "But the statute of New York has disregarded the suggestion."

§ 1101. *Construction of statute. Revised Statutes of New York, vol. I, p. 738, sec. 139, confines the relief of the mortgagee to the land in the absence of any collateral undertaking.*

In the fifth edition he added to the note: "And it is in opposition to the current of authority and reason of the thing." Vol. 4, p. 145. In all this the effect of a transaction of loaning money and taking a mortgage, without more, seems to be what is spoken of. The statute seems to be aimed against sustaining an action for a debt secured by mortgage merely by the production of the mortgage, when it contains no express covenant to pay the debt. It sets out with the declaration that no mortgage shall be construed as implying a covenant, etc., and what follows seems to be intended to carry out that principle. That a personal action can be maintained for a mortgage debt when proved by competent evidence, whether in writing or by parol, cannot be questioned. In *Conway v. Alexander*, 7 Cranch, 218 (§ 457, *supra*), Mr. Chief Justice Marshall said: "It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor." And in *Russell v. Southard*, 12 How., 139 (§§ 491-509, *supra*), Mr. Justice Curtis said: "In such a case it is settled that an action of *assumpsit* will lie." In a case like this the deed could not be shown to be a mortgage without showing the debt; showing it to be security would involve showing what it secured. Still the statute is understood to apply as well to an absolute deed made for security, as to a conditional one made for security. Each is understood to be a mortgage. *Hone v. Fisher*, 2 Barb. Ch., 559. But here is not the mere transaction of loaning money and taking either a technical mortgage or an absolute deed for security. When the plaintiff paid the money for the defendant, as his surety, the law raised the promise at once from the defendant to repay it; and a cause

of action accrued for it immediately, and that is the cause of action in suit. The proof of it consists in transactions entirely separate from the deed. The conveyance was not taken in satisfaction of this pre-existing debt; neither was it any consideration for the debt. Nothing rests upon any implication in the deed. The statute was not intended to take away perfected causes of action, which could be proved without violating it, and the proof of this cause of action is not touched by it. This view is the more satisfactory because upholding the suit for the plaintiff will not enable him to collect any more than his just due, however ample the security may be; and if the suit failed and the security should be inadequate, he might, for want of ability to maintain the suit, lose some part of what justly belongs to him. The motion must be denied, and judgment be entered on the verdict.

§ 1102. General execution for balance in United States courts.—The power vested in the federal circuit courts by rule of the supreme court, adopted April 18, 1864, to order a general execution for any balance remaining due after the sale of the mortgaged premises, is a discretionary one; hence, they may or may not exercise it as they see fit. *Phelps v. Loyhead*,* 1 Dill., 512.

§ 1103. In Indiana, the code contemplates a personal judgment in proceedings to foreclose a mortgage where there is a written agreement to the debt secured by the mortgage. *Putnam v. New Albany*, 4 Biss., 365, 377.

XXXII. POWER OF SALE IN MORTGAGES AND TRUST DEEDS.

1. *Nature and Operation of Such Instruments.*

SUMMARY — A trust deed with power of sale is a mortgage, § 1104.—Right of possession, §§ 1105-1108.

§ 1104. Under the code of California, a conveyance in trust, substantially in the form of a mortgage, with a power of sale in the trustees upon default, is in law and in fact a mortgage. *Southern Pacific Railroad Co. v. Doyle*, §§ 1109-1112.

§ 1105. A mortgage with a power of sale in a third person necessarily embraces a trust; but it does not necessarily convey the right of possession before default. *Ibid.*

§ 1106. If the instrument be a trust deed the result is the same, for it in express terms reserves to the grantor the right of possession until default. *Ibid.*

§ 1107. Under the code a trust deed vests the title in the trustees and not in the beneficiaries; but the estate which vests depends upon the terms of the instrument. *Ibid.*

§ 1108. The trustees in such an instrument have no right to enter upon or take possession of the lands until the default provided for in the instrument occurs. *Ibid.*

[NOTES.— See §§ 1113-1120.]

SOUTHERN PACIFIC RAILROAD COMPANY v. DOYLE.

(Circuit Court for California: 11 Federal Reporter, 258-268. 1882.)

STATEMENT OF FACTS.—In this action the defendant sets up as a defense that before the institution of this suit plaintiff had by deed of trust conveyed the property in question to Mills and Tevis, who held the legal title and right of possession, and that therefore plaintiff had no such interest in the property as would support this action. The terms of the deed of trust sufficiently appear in the opinion of the court.

Opinion by SAWYER, J.

It is claimed by the plaintiff that the instrument in question is only a mortgage with a power of sale, the legal title and right of possession remaining in the mortgagor; while the defendant asserts that, under the provisions of the

code and the decisions of the courts of California, it is a trust deed which vests the legal title and the right of possession in the grantees and trustees, Mills and Tevis, and that the right of action in this case is vested in them alone.

§ 1109. *Distinction under the California code between a mortgage and a deed of trust passing the title.*

In *Platt v. Union Pac. R. Co.*, 99 U. S., 57, the supreme court of the United States held a similar instrument to be a mortgage. Says the court: "The instrument, we think, though in form a deed of trust, was substantially a mortgage." The dissenting justices also regard it as a mortgage. But the defendant urges that the civil code of California controls the case, and that, under the code, the instrument is not a mortgage, but a deed of trust passing the legal title. Upon an examination of the instrument and the provisions of the code it seems to answer the description of a mortgage as well as it does that of a trust deed. It is certainly a "contract by which specific property is hypothecated for the performance of an act, and without the necessity of a change of possession" (Civil Code, § 2920); for no change of possession is provided for until a default, and not even then unless a large portion of the holders of the bonds secured demand it. The "lien" created is also "special, and is independent of possession," as is provided in regard to a mortgage in section 2923. "A mortgage does not entitle the mortgagee to possession of the property unless authorized by express terms of the mortgage." Section 2927. "A power of sale may be conferred by a mortgage upon the mortgagee, or any other person, to be exercised after a breach of the obligation for which the mortgage is a security." Section 2932. This instrument provides for taking possession by the grantees named in it after default, and not before, and confers a power of sale upon them in the contingencies specified, they being persons other than the persons for whose security it is intended, just as these provisions of the statutes say may be done. The statutory definition of a mortgage does not say that the contract of hypothecation must be with the creditor, nor that the power of sale authorized to be given shall be given to him, but in express terms that the latter, at least, may be to "any other person." So section 744 of the Code of Civil Procedure provides "that a mortgage of real property shall not be deemed a conveyance, *whatever its terms*, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." Under this provision conveyances absolute in form, without any instrument of defeasance, if made to secure the payment of money, have often been held by the supreme court of California to be mortgages. This provision is a statutory recognition of the principle that mortgages may be made in various forms. Wherein, then, does the instrument in question fall short of being a mortgage within the definitions and various descriptions given in the several provisions of the statute cited?

§ 1110. *Under the California code a mortgage may confer a power of sale.*

But it may also contain the elements of a trust deed, as described in the statute, and fall within the definition of or embrace a trust. But is it any the less a mortgage? If the mortgage contains a power of sale to "any other person" than the mortgagee, and the code says it may, it necessarily embraces a trust; but it does not necessarily carry the right of possession and control of the land, at least before default. The sole purpose expressly appears in every part of the instrument in question to be to secure the payment of certain bonds which are constantly and always, in the instrument and in the bonds them-

selves, called "first-mortgage bonds." The authority from the board of directors to make the instrument, recited in the instrument, is only authority to execute a mortgage; and there is no authority recited to execute anything but a mortgage. And no other authority than that recited in the instrument appears in evidence. The resolution of the board of directors authorizing the transaction according to the recitals, is only to execute a mortgage. The parties evidently supposed it was a mortgage, and it doubtless is a mortgage in substance, in law and in fact, though it also creates a trust.

§ 1111. *A trust deed under the California code conveys no right to the possession of lands until after default.*

But suppose it creates a trust in the form in which the instrument is drawn, even under the provisions of the code cited, the result must be the same. The substantial title and the present right of possession to the land under the express terms of the instrument, as executed, are in the grantor, and the trusts are limited by the terms of the instrument, as expressly provided by the code. "Uses and trusts in relation to real property are those only which are specified in this title." Civil Code, § 847. And in the title it is provided that "express trusts may be created for any of the following purposes:" (1) "To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trusts;" etc., the power, if any, applicable to this case. Section 857, as amended. By section 863 it is provided: "Except as herein-after otherwise provided, any express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

§ 1112. *What title passes to the trustee in a deed of trust under the California code. The rights of beneficiaries.*

That is to say, whatever the estate is, be it more or less, that passes by the terms of the conveyance; it all vests in the trustees, and not in the beneficiaries. But what the extent—the quantity or quality—of the estate is which passes to the trustees, depends wholly upon the terms of the instrument creating the trust. Its limits are defined by the terms of the instrument itself, and not by this provision of the code. The instrument having defined the estate, the whole of that estate, as so defined, goes to the trustees, and not to the beneficiaries. The beneficiaries take none of the estate as between them and the trustees, but only the right to compel the performance of the trust. This provision regulates the rights as between the trustees and beneficiaries, and not between the "trustor," as the grantor is termed in the statute, and trustees. Those rights are determined by the terms of the instrument, or, in the language of the code, as we have seen, "in accordance with the instrument creating the trust." The following sections carry out this idea: "Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust, and may transfer or devise such property subject to the execution of the trust." Section 864. "The grantee or devisee of real property subject to a trust acquires a legal estate in the property as against all persons except the trustees and those lawfully claiming under them." Section 865. How do they get a legal estate in the property unless their grantor or deviser has a legal estate in it?

And again: "Where an express trust is created in relation to real property, every estate not embraced in the trust and not otherwise disposed of is left in

the author of the trust or his successors." Section 866. And, "when the purpose for which an express trust was created ceases, the estate of the trustees also ceases." Section 871. No reconveyance is here required. The interest of the trustees ceases *ipso facto* and *eo instantur* upon the performance or ceasing of the trust. If the trustor, or his grantee, has "a legal estate in the property as against all persons except the trustees," even as against the beneficiary, where does a mere trespasser against all—trustor, trustee and beneficiary alike—obtain a *status* wherein he can question the right of the trustor? Now, all that has been granted by this instrument is a security for the payment of the bond described—a right to have the lands sold and the proceeds applied, so far as is necessary, to the satisfaction of the bonds. All else remains in the plaintiff. The plaintiff has the entire estate in the land, subject only to the right of the bondholders to have the bonds satisfied out of their proceeds in case some other provision for their payment is not made. The right is, therefore, wholly contingent. The plaintiff can, at its option, provide other means for payment, and, upon such payment from other sources, the trust, by express provision of both the statute and the instrument itself, ceases.

The code, in another title and chapter, further provides: "The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee." Civil Code, § 2250. And "the nature, extent and object of a trust are expressed in the declaration of trust." Section 2253. Again: "A trustee must fulfil the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at the time of its creation," etc. Section 2358. And still again: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other." Section 2267. The provisions of this chapter, I suppose, refer to those trusts which are wholly for the benefit of third parties, wherein the title wholly passes to the trustee, there being nothing to be done for the benefit of the trustor—nothing left in or to be returned to him; and not to that class of trusts, like the present, where the trustor is as much interested in the trust as the designated beneficiary himself—indeed, where he is the principal party in interest, and the beneficiary's interest is only an incident to some other right. Indeed, such are the express provisions of section 2250: "Trusts created for the benefit of another than the trustor." But suppose it to be otherwise, the result would be the same; for in this class of trusts, as in that referred to in the other title of the code already cited, "the nature, extent and object of the trust" are limited to those "expressed in the declaration of trust." The trustee must fulfil the purpose of the trust as declared at its creation, and must follow all the directions of the trustor given at the time. "He is but a general agent of the trust property, and his authority is such as is conferred upon him by the declaration of trust, and by this chapter, and none other." Section 2267. "So, in the other class of trusts already referred to, under which, if either, this case falls, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust." Thus, in either kind of trusts, the rights and powers of the trustee under the code itself are defined and limited by the instrument creating the trust. What, then, are the purposes of the trust in question, and the powers, and the limitations upon those powers, of the trustees, Mills and Tevis? It is only necessary to glance at the passages of the instrument set out in the preliminary statement of the contents of the instrument, to find an answer to

this inquiry. The express provisions of the instrument are so plain and specific that they do not admit of construction or doubt. The purpose, and only purpose, is to secure the payment of a loan of money raised upon bonds issued and secured by what is substantially a mortgage, and put upon the market in the usual form adopted by railroad companies.

The lands of the company, as well as the road, rolling stock, and all other appendages and equipments, are conveyed with a condition of defeasance. The granting part as to the lands is in the usual form of that class of real estate mortgages, except it says to "the said parties of the second part, *as trustees*;" and the *habendum* clause is, "unto the said parties of the second part, . . . *as trustees*, for the uses and purposes, and upon the *trusts, terms and conditions and agreements, in this indenture set forth and declared*." It is not for any other purpose than as set forth in the instrument. The defeasance is as follows: "Provided, always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth *this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part*." The only change in this defeasance from the usual defeasance in an ordinary mortgage is in form, not in substance. Instead of saying, as in the usual form, "this indenture shall be null and void," the instrument says, "this indenture and the estate hereby granted shall cease and determine, and all the right, title and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part." This is substantially the same as the provision of the statute already cited, which requires no reconveyance. It is true that further along in this instrument there is another clause providing for a reconveyance, which, under this provision and the statute, seems to be superfluous.

But the instrument contains the following clause expressly limiting the rights of the trustees: "These presents and the bonds are made, executed and delivered upon the trusts, terms, conditions and agreements following, that is to say: That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same, at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustee, as hereinafter provided. But no title to any tract of land contracted to be sold by the said party of the first part shall be given until the whole of the purchase money of said tract shall be paid to said parties of the second part, or their successors or survivor, in cash or in said bonds, or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands, as shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most judicious,

having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor,—the prices being, nevertheless, at all times subject to revision and alteration by the said parties; and the party of the first part may reserve from sale any lands necessary for depot grounds, or other purposes connected with the construction or operation of the said railroad or telegraph.”

Thus, by the express terms of the trust, the lands hereinabove conveyed and mortgaged are to “be under the sole and exclusive management and control of the said party of the first part” — the plaintiff herein — “until entry and foreclosure by the trustees as hereinafter provided;” and the following is the provision hereinafter made: “If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment when the same shall become due, then the said trustees may, on being requested by the holders of at least \$100,000 of such bonds, enter into and take possession of any of the lands above conveyed, and foreclose this mortgage; and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges and expenses of such entry, foreclosure and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by these presents mortgaged or conveyed, foreclose this mortgage, and sell at public auction all said lands, or so much thereof as may be necessary, first giving at least six months’ previous notice of the time and place of sale, in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles and San Diego; and they shall apply the proceeds thereof, after deducting the costs, charges and expenses of such last mentioned entry, foreclosure and sale, to the payment of all said bonds then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part.

“If, after any such entry shall be made, or any such foreclosure proceedings shall be commenced, for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, and deliver the coupons therefor to the said trustees, and pay all the costs, charges and expenses incurred in such entry and foreclosure, and the proceedings thereon, then, and in every such case, the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all of such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings commenced.”

So, by the express terms of the trust, the trustees have no right whatever to enter into or take possession of any of the lands above conveyed “until default,” and not then, except “on being requested so to do by the holders of at least \$100,000 of such bonds.” And even then they are only authorized to

take possession of and sell "so much of said lands as may be necessary to discharge all arrears of such interest," costs, etc. But if default continues "for one year from the time of such demand and refusal, the principal shall become due, and then the said trustees may enter into and take possession of all the lands by these presents mortgaged or conveyed, foreclose this mortgage, and sell . . . so much thereof as may be necessary," etc. But "if, after such entry shall be made, or any such foreclosure proceedings shall be commenced for the satisfying of interest only, . . . and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, etc., . . . then, and in every such case, the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms and conditions of these presents in like manner as if such entry had not been made, nor such foreclosure proceedings been commenced."

Thus it appears, by clear, express, positive provisions of the instrument creating the trust, so plain that there can be no possible ambiguity upon the point, that the said trustees had no right whatever to enter upon or take possession of said lands or any portion of them, until the contingency of a default and demand by the bondholders had arisen; and, even then, upon the removal of the contingency by the plaintiff, they would be required to restore the management, control and possession to the plaintiff. The present possession, management and control of these lands were not any part of the estate conveyed to the trustees. "This estate" was not "embraced in the trust;" and, as we have already seen, under the code, "every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust." This estate was, therefore, left in the plaintiff, in this case — the author of the trust. In every aspect of the case, then, whether regarded as a mortgage or a trust, and no matter which class of trusts, the right of action to recover possession of the lands as against trespassers is left in the plaintiff. Any other construction would take the road and its equipments from the possession, management and control of the plaintiff, contrary to the expressed intention, and give them to the trustees; and thus not only prevent the company from operating the road already built, but, after the date of the instrument, prevent the construction and operation of any more road. It would defeat the very object for which the instrument was given, namely, to enable the plaintiff to build, equip and operate the Southern Pacific Railroad.

Although the proceeds of sales of lands go into the hands of Mills and Tevis for the redemption of the bonds, even the power of sale is not in them, except after default. It is the plaintiff "who shall have full power and authority to make contracts for the sale of the land." But it shall be "at such price, on such terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second part." Thus, while the management, control and power to make the contracts is in the plaintiff and not in the trustees, both the plaintiff and the trustees must agree on the price, and terms and conditions of the sale; and as a mode for fixing the terms of sale, it is provided further in the instrument that the plaintiff and the "trustees shall cause all such lands as shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be judicious, having in view the interests of all parties, and said lands shall be and remain at all times thereafter open for sale to any

person who may desire to purchase and pay therefor, the prices being, nevertheless, at all times subject to revision and alteration by the said parties."

It is in pursuance of this provision that the lands have been graded, and the prices fixed by the plaintiff and the trustees, acting together, which prices appear to have created the great dissatisfaction in various ways manifested by the several defendants in these various suits. Since the execution of this instrument the fixing or changing of the established prices has been beyond the power of the plaintiff alone, without the concurrence of the trustees; and the trustees are bound, by the express terms of their trust, to consult the interests of the beneficiaries, and of all the parties in interest; that is to say, all parties having an interest under this instrument. These lands, according to their reasonable full value, are a part of the security upon which the purchasers of the bonds secured are entitled to rely.

Another limitation upon the estate and the powers of the trustees is found in this instrument, in the provision that when any of these lands shall have been purchased and paid for, "the same shall be conveyed by the said parties of the first and second parts to the purchaser in fee-simple." So that the trustees have no power alone even to convey, except after default, upon foreclosure and sale. This is another evidence of the care which the plaintiff took to limit the extent of the estate, and the rights and powers vested in the trustees; and the limitations thus made in the instrument creating the trust must be the full measure of the rights and powers of the trustees. The case of *Ellis v. Patterson*, in this court, cited by counsel, presented no such question as that involved in this case. The instrument was different in its provisions, and the object of the suit was to set aside conveyances made by the trustee under the power contained in the instrument, and for an account and redemption.

All the other contested points in this case, both of law and fact, have been before decided in this court against the defendant. They are all, or nearly all, questions that can only be litigated in a special proceeding for the purpose either between the plaintiff and the United States, or between the plaintiff and the state of California. It is no part of the defendant's duty to vindicate the rights either of the United States or the state of California; and he does not occupy a position that entitles him to do either. Let there be findings and judgment in favor of the plaintiff in this and in the other cases submitted with it.

§ 1112. Acceptance of trust.—Any act done by a trustee under a trust deed is evidence of his acceptance of the trust. *Lewis v. Baird*, 8 McL., 56, 65.

§ 1114. Mortgage and trust deed the same in legal effect.—There is no difference in legal effect between a mortgage with a power of sale and a deed of trust, executed to secure a debt, where the power of sale is placed in a third person. Both are securities for a debt; both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. *Bartlett v. Teah*, 1 McC., 176, 178.

§ 1115. A deed with a power of sale is in equity a mortgage, if there is any right to redeem. *Shillaber v. Robinson*, 7 Otto, 69 (§§ 1146-1148).

§ 1116. An instrument which conveys land to trustees as security for the payment of a debt to another, and provides that on payment of the money the title shall be reconveyed to the grantor, is a deed of trust and not a mortgage; and a reconveyance of the land is necessary upon payment. *Wilkins v. Wright*,* 6 McL., 340.

§ 1117. Trust deed conveys the title.—A deed of trust conveys to the trustee a sufficient title to enable his alienee to recover in ejectment. *Newman v. Jackson*, 12 Wheat., 570 (§§ 1153, 1154).

§ 1118. *Trustee may be removed.*—A trustee named in a deed of trust may be removed by a court of equity on account of personal ill will between him and the *cestui que trust*. *McPherson v. Cox*,* 6 Otto, 404.

§ 1119. *Sale under power and judicial sale.*—A sale made by decree of a court of equity varying substantially in its terms from the provisions of the power is a judicial sale and not a sale under the power. *Chew v. Hyman*,* 7 Fed. R., 7.

§ 1120. *Trustee exercises the power to sell at his discretion.*—Under a trust deed made to secure a loan, with authority to the trustee to take possession of the property and sell it upon thirty days' notice, the authority to sell is for the benefit of the creditor and may be exercised at the discretion of the trustee. He is not bound to sell within the time named, or at all, unless by direction of a court of equity. In the mean time it is his right and duty to take possession and to apply the rents and profits to the payment of the debt. The object of the trust is to enable the creditor to make his money out of the property, and therefore its provisions are to be construed and applied with a view to that end. *Walker v. Teal*, 7 Saw., 39 (§§ 669-672).

2. *Exercise and Suspension of the Power of Sale.*

SUMMARY — *Mortgagor within Confederate lines*, § 1121.—*Sale when property subject to conflicting liens*, § 1122.—*Injunction against sale in favor of purchaser mistaken as to power of sale*, § 1123.

§ 1121. *Legal proceedings to foreclose a mortgage*, as against a defendant who had been driven by military order during the rebellion within the Confederate lines, and not permitted to return, were void and inoperative. *Dean v. Nelson*, §§ 1124-1128.

§ 1122. Where a trustee under a power in a deed of trust attempts to sell property subject to conflicting liens, some of which it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity, which may restrain a sale for the purpose of deciding the mutual rights of the parties and administering the fund accordingly. *Draper v. Davis*, § 1120.

§ 1123. Where one purchased land subject to a mortgage which he supposed was in the common form, without a power of sale, and would require three years' possession by the mortgagee to effect a foreclosure, the mortgage having been made the same day and not recorded, a sale under the power was enjoined upon his application. He was allowed, however, only time to raise the money and not the three years in which to redeem. *Platt v. McClure*, §§ 1130, 1131.

[NOTES.—See §§ 1132-1140.]

DEAN v. NELSON.

(10 Wallace, 158-172. 1869.)

APPEAL from U. S. Circuit Court for West Tennessee.

STATEMENT OF FACTS.—In May, 1861, Dean, who lived in Cincinnati and was the owner of shares of stock in the Memphis Gaslight Co., apprehending hostilities and a confiscation of the stock by rebels, transferred his shares to Pepper, the secretary of the company, to be by him disposed of for Dean's benefit. In June and July, 1861, Pepper transferred the stock to Nelson at par, taking for the whole sum Nelson's note, which provided for payment of interest and principal out of the earnings of the stock in quarterly instalments, but should Nelson fail to pay any of the instalments quarterly after receipt by the company of the net earnings, then the full sum with interest, less payments made, should become due. To secure payment of the note, Nelson executed an instrument in the form of a mortgage, conveying to Pepper Nelson's interest in the property of the company. Intercourse with Tennessee was soon after prohibited. Nelson continued to reside at Memphis, and received dividends on the stock, but did not make any payments to Dean nor Pepper, who were within the federal lines. On June 1, 1862, Nelson transferred as a gift to his wife all the shares except ten, which were transferred without consideration to one May, to enable him to be a director. On June 6, 1862,

the United States troops took Memphis and retained it to the end of the war. Dean went to Memphis that summer and saw Nelson, who failed to pay anything on the notes. In 1863 Nelson and his family were ordered to remove south of the military lines and not to return, which order they obeyed till the end of the war. May all the while remained within the rebel lines. A civil court having been soon after organized by the military commander in Memphis, Nelson filed therein a petition, setting out the facts as to the stock, notes and mortgage, and praying for the foreclosure of the mortgage and sale of stock against Nelson and wife and May. The defendants being returned not found, publication of notice was made according to the Tennessee statute. No appearance was entered, a decree was rendered and the stock sold under execution, and the purchaser immediately transferred it to Dean, who thenceforward received the dividends till June, 1865, when Nelson and wife and May filed a bill in the court below, praying the stock to be decreed to belong to them, and that Dean account for the dividends received.

§ 1124. *Transfer of shares in a corporation an executed contract of sale, and valid, when.*

Opinion by MR. JUSTICE BRADLEY.

In determining the questions raised by this record, the court is of opinion, in the first place, that Dean must be regarded as concluded on the question of the sale of his stock. Had the transaction been merely an agreement for a sale upon the terms on which the sale was actually made, and this a bill by the vendees for a specific performance, we should find great difficulty in distinguishing this case from that of *Dorsey v. Packwood*, 12 How., 126. But here the sale was actually made, and the stock was actually transferred to Nelson, so that in the absence of fraud it became absolutely his. And in support of the *bona fides* of the transaction, it may be said that in view of all the contingencies of the situation, the arrangement was at the time an advantageous one for Dean. At all events, he chose, on the whole, to acquiesce in it, and in his bill to foreclose the stock presented before the civil commission, he makes no claim but that of holder of the mortgage, affirming and claiming under Nelson's title throughout. And in his answer to the present bill he nowhere hints that Nelson was guilty of any bad faith in the transaction, or made any agreement to hold the stock for him, or in any other way than as a *bona fide* purchaser thereof.

§ 1125. *Condition in a note to pay the whole amount immediately upon failure to pay any instalment.*

And it is hardly correct to say that Nelson incurred no obligation in the transaction. He agreed to pay the whole amount immediately in case of failure to pay any instalment after the receipt *by the company* of the net quarterly earnings. And this condition was not in the nature of a penalty as surmised by the appellees; but was of the substance of the contract. So that on failure to pay or tender the money received by him, or by the company, on account of the stock purchased, the whole debt became due and payable as a personal obligation of Nelson. But, at all events, the stock was actually sold and transferred, and became the property of Nelson and was possessed by him. The contract was an executed contract, and that transaction cannot now be impeached.

§ 1126. *A court has no power to make a transaction other than the parties themselves made it.*

The next question relates to the character of the instrument given by Nelson to Pepper as security for the payment of his notes. Was it a conditional sale,

or was it a mortgage? On this question hardly a doubt can be raised. The court is asked by the appellants, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to *consider* the instrument as a conditional conveyance of the stock, and not a mortgage. But the court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage it is the duty of the court to declare it a mortgage; and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it *is* a mortgage there is no room for question.

§ 1127. *An instrument conveying property, but to be void upon the payment of a note therein described, is a mortgage and not a conditional sale.*

The principal engagement is contained in the note, which creates a debt as soon as earnings or dividends are received. The other instrument is secondary, and is intended as security for the payment of the note. The appellee himself, in his proceedings before the civil commission, treats his claim as a debt, and the instrument of security as a mortgage. He calls it a mortgage; and the doctrine of "once a mortgage, always a mortgage," applies to it. Then, being a mortgage, whether of real or personal property, the mortgagor has an equity of redemption, unless it has been extinguished in some legal way. The great question of the cause is, whether the equity of redemption has been extinguished. It is unnecessary to decide whether the mortgage was one of real or of personal estate, or whether it was a legal or only an equitable mortgage. As no attempt has been made to cut off the equity of redemption in any other manner than by legal proceedings, the question is reduced to the simple one, whether those legal proceedings are valid and effectual for that purpose.

§ 1128. *Foreclosure on publication of notice, the defendants being within the Confederate lines.*

It is objected that the court or civil commission was not legally established; but it is not necessary to determine that question, as the proceedings themselves were fatally defective. The defendants in the proceedings (the appellees here) were within the Confederate lines at the time, and it was unlawful for them to cross those lines. Two of them had been expelled the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see nor obey it. As to them the proceedings were wholly void and inoperative. This leaves the equity of redemption in the mortgaged property unextinguished; and it is, therefore, the right of the appellees to redeem it. In the opinion of the court, the whole principal and interest of the notes have become due and payable, and a redemption and retransfer of the stock should be decreed only on condition of the payment of principal and interest in full, after giving to the appellees credit for the sums received by the appellant; legal interest on each side to be allowed. The decree of the circuit court, therefore, will be so far modified that, instead of requiring the appellant to forthwith transfer the stock, as directed in the decree, he be decreed to transfer it to the defendants, Miriam W. Nelson and Benjamin May, respectively, as therein directed, upon payment by the appellees to the appellant of the amount which shall be found to be due to him on the said two notes, after taking and stating the account in the said decree afterwards directed; neither party to recover costs of the other in this appeal.

Decree modified accordingly.

DRAPER v. DAVIS.

(14 Otto, 347-349. 1881.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The circumstances out of which this case grew were as follows: In 1867, Draper, Thomas & Bodine, partners in business, having purchased a planing-mill, with its fixtures, machinery and chattels, from one Henry S. Davis, executed to Fendall & Winder a deed of trust to secure the payment of notes to the amount of \$20,000, given to Davis for the purchase money. The deed embraced the lot, the mill, machinery and all other goods and chattels on the premises, and also all other machinery and other articles then in and on said premises, or which might thereafter be placed in and upon them. This debt was reduced by payments to an amount somewhat less than \$10,000. In July, 1872, Bodine sold his interest to Draper & Thomas, and to pay him they borrowed \$10,000 of one Mrs. Forest, and executed, as security therefor, a trust deed to Anthony Hyde, upon the same lot, mill, machinery, fixtures and furniture then on the premises, and also upon several other lots not embraced in Davis' trust deed. In February, 1875, the mill burned down, and Draper & Thomas rebuilt it, at an expense of about \$3,600, Davis furnishing the money.

Draper & Thomas failing to pay their interest, in March, 1877, Hyde, as trustee for Mrs. Forest, advertised for sale the property embraced in her deed of trust, including the fixtures, machinery and personal property in the planing-mill. The original bill in this case was filed by Draper to restrain the sale. The principal grounds on which the bill was founded were that Hyde threatened to sell more property than was embraced in his trust deed; that the sale at that time would be attended with a great sacrifice; that Davis' trust deed was prior to that of Mrs. Forest's; that her deed did not cover the machinery and chattels procured since the fire, or since its execution; that Thomas, in 1870, had executed a trust deed on his share to the complainant Draper to secure \$2,600; that Mrs. Forest's trust deed covered other property; and that to secure a just and equitable distribution of the proceeds there should be a sale under a decree of the court. The bill prayed an injunction to prevent Hyde from making a sale as proposed by him, especially as to the machinery and personal property, and made Thomas and his wife, Davis and his surviving trustee, Winder, and one Champlin, parties defendant. A temporary injunction was granted. Answers were filed and proofs taken. In June, 1877, whilst the suit was pending, Davis directed his trustee, Winder, to advertise for sale the property embraced in his deed of trust. Draper then filed a supplemental bill to enjoin this sale. The court finally made a decree directing Winder to sell all the property embraced in the trust deed executed to him and Fendall, including the planing-mill, fixtures, machinery and personal property, and to bring the proceeds into court to abide its further order, retaining the cause in the mean time for the purpose of ascertaining the condition of all the parties after the sale shall have taken place. Hyde was enjoined from making a sale until further order.

§ 1129. *Where a trustee attempts to sell property subject to conflicting liens, a court of equity has jurisdiction to restrain the sale and adjust the rights of the parties.*

Draper appealed from this decree. Why he has appealed it is somewhat

difficult to see. The decree is substantially in accordance with what he sought by his bill—a judicial administration of the property and a provision for ascertaining the equities of the parties. We think that the decree was a just and proper one. Although a deed of trust to secure a debt usually authorizes the trustee to sell on default of payment, yet where a trustee attempts, as Hyde did in this case, to sell property subject to conflicting liens, some of which it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly. No injury is done by the decree appealed from to Davis or to Mrs. Forest, because they want a sale to be made, and the sale ordered by the court will fully protect their rights, as well as those of all the other parties; and, besides, they have not appealed from the decree. It cannot be doubted that the court had full power to take the trustee, Winder, under its control, and to direct him to dispose of the trust fund embraced in the deed executed to him, including the personal property in dispute. As it is the purpose of the court to adjust all the equities of the parties in due and regular course, we are unable to perceive anything in the decree which can injuriously affect the appellant.

Decree affirmed.

PLATT v. McCLURE.

(Circuit Court for Massachusetts: 3 Woodbury & Minot, 151-156. 1847.)

STATEMENT OF FACTS.—Dallinger conveyed the premises in question to Hoit, who mortgaged them to McClure, and the same day conveyed the equity of redemption to Platt. The mortgage was not recorded, and contained a power of sale upon thirty days' notice. This fact did not appear in the recital of the mortgage in the conveyance of the equity of redemption. This bill was filed to prevent a sale under the power, on the ground of surprise and mistake, Platt having supposed that the mortgage was in the usual form.

§ 1130. *When an injunction will be granted although the answer denies mistake or fraud.*

Opinion by WOODBURY, J.

Though the plaintiff has an opportunity to give notice of his claim at the sale, it would be no bar to the sale if the defendants choose to proceed and could find bidders. Eden on Inj., 291. The result then would be new and further litigation with the purchaser, and hence that is to be avoided by a preventive relief, if a proper case is made out. 16 Ves. Jr., 267. An injunction temporary is sometimes proper, though the answer sets up title in the defendant and denies mistake or fraud. Eden on Inj., 118; Orr v. Littlefield, 1 Woodb. & M., 20. Thus, if the mischief in proceeding and disallowing the injunction is otherwise irremediable or incurable. 1 Glyn & Jameson, 122; 4 Dow., 440. Such seems to be the sale in this case, and the expected delay in raising the money, beside the advantages in the mean time anticipated from the rise of the property in value. It may be replied to this, in the present case, that the complainant could borrow the money and bid at the sale the full value, and that the excess over the mortgages would belong to him as owner of the equity.

But the complainant belongs to a distant state, has not been able to visit there and obtain the money since the advertisement issued, and feels obliged to seek relief by longer delay, in a different mode. It seems to me that on the

bill and answer alone he has made out no case for a permanent injunction. No defect is shown in the notice to sell which may justify such an injunction against that sale. Drury on Inj., 342; 6 Madd., 10. No fraud is admitted or to be fairly inferred, though some slight presumptions exist of unfairness in Dallinger in keeping his estate in others' names to some extent. But that is not shown to have been co-operated in by McClure, or to have affected the plaintiff as a creditor so that he can except to it. 2 Johns. Ch., 204; 3 Sumn., 70.

§ 1181. *The assignee of a mortgagor is entitled to a temporary injunction to stay a sale of mortgaged premises under a power contained in the mortgage, that instrument not having been recorded.*

Nor is ground sufficient shown even for a temporary injunction — beyond the peculiarity of the case,— showing that his damage may be great and without remedy, unless he is now indulged with time sufficient to return home and obtain the money to buy in the premises at the sale, if postponed. He seems to lay the foundation for that in equity, in the fact of the large nominal consideration he is admitted by the answer to have paid, in the further admitted fact that he was not informed of the peculiar form of this mortgage, giving the respondent a power to sell, and hence, undoubtedly, purchased under a mistake as to its existence. This he testifies to in express terms, and it is not denied on the other side (though all design to cause a mistake is repelled), in another fact, not noticed at first by myself, that the mortgage containing this power was not recorded, so that he could see its peculiar form when he bought the equity, and in the consequent fact that no special negligence existed in him or his attorney [who was left to close up the business] in not seeing its peculiar form, and in the further fact, well known, that such powers are not customary in many sections of the country, though somewhat usual elsewhere; and, finally, in the fact that their legality has been denied in some places (4 Kent, 146, 148, note), and questioned in others, though not for all purposes and at all times void. 1 Powell on Mortgage, 9, 10; Comyn's R., 603; 3 Pick., 483; 2 Metc., 29. Its operation seems equitable only where the land is worth but little more than the debt, and interest has not been punctually paid.

It is to be further considered that this relief may enable him to avoid loss and have some opportunity to prove fraud, if it existed, so that he can avail himself of it; and the court can prevent the delay from being injurious to the respondent by requiring, as it has, a bond to be filed to secure the payment of the costs, and another bond to indemnify the defendant for any injury by delay in the depreciation of the property. See, on this practice, Hawes v. James, 1 Wils., 2; Drury on Inj., 339. As the money market is not straitened at this time, no other injury can happen to the respondent by a short delay. He is conceded to be a man of property; and if obliged, in the mean time, to borrow, could doubtless procure the amount at legal rates and without sacrifices. It is true that mortgagors and their grantees are bound in law to make payment at the day the debt falls due. But it is equally true that now not only equity permits a longer time on paying interest, but the law does it under express statutes in probably every state in the Union. It is also true that the injury by this mistake or fraud, if either were perfected, would be only the trouble of raising the money to redeem the mortgages now instead of three years hence. But that may be very considerable to some men and very little to others; and the plaintiff being a stranger here, and not shown to possess much property, it

will probably be so great to him as to justify the allowance of a short time, on the terms and grounds before indicated, to visit his home and procure the money. Let the temporary injunction then issue till the adjourned session of this term, in September next.

§ 1182. In Georgia power of sale expires with mortgagor.—In Georgia a mortgage is only a security for a debt and passes no title. A power of sale is merely a collateral power and not one coupled with an interest, and therefore it expires with the life or bankruptcy of the mortgagor. *Lockett v. Hill*,* 1 Woods, 552.

§ 1183. A mortgagee's possession of the mortgaged premises as a tenant at will or at sufferance is not of that dignity and nature which could be engrafted on a power in a mortgage in so far as to make it a power coupled with an interest. *Ibid*.

§ 1184. If a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted. *Ludlow v. Ramsey*, 11 Wall., 581, 589.

§ 1185. The existence of the civil war did not exempt property of persons residing in the rebel states, located in loyal states, from foreclosure and sale under powers of sale, for debts due to citizens of the latter states. *University v. Finch*, 18 Wall., 106.

§ 1186. War between the so-called Confederate States and the United States must be regarded as war between all the inhabitants of one territory and all inhabitants of the other territory. *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*,* 7 Blatch., 891.

§ 1187. The remedy for the recovery of the debt in this case by a sale of the trust land was suspended during the war. *Ibid*.

§ 1188. Notice could not be given to persons residing in the enemy's territory during the rebellion. *Ibid*.

§ 1189. Suspension of the right of action during the rebellion includes any species of proceedings, judicial or otherwise, to enforce contracts. *Ibid*.

§ 1140. Sale not enjoined without good cause.—The court will not enjoin a sale under a power of sale mortgage without good cause. If the mortgagor wishes to redeem he should bring the money into court or tender it. It is not reasonable to delay the mortgagee when the property is yielding but little. As to the conduct of the sale, the power of sale is a matter of contract and should not be overthrown by the court. *Bowen v. Kendall*,* 23 Law Rep., 588.

3. Notice of Sale under Power.

SUMMARY—Sale must be made according to general law, § 1141.—Notice must be published according to terms of power, § 1142.—Description of premises in notice, §§ 1143, 1144.—Notice of sale at court-house which has been destroyed, § 1145.

§ 1141. A sale under a power in a deed not made in conformity with the terms prescribed by the general law is void. *Shillaber v. Robinson*, §§ 1146-1148.

§ 1142. A requirement in a deed of trust that sixty days' notice shall be given in newspapers published in Richmond, Virginia, and in the city of New York, must be fully complied with to effect a valid sale; and the fact that the mortgagee was in Virginia, where the land was situated, and communication with New York was prohibited on account of the pending war, is no excuse for failure to publish the notice as required. The publication of the notice according to the requirement in the deed was a condition precedent to a valid sale, and the sale made without such publication is a nullity. *Bigler v. Waller*, §§ 1149-1152.

§ 1143. A notice of sale by a trustee of a deed of trust need only to be certain to a common and reasonable intent. *Newman v. Jackson*, §§ 1153, 1154.

§ 1144. Thus a notice describing the premises as being in "Peter, Beatty, Threlkeld and Deakins'" addition to Georgetown, and also a "lot No. 99, fronting sixty feet on Fayette street, and one hundred and twenty on Second street," is sufficiently accurate, although the premises are in fact in Threlkeld's addition. *Ibid*.

§ 1145. A sale under a trust deed, made at the site of the door of the court-house after its destruction by fire, cannot be objected to as irregular after such sale has been had, and a deed given, in which it is recited that the sale was in due form, and according to the terms of the deed. A subsequent purchaser is not bound to look beyond the recitals of such deed. *Long v. Rogers*, §§ 1155, 1156.

SHILLABER v. ROBINSON.

(7 Otto, 69-79. 1877.)

APPEAL from U. S. Circuit Court, Eastern District of New York.

STATEMENT OF FACTS.—In a suit in Illinois for specific performance of a contract for the sale of land in that state by Shillaber to Robinson, in part payment for which Robinson was to convey to Shillaber three parcels of land in New York, situate in three different counties, there was a decree establishing an indebtedness of Shillaber to Robinson, and ordering that on the payment of this, Robinson should convey to Shillaber the land in New York. It also provided that in case Shillaber should not pay the debt within a certain time, Robinson should convey the lands in New York to one Noble, in trust, to sell the same after giving such notice as might be usual or provided by law in said state; and out of the proceeds pay to Robinson the amount due him. Shillaber not paying the money as ordered, Robinson made the deed of trust to Noble in accordance with the decree; and Noble sold the land, after giving notice by publication once a week for six weeks successively in a newspaper published in one of the three counties, and made conveyance to a person who bought for the benefit of Robinson. Neither the deed to Noble nor that from him was recorded. The statutes of New York then provided for notice by publication once a week for twelve weeks successively in a newspaper published in the county where the premises are situated. Some years afterwards, Shillaber's heir brought suit against Robinson, who had in the mean time sold the lands for a sum much exceeding his claim against Shillaber, requiring him to account for their value.

Opinion by MR. JUSTICE MILLER.

The principal, in fact the only, defense which merits any consideration in this case, is that by the trust deed which Robinson made to Noble under the decree of the court, and by the sale which Noble made in conformity to the terms of the decree, and of that deed, Shillaber's rights were completely divested in the land; and since it did not bring, at that sale, as much money as was due to Robinson, which, by the terms of both the decree and the deed of trust, was to be paid to him out of the proceeds of that sale, nothing was left for Shillaber in the matter. The decree in the Illinois suit, in which Theodore Shillaber had appeared after his father's death, is binding and conclusive on both parties. The deed of trust made by Robinson to Noble is in accordance with the decree, and conferred an authority on him to sell the land. The purpose of this sale, as expressed in the deed of trust and the decree, was to pay to Robinson the \$4,249.58, which was a first lien on the land, and the balance into the court, for the use of Shillaber.

Much discussion has been had in the case as to the nature of the conveyance to Noble, one party insisting that it is a simple mortgage with power of sale, and the other that it is, under the statutes of New York, the creation of a valid trust in lands. The point of this discussion is found in the question whether the sale by Noble, under that instrument, was valid or was void. The counsel of defendant insists that Noble became vested with a perfect title to the land by the deed of Robinson, and that his sale and conveyance are valid whether he pursued the direction of the deed in regard to advertising or not; and that, if any such advertising were necessary, there was no usual notice, nor any provided by law, for such sales in the state of New York. It is shown by the evidence that Noble did publish a notice that the three pieces of land in the

three different counties would be sold on a day mentioned, at Montague Hall, in the city of Brooklyn. This notice was published, for six weeks preceding the day appointed for the sale, in the "Brooklyn Standard," a weekly paper printed in Kings county. But the statutes of New York, then in force, prescribed publication of such notice for twelve weeks successively before the sale.

§ 1146. *A sale made under a power in a deed is void if not made in conformity with the terms prescribed by the general law.*

If the instrument under which Noble acted is a mortgage with power of sale, it is beyond dispute that the sale is void, because it was not made in conformity with the terms on which alone he was authorized to sell. That the sale, under such circumstances, is void, is too well established to admit of controversy. We refer specially to the recent case in this court of *Bigler v. Waller*, 14 Wall., 302 (§§ 1149-52, *infra*). The list of authorities cited by the appellant are to the same effect.

§ 1147. *A deed with a power of sale is in equity a mortgage, if there is any right to redeem.*

Without entering into the argument of the question whether the instrument under which Noble acted is in all respects a mortgage, the case of *Lawrence v. Farmers' Loan & Trust Co.*, 13 N. Y., 200, shows that it is an instrument which, for the purposes of the sale under the power which it contains, comes under the provisions of the statute we have cited as regards publication of notice. It also decides that a sale made without such notice is void. It is the well-settled doctrine of courts of equity that a conveyance of land, for the purpose of securing payment of a sum of money, is a mortgage, if it leaves a right to redeem upon payment of the debt. If there is no power of sale, the equity of redemption remains until it is foreclosed by a suit in chancery, or by some other mode recognized by law. If there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery. These instruments generally give specific directions regarding the notice to be given, and of the time, place and terms of the sale. In some states the statute prescribes the manner of giving this notice, and in such case it must be complied with. In either case, the validity of the sale being wholly dependent on the power conferred by the instrument, a strict compliance with its terms is essential.

If this is not a mortgage to which the notice of the New York statute is applicable, we do not see that the defendant's position is improved by that circumstance; for there is, then, no provision for a sale or foreclosure of the equity of Shillaber, but by a decree of an equity court. This has never been had, and it still remains that there has been no valid execution of the trust reposed in Noble by the deed. If the matter had remained in this condition, Shillaber would, on payment to Robinson of the \$4,249.58, with interest, have had a right, enforceable in this suit, to have a conveyance of the New York land by Noble to him. But neither the conveyance by Robinson, which remained an escrow, nor that to Noble, was ever placed on record; and Robinson, in whom, according to the records of the proper counties in New York, the title still remained, sold all these lands to persons who, as innocent purchasers for a valuable consideration, now hold them by a good title. This title is equally beyond the reach of Robinson, of Shillaber, and of the court. Indeed, although Robinson alleges in his answer that the purchase of John A. Robinson was

made for his benefit, he seems to have attached no importance to it; for he does not aver that John A. Robinson ever conveyed to him, nor does he, while giving copies of all the deeds on which he relies, including the deed to John A. Robinson, show any evidence of a conveyance from John A. Robinson to him.

§ 1148. *A party holding the strict legal title, selling land without due authority, must account for its proceeds to the holder of the equity of redemption.*

The defendant, therefore, when he sold and conveyed this land to the parties who now hold it under him, did it in violation of the rights of Shillaber, as settled by the Illinois decree. By that decree, Robinson had no right to sell. By the conveyance made to Noble under that decree, he had nothing left in the New York lands but a lien for his \$4,249.58. The sale by Noble was void, and conferred no rights on Robinson whatever. His belief in its validity did not change the matter. By availing himself of the title which was in him originally, and which appeared by the records to be there, yet he sold the lands for twice as much as his lien and received the money. That he must account to Shillaber in some way is too plain for argument. If Shillaber could, by paying his debt to Robinson, redeem the lands from their present holders, it is the relief which he would prefer, and to which as against Robinson he would be entitled. But Robinson has put this out of his power by a wrongful sale and conveyance to innocent purchasers. There is no evidence to show that the lands are now worth any more than Robinson sold them for; no evidence that they were worth more when he sold them. His answer gives the precise sum received by him for each parcel of land, and the date when he received it. He probably believed the land was his own when he sold it; but, as we have seen, he must be considered as holding such title as he had in trust, first for his own debt due from Shillaber, and the remainder for the use of Shillaber. Treating him then as trustee, he must account for the money received for the lands according to the trusts on which he held them. The decree of the circuit court dismissing Shillaber's bill must be reversed and the case remanded to that court with instructions to render a decree on the basis of charging Robinson with the sums received by him for the lands and interest thereon until the day of the decree, deducting therefrom the sum found due him from Shillaber by the Illinois decree, with interest to the same time, and rendering a decree, for the difference in favor of Shillaber against Robinson, with costs; and it is so ordered.

BIGLER v. WALLER.

(14 Wallace, 297-308. 1871.)

APPEAL from U. S. Circuit Court, District of Virginia.

STATEMENT OF FACTS.—Waller, on May 10, 1853, in pursuance of an executory agreement, dated April 2, 1853, the important clause of which is recited in the opinion, conveyed certain lands to Bigler, who gave his bond for a balance of the purchase money and took possession. A mortgage of the land was made to Saunders in June, 1853, to secure conditions of the bond. Its effect appears in the opinion. The executory agreement was in no manner incorporated in the bond or mortgage. Bigler improved the property, and in 1854 wanted to sell certain parts, but Waller refused to allow this. Up to May 10, 1861, Bigler performed his agreement. War now broke out, and Bigler being in the north the rebel army took possession of the lands and devastated them. In 1862 a sale of this land, without conforming to requisites of the mortgage, was made by Saunders to Waller for \$17,000, canceling the bond, on which \$13,000

was then due from Bigler. Waller was not present nor did he approve of the *rain* worked by the rebel army. Nothing further was shown of Waller's possession, and, in fact, he had received no rents or profits after his purchase. Waller instituted suit for \$13,000, but afterwards dismissed the same before the hearing of Bigler's case. Bigler filed a bill in equity, setting out the foregoing facts, and charged Waller with the rents, etc., and the balance due to Saunders on his purchase in 1862 over and above the amount due on Bigler's bond. The bill charged that Saunders, with Waller, was about to fraudulently resell the property, and that Waller was insolvent. The bill was revived against the administrator of Waller on the latter's death, and Saunders dying, Cabell was appointed in his place. An injunction was asked to prevent a resale and assignment of Waller's interest in Bigler's bond during the pendency of Waller's suit for \$13,000, or until a master in chancery might examine the matters in dispute and take an account. The bill further prayed all deeds in possession of defendant relating to the sales should be delivered up. There was also a prayer for general relief. Waller denied the bill. The court overruled the report of the master and held Bigler liable to pay his bond in coin, and was entitled to recover only a small sum from Waller for damages paid by the rebel government. Bigler appealed. The remainder of the case is stated in the opinion.

Opinion by MR. JUSTICE STRONG.

The complainant insists that the circuit court erred in assuming that the sale which was made by Saunders in 1862 was a nullity, and that the property remained the complainant's notwithstanding. This position is taken in order that it may be inferred the residue of complainant's bond for the purchase money was satisfied by a sale under the trust, and that Waller has not only been thus paid but that he is accountable for the excess of his bid at that sale above the amount then due him by virtue of the bond. The position is certainly a strange one. It is directly in conflict with the law of the case and with the complainant's bill. By the deed of trust it was stipulated that in case of a sale the trustee should give sixty days' notice in newspapers in Richmond and in the city of New York. To a valid execution of the power of sale such notice was indispensable, and a sale without it of course conveyed no title. It is not pretended that such notice was given. On the contrary, the bill charges that it was not, and to this the answer of Waller makes no denial; while the answer of Saunders expressly admits that there was no advertisement in a New York paper, giving as a reason for the failure thus to advertise that communication with the northern states was then prohibited.

§ 1149. *Where a condition precedent to a sale under a mortgage, such as publishing a notice, is not performed the sale is a nullity.*

The fact that the sale was made without the requisite notice is then an established fact, and the inevitable inference is that the sale was inoperative to divest the ownership of the complainant. Without confirmation by him it was a mere nullity, disturbing no right and conferring none. But if this were not so, the theory of the complainant's bill is that his title was not divested. It charges that the necessary notice was not given. It complains that possession was taken by Waller after the sale, that he received the rents, issues and profits down to 1865, received compensation for injuries done to the improvements by the Confederate military forces, and it asserts that Waller is accountable to the complainant for such possession, rents and profits, as well as for the compensation he obtained. All this is utterly inconsistent with the assertion that the sale was effectual to change the title. But this is not all. There is much more

in the bill that asserts continued ownership of the complainant, and the invalidity of the sale made in 1862. The averment that the trustee is about to sell the lands again under the trust deed, and the charge that the sale will be conducted in such a partial and unjust manner as to cheat and defraud the complainant, are full of meaning. So is the prayer for an injunction against another sale, and the prayer for the delivery over of the deeds. In view of all this it is impossible for the complainant to maintain now that the attempted foreclosure in 1862 was not a nullity, ineffective to transfer his right to Waller. Even if he could have affirmed the sale, he has precluded himself from doing so, and has left nothing for the court but to adjudicate upon the case as he has made it. There has then been no actual payment of the bond.

§ 1150. *A false claim of title is, of itself, insufficient to render one liable for rents and profits.*

The next inquiry is whether Waller is chargeable with the rents, issues and profits of the property from the 1st of April, 1862, when the sale was made, until the spring of 1865, when the complainant returned to the land and resumed actual possession. This, of course, assumes that the sale had no validity, for if it worked a foreclosure of the complainant's equity, if it vested the title in Waller, there can be no pretense that he is liable for subsequently accruing rents and profits. It is only while he can be considered as holding the possession in trust for the mortgagor that he can be called to account. Had he entered in pursuance of his purchase, claiming title in himself by virtue thereof, he would doubtless be chargeable as a trustee, though the purchase was wholly void; and it may be conceded, if he had taken actual possession without claim of right, that he might be treated as such. But actual occupation of the mortgaged premises is indispensable to the existence of such a liability. It is the enjoyment of the property, or the perenancy of its profits, that raises the trust. A false claim of title is, of itself, insufficient. The difficulty of the complainant's case is, there is no proof that Waller was in actual possession, or even that he was on the land at all, from the time of the sale until this bill was filed, or that he ever received any of its rents, issues or profits. There is a total failure of any such evidence. The most that can be alleged is, that he claimed sometimes to be the owner without ever enjoying any of the rights of ownership. It is proved that he had possession neither of the personalty nor of the realty. Equally unsustained is the claim that Waller is responsible for the waste committed upon the land and the destruction of improvements. The property was greatly injured between 1861 and 1865, during the existence of the civil war, but the evidence wholly fails to show that the injury was caused by any act of the defendant's. It was done by the Confederate military forces in Waller's absence, and, so far as it appears, without his knowledge.

It is further insisted, on behalf of the complainant, that the circuit court erred in refusing to allow him a credit for damages which, it is alleged, he sustained in consequence of a refusal by Waller to release portions of the land from the operation of the deed of trust in order to enable him to sell them. This claim is founded upon the clause in an executory agreement between the parties, dated April 2, 1853, by which it was stipulated that Waller would allow Bigler to sell such portions of the land as, from time to time, he might see fit, Bigler paying over such proceeds of the sales as would afford ample security for the residue of the debt due for the purchase money of the land. The deed for the land from Waller to Bigler was, however, not made until the 10th of May, 1853, and probably not delivered until the 22d of June next fol-

lowing, when the deed of trust was executed. Neither the deed nor the deed of trust contains any such stipulation for releases as is contained in the agreement of April 2d, and it might perhaps be maintained that the agreement was subsequently changed, or merged in the after-executed contracts. But, assuming that it was not, what is the evidence of the breach of the agreement? It does appear that, in 1853 or 1854, the complainant had offers to purchase some parts of the land situated in the heart of it; that he applied to Waller for releases, and that they were refused. But it does not clearly appear that those lots thus located could have been sold without so impairing the value of the remainder as to leave it less than ample security for the payment of the residue of the debt. Applications were afterwards made for releases of other and larger portions differently situated, and the releases were given. That those first asked were not given, when only one-sixth of the purchase money of the whole property had been paid, ought not to be regarded as a violation of the agreement without very clear evidence that Waller knew they could have been given with entire safety. Besides, it does not distinctly appear that the complainant was injured by the refusal, or that he ever claimed compensation for it until this bill was filed. From year to year, down to 1860, and including that year, he paid the annual instalments of the purchase money called for by his contract without claiming any deduction — a course of conduct inconsistent with the existence of any just claim to compensation for a prior breach of his creditor's engagement. There is, then, no sufficient reason for the allowance of a credit on his bond in consequence of Waller's refusal to execute releases.

§ 1151. *Where persons are not made parties to a suit, the decrees therein cannot affect them.*

It is further objected to the decree of the circuit court that it does not direct a conveyance by the heirs of Waller to the complainant. His heirs were not called in, and they are no parties. No decree could, therefore, have been made against them; nor was any necessary. If, by the conveyance of Saunders to Waller in 1862, and his subsequent death, the legal title was cast upon Waller's heirs, it was only a naked legal right, which they may be compelled to surrender whenever the purposes of the trust shall be accomplished — when the debt secured by the deed of trust shall be paid. Besides, Saunders, the trustee, has also died, and a new trustee has been appointed clothed with all the rights, duties and responsibilities of the trustee named in the deed. It is, however, easy to protect the complainant against any outstanding title in the heirs of Waller by staying the execution of any decree until those heirs shall have conveyed to Henry Coalter Cabell, the new trustee, all the interest, if any, conveyed to their father by the deed of Saunders to him, to be held by Cabell under and subject to the trust declared in the deed of trust to Saunders. Such an order the circuit court may properly make.

§ 1152. *In view of Knox v. Lee, 12 Wall., 457, decree of payment of a debt in United States coin is erroneous.*

There remains to be considered but one other objection made to the decree. It is that the sum found by the account due to the administrator of Waller was decreed to be paid in United States coin. In view of the ruling of this court in *Knox v. Lee* and *Parker v. Davis*, Legal Tender Cases, 12 Wall., 457, this was erroneous, and for this cause alone the decree must be reversed. Decree reversed, and the cause remanded with directions to proceed to an amended decree in accordance with the foregoing opinion.

NEWMAN v. JACKSON.

(12 Wheaton, 570-574. 1827.)

Opinion by MR. JUSTICE TRIMBLE.

STATEMENT OF FACTS.—This is an action of ejectment, brought to recover lot No. 99, in Threlkeld's addition to Georgetown, with the improvements thereon, fronting sixty feet on Fayette street and one hundred and twenty feet on Second street. The plaintiff in error was tenant in possession of the premises, appeared to the action, and, upon entering into the common consent rule, was admitted to defend and pleaded not guilty, upon which issue was joined. Upon the trial in the court below, the plaintiff gave in evidence a deed from John W. Bronaugh to Thomas G. Moncure, conveying to him in trust, for the payment of certain enumerated creditors: "A lot on Fayette street and Second street, in Georgetown, fronting sixty feet on Fayette street and one hundred and twenty feet on Second street, with the buildings, improvements and privileges," in trust, to secure the payment of the enumerated debts within thirty days; and, if not then paid, the property conveyed in trust to be sold, "after a week's notice in the Messenger," etc. The plaintiff gave in evidence the notice published in the Messenger, under and in pursuance of which the property was sold at public auction, in these words, to wit:

"By virtue of a deed of trust to the subscriber, for the securing certain moneys therein mentioned, will be exposed to public sale, on Thursday, the 4th of March next, for ready money, the following described property, namely, lot No. 99, in Peter, Beatty, Threlkeld and Deakins' addition to Georgetown, fronting sixty feet on Fayette street and one hundred and twenty feet on Second street, with a two-story brick dwelling-house, in excellent repair, thereon. The sale to take place on the premises.

"THOMAS G. MONCURE, Trustee.

"The above sale postponed until the 4th day of May next, when it will certainly take place.
March 24, 1819."

The plaintiff proved that the lot conveyed by the deed of trust had been sold on the premises, at public auction, by Moncure, the trustee, on the day mentioned in the notice, and that Jackson became the highest bidder and purchaser; and the plaintiff gave in evidence the deed of conveyance made by the trustee to Jackson, for lot No. 99, etc., in pursuance of the public sale. It was proved that the plaintiff in error had entered upon the premises as tenant to John W. Bronaugh, and that he was in possession at the commencement of the suit; and the town plats were also given in evidence. A verdict was taken for the plaintiff, subject to the opinion of the court as to the law arising upon the case, and the court below thereupon gave judgment for the plaintiff in that court.

§ 1153. *A deed of trust conveys to the trustee a sufficient title to enable his alienee to recover in ejectment.*

It is contended for the plaintiff in error that the judgment of the court below is erroneous and should be reversed: 1. Because no valid sale could be made of the premises in question without the aid of a court of equity. 2. Because the trustee's "proceedings were irregular and no title passed to the apellee by Moncure's deed of the 14th of June, 1819."

We do not think there is any thing in the first ground assumed by the counsel for the plaintiff in error. Whether the conveyance from Bronaugh to Moncure be regarded as a mortgage, as contended for by the counsel, or as a

deed of trust in the usual and technical sense of the term, there can be no doubt it vested in Moncure the legal title to the premises; and his conveyance of the premises by deed to the appellee, if regularly made, must necessarily be regarded in a court of law as investing the appellee with the legal title. How the matter might be regarded by a court of equity is not for this court here to say. But it is perfectly clear that the conveyance of the trustee was a sufficient title at law to enable his alienee to recover in the action of ejectment, unless the second objection is maintainable.

§ 1154. *A notice of sale by a trustee of a deed of trust need only to be certain to a common and reasonable extent.*

The second ground of argument proceeds upon an objection to the notice of sale. It turns out, upon an inspection of the town plats, that the premises in question do not lie in "Peter, Beatty, Threlkeld and Deakins' addition to Georgetown," as described in the notice, but in "Threlkeld's" addition to Georgetown. And this mistake in the description of the premises, it is insisted, wholly vitiates the notice, and must render the sale made under it void. We think the objection ought not to be sustained. The law has prescribed no particular form for a notice of this description. It is sufficient if upon the whole matter it appears calculated reasonably to apprise the public of the property intended to be sold. We think the notice sufficient for that purpose, notwithstanding the inaccuracy of describing the property as being in "Peter, Beatty, Threlkeld and Deakins' addition," instead of "Threlkeld's addition." It could not mislead those who did not know the precise limits of these respective additions, and they were to those who might wish to purchase of so little consequence as scarcely to form a subject of inquiry. That part of the description, all must have known, did not and could not point out the particular lot intended to be sold. That could only be arrived at by the more certain and specific description of its locality, namely, "lot No. 99, fronting sixty feet on Fayette street and one hundred and twenty on Second street." To those who knew the precise limits of the several additions, the notice furnished upon its face not only sufficient evidence of the mistake, but a sufficient corrective of that mistake. They could not be ignorant that Fayette street and Second street were not in the addition described, but in the adjoining addition, in the name of Threlkeld. As the lot is described as fronting sixty feet on one of those streets and one hundred and twenty on the other, it must have been obvious at once that as these streets crossed each other at right angles, and the lots were laid off in right-angled parallelograms, the lot intended lay in the angle formed by these two streets. The streets of a town are its public highways and must be presumed to be well known to or easily found by all those who have an interest in knowing them or inquiring for them. They are, indeed, the most prominent and notorious landmarks and guides by which the lots are to be sought for, found and known.

It cannot be believed that any one wishing to find or know lot No. 99, fronting sixty feet on Fayette street and one hundred and twenty feet on Second street, or to purchase, could be for one moment misguided by the inaccurate and palpably mistaken description of its being in "Peter, Beatty, Threlkeld and Deakins' addition." Common sense would dictate to every one who read the notice that the less important, obscure and indefinite part of the description which, whether true or false, did not fix and give locality to the lot intended to be described, ought to yield to that palpable and notorious description, in reference to the public streets and highways of the town, which gave it posi-

tive locality. It has been said that the No. 99 did not appear on the recorded plat of the town, upon which the square only is laid down, without divisional lines and numbers designating the lots of each square; but it is admitted it was numbered on the plat made out by order of the corporation and lodged with the register but not recorded. It is believed no purchaser would have ventured to buy without first inspecting the title deeds and both the plats. But be this as it may, and even if any should have been so careless as not to examine the latter plat, still, it would clearly appear from the recorded plat that the lot described did not lie in the addition supposed by the notice, but in Threlkeld's addition, which was all that was necessary to correct the mistake; and it would also appear it must necessarily lie in the angle made by Fayette street and Second street. A purchaser or any one inclined to be a purchaser of property upon those streets could not have failed to have ascertained the particular lot intended by the notice.

We all think the notice was, notwithstanding the mistake in part of the description, certain to a common and reasonable extent, and that is sufficient. Judgment affirmed, with costs.

LONG v. ROGERS.

(District Court for Illinois: 6 Bissell, 416-419. 1875.)

STATEMENT OF FACTS.—Proceeding in equity to set aside a sale had under a trust deed from one Rogers to King on the grounds specified in the opinion of the court. Rogers borrowed \$4,000 from the Equitable Insurance Company, of which plaintiff is the assignee, to secure the payment of which he gave a trust deed to one Montgomery. At that time a prior deed of trust to King was outstanding. In January, 1872, the insurance company was adjudicated a bankrupt. Prior to this, however, default having been made in the payment of the interest on the \$4,000 loan, and the first deed of trust being due and unpaid, the property was advertised for sale thereunder. Before the latter could be had the court-house at which the sale was to be had burned down, and the property was readvertised and sold upon the site of the old court-house door, for the amount of the trust deed and costs, to one Smith, and a deed to the property given him by the trustee. A short time after this Smith borrowed \$8,000 from Trinity College, giving the latter a deed of trust upon this property as security; he parted with his equity of redemption subsequently to one McIntosh, who is a defendant herein.

Opinion by BLODGETT, J.

It is not disputed that Long, the assignee, did hold all the rights which the Equitable Insurance Company held by virtue of the Montgomery trust deed, which was the second one given. In regard to the first point, namely, that of fraudulent combination between Rogers, the mortgagor, and Smith, the purchaser, and Fisher, the holder of the note, I do not think the evidence sufficient to sustain the allegation or entitle the party to relief on that ground.

§ 1155. *Sale under a trust deed, made at the ruins of the door of the old court-house.*

In regard to the second point, namely that the sale was irregular because it was made at the ruins of the door of the old court-house, I am inclined to think that would be a good point if made at the time the sale took place. It would be good ground for stopping the sale before rights intervene, but I doubt if a purchaser would be absolutely obliged to take notice that the court-house was a ruin. Here is a trust deed with power to sell, and under its pro-

visions a sale does take place, and a deed is given, in which it is recited that the sale was in due form and according to the terms of the deed. Under that the person buying is clothed with a title, and thereupon he sells the property to another. Now, is it for a moment to be supposed that the other is obliged to look back to all the external facts connected with the sale, when his deed seems perfectly valid, and is in the regular form? I am inclined to think not, and I also think that the sale was made in pursuance of the terms of the trust deed.

§ 1156. *The fact that a subsequent mortgagee is a bankrupt does not prevent a sale under a prior mortgage.*

I now come to the third point, namely, that the sale was void because the Equitable Insurance Company was in bankruptcy at the time. Now, the position of the company was simply that of mortgagee of Rogers' equity of redemption. That they held that is clear; but it is clear also that he had the right to redeem from both the King and Montgomery incumbrance in which the insurance company was interested. Now, it has been held in several instances that when a bankrupt was the owner of the equity of redemption, and foreclosure proceedings were instituted after the bankruptcy, or an attempt was made to foreclose by a sale under a power in a trust deed, that the proceedings were void unless made with leave of the bankrupt court. *Hutchings v. Muzzy Iron Works*, 6 Ch. Leg. N., 26; *In re Bruckman*, 7 N. B. R., 421. In this case, however, the company did not hold the equity of redemption vested in Rogers. The only interest the company held was as second mortgagee. King, by the power delegated to him under the first trust deed, was authorized to sell upon certain contingencies. These contingencies which so authorized him to sell had actually arisen and happened, and accordingly he proceeded to, and did, make the sale. The grantor to him was not in bankruptcy; he was capable of acting. Rogers was capable of paying off the debt,—at least nothing has been proved to the contrary; and consequently he was capable of acting. Now the ground upon which the courts have gone in the question above referred to is that the grantor could not pay off the debt without leave of the court, and that therefore the proceedings were void, because of the invalidity of the bankrupt to act. But here, in this case, King was not bound to take notice of the fact that the insurance company was the holder. I am inclined to think that, under the circumstances, he was not bound to suppose that he rested under any disability, and there was no privity of contract between him or Fisher and the bankrupt. They stood in no relation to the bankrupt, and had no right to take notice of the insurance company's position, and, inasmuch as there was no such privity between the parties, I do not think the sale was void. Besides, Trinity College and McIntosh had advanced large sums of money on the faith of their titles and the validity of the sale, and it seems to me that it would be going a great ways to set aside this sale to the detriment of innocent holders. The bill will therefore be dismissed.

4. Conduct of Sale.

SUMMARY — *When trustee should sell whole, not a part*, § 1157.—*Acquiescence in conduct of sale*, § 1158.—*Sale for cash or credit*, §§ 1159, 1160.—*Adjournment*, §§ 1161, 1163.—*Recovery of deficiency after irregular sale*, § 1162.

§ 1157. It is not the duty of a trustee under a deed of trust to sell part of the mortgaged premises, but the whole, especially when it consists of a single lot, unless there is an express provision for selling a part. *Connolly v. Belt*, §§ 1164–1169.

§ 1158. The acquiescence of the mortgagor in the conduct of the sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it. Where the mortgagor was present at the sale, and made no objection to the terms and conditions of it, his acquiescence was held to conclude him from making objection afterwards. *Markey v. Langley*, §§ 1170-1172.

§ 1159. When the mortgagee is expressly authorized to sell for cash or on credit, he may do either or combine both in the sale, and although the terms of sale provide for the payment of one-third of the purchase money in cash, and the balance in notes secured by mortgage upon the same property, it is competent for the mortgagee to change the terms after the property is struck off, by giving credit for a larger portion of the purchase money. *Ibid.*

§ 1160. A mortgagee, being authorized to sell for cash or for credit, sold wholly upon credit, and took property in addition to that covered by the original mortgage as security. On account of a great depreciation in value afterwards, the mortgagee was obliged to sell the property again, and for a less price; and a subsequent incumbrancer then claimed that the mortgagee should be charged with a portion of the nominal proceeds of the first sale as cash, on the ground that he was not justified in selling for credit wholly. It was held that, having authority to sell in this way, and having acted at the time in good faith and for the benefit of all concerned, so far as then appeared, he could not be held responsible for the results. *Ibid.*

§ 1161. If a trustee, in selling under a trust power, finds there is no bidder except the creditor, or only sham bidders, he should adjourn the sale. *Fairfax v. Hopkins*, §§ 1173, 1174.

§ 1162. If the creditor at such a sale has bought the property at his own price and recovered judgment for the balance of his debt, equity will enjoin its collection until the real value of the land is found. *Ibid.*

§ 1163. The power to a trustee to sell by public auction, after a certain public notice of the time and place of sale, includes the power to adjourn the sale, in the exercise of a sound discretion, in order to obtain a fair price for the property. He may adjourn it more than once. *Richards v. Holmes*, §§ 1175-1179.

[NOTES.—See §§ 1180-1182.]

CONNOLLY v. BELT.

(Circuit Court for District of Columbia: 5 Cranch, C. C., 405-409. 1838.)

Opinion by CRANCH, C. J.

STATEMENT OF FACTS.—The bill of Owen Connolly states that he purchased lot No. 3, in square No. 403, in Washington, at a sale made by Raphael Semmes under a deed of trust from Thomas J. Belt to the said Raphael Semmes, to secure a debt due to John Pickerell, from whom Belt had purchased the lot. That by the deed of trust, it was the duty of the trustee, in a certain event, "to sell the premises at public auction, after giving twenty days' notice, at such time and place, and upon such terms and conditions as the said trustee shall deem most for the interest of all parties concerned in said sale." That he sold accordingly with the assent of Belt, who promised to deliver up possession of the premises to the plaintiff on the 1st of February thereafter, on the faith of which the plaintiff paid the purchase money, \$1,620, but Belt refused to deliver up the possession; whereupon the plaintiff brought his action at law for damages for not delivering possession according to his promise; and also an ejectment, in the name of Raphael Semmes, the trustee, to recover the possession. That there will be a surplus of purchase money in the hands of the trustee, after paying all liens and expenses, of from \$360 to \$400, payable to Belt. The bill suggests his insolvency, and prays for an injunction to stay that surplus in the hands of the trustee, to satisfy the damages and costs which the plaintiff may recover in his action at law, and for general relief.

§ 1164. *The surplus of a trust fund, proceeds of a sale, cannot be enjoined in the hands of the trustee to answer damages unless the debtor is insolvent.*

The main object of this bill, and the relief prayed, is to stay the surplus in the hands of the trustee, to meet those damages and costs; and I do not see

that any other relief can be granted upon the bill; and even that relief depends upon the insolvency of Belt; for upon no other ground can the court be justified in detaining it from him. The answer of Belt positively denies his insolvency; and this answer, being responsive to the allegation of the bill, must be taken to be true, and thus takes away all ground of relief. Doctor Dawes, indeed, says in his deposition that he believes that the pecuniary circumstances of Belt were bad at the time of the sale. He had two small judgments against him, which were unpaid. But this evidence is not sufficient to rebut the positive denial in the answer. The answer, it is true, denies the validity of the sale, because made for less than the price limited by the verbal agreement at the time of sale. But this is unimportant, as the plaintiff does not seek to have his purchase confirmed. His complaint is, that Belt will not surrender the possession; but for this he has sought his remedy in another forum, in a court of law, and therefore cannot now ask it in equity. If the plaintiff recovers judgment for his damages and costs at law, the law is competent to enforce it. The only equity in the bill is the supposed insolvency of Belt, and that is denied in the answer, and not supported by sufficient evidence. I think, therefore, that this bill of Connolly against Belt and Semmes should be dismissed.

§ 1165. *A responsive answer is evidence.*

The cross-bill of Belt v. Pickerell, Semmes and Connolly seeks to avoid the sale to Connolly: 1. Because the conditions of said deed of trust were not complied with, "inasmuch as the property was not offered for sale at such time and place, and upon such terms and conditions, as the trustee thought most advantageous to all parties concerned." This averment is directly and positively denied by the answer of the trustee, and this denial, being responsive to the allegation in the bill, is evidence.

§ 1166. *It is the duty of a trustee to sell the "premises" if the deed so requires, not a part of the property.*

2. Because the whole lot was sold, when a part would have satisfied this incumbrance of Pickerell's, and although he was requested to offer the corner division of the lot for sale to satisfy his lien. The fact that a proposition was made by the friends of Mr. Belt to Mr. Pickerell, to sell only a part of the lot, seems to be supported; and also that a sale of that part of the lot would have produced money enough to satisfy the claim of Mr. Pickerell; but it is evident that the subsequent incumbrancers would have proceeded against the residue of the lot at an increased expense; and it is very doubtful whether it would have produced as good a price, thus divided, as if sold entire. There was no obligation upon the trustee thus to divide it; nor had he authority so to do, without the consent of all who were interested in the property, including the subsequent incumbrancers. His duty, under the deed of trust, was to sell "the premises," not a part of the premises. The case of Delabigarre v. Bush, 2 Johns., 490, was upon a common mortgage, and one of the questions was, whether the court, in the exercise of its equitable jurisdiction, upon the foreclosure of the mortgage, should order the whole of the mortgaged premises to be sold, or only so much as should satisfy the mortgage debt. The premises consisted of two farms, the property of the mortgagor, and sundry city lots, the property of his wife. The court decided that it was not "a matter of course to order a sale of all the mortgaged premises." "That there can, perhaps, be no general rule upon the subject; each case must depend upon its own circumstances." Considering that a sale of the whole of the mortgaged

premises might materially injure the wife of the mortgagor, by converting her real estate into personal, whereby, if not necessary to pay the debt, it would become the absolute property of her husband, the court of errors reversed the decree for the sale of the whole, and ordered the husband's property to be first sold; and if that should not be sufficient, then so much of the wife's as should be necessary.

§ 1167. *Distinction taken between a mortgage and a deed of trust.*

The present case is not that of a common mortgage, but a deed of trust, where the trustee is bound to pursue his powers strictly; and although a court of equity would probably sanction a sale of part only, yet the deed of trust itself authorizes and requires the trustee to sell "the premises;" and where there was a contest between the *cestuis que trust* whether he should sell the whole, or a part only, his safest course, perhaps, was to sell the whole, especially as it consisted of a single lot. His refusal to yield to the wishes of the debtor in that respect, contrary to those of the creditor and subsequent incumbrancers, cannot make the sale void as against the purchaser, who had nothing to do with that question, and who was encouraged to bid by the debtor himself.

3. The third ground for avoiding the sale, as urged by Mr. Belt in his cross-bill, is, that it was agreed on the day of the sale that the property should not be sold under \$1,800, but it was knocked off to Connolly at \$1,620. But this allegation is not sustained by the evidence, and the objection therefore fails.

§ 1168. *It is not necessary to a sale under a deed of trust that the trustee should be present in person.*

Another objection was made in the argument, but not suggested in the bill, namely, that the sale was void because the trustee, Mr. Semmes, was not personally present. This objection was not made at the sale. In support of it the case of *Heyer v. Deaves*, 2 Johns. Ch., 154, was cited. That was a sale of mortgaged premises, made under a decree of the court of chancery of New York, in the absence of a master, who, being sick, did not attend, but deputed a competent agent, who attended and sold the land. The statute of that state requires "that all sales of mortgaged premises, under a decree, shall be made by a master." The chancellor says: "The statute intended that such sales should be under the immediate direction of a known and responsible public officer. An under, or deputy-master, is not an officer known in law." Neither that statute nor that case is applicable to the present case, which is a sale under a common deed of trust. The time, place, terms and conditions were such as were deemed by the trustee most for the interest of all the parties concerned in the said sale, as appears by the answer of the trustee; and a sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be personally present at the auction. No objection having been made by Mr. Belt, or his friends, on account of the absence of Mr. Semmes, the trustee, who was represented by Mr. C. Cox, as his agent, at the sale, and their suffering the sale to go on, is, I think, a waiver of the objection; it would have been otherwise valid. But the objection, in itself, is of no avail.

§ 1169. *The relief granted must always be consistent with the allegations of the bill.*

If the sale was valid it is not important in this suit to inquire how the trustee has applied the purchase money. The bill seeks to avoid the sale altogether, and does not ask for a decree for the surplus money in the hands of the trustee; and the plaintiff is not entitled to such a decree under the prayer for general

relief; for it would be inconsistent with his own statement of his case. The relief granted must always be consistent with the allegations of the bill. If the sale was void, as the plaintiff contends, he is not entitled to any part of the proceeds of the sale; and if he cannot support his bill upon the grounds which he has assumed, it must be dismissed.

Upon the whole, I think both bills must be dismissed.

MORSELL, J., concurred.

MARKEY v. LANGLEY.

(2 Otto, 142-156. 1875.)

APPEAL from U. S. Circuit Court, District of South Carolina.

STATEMENT OF FACTS.—The Kalmia Mills, a corporation of South Carolina, borrowed from Langley & Co. large sums of money upon two mortgages of its entire property, and its notes indorsed by Evans, its president, and by Cogswell and Mordecai, its managers. The mortgages not being paid according to their terms, the mortgagees advertised and sold the property in accordance with powers of sale contained in the mortgages to Cogswell, who bought for himself and the other indorsers, Evans and Mordecai. The corporation was indebted to other persons to the amount of about \$20,000, in addition to the company's assets not covered by the mortgages. Among these creditors were Markey & Co., contractors and builders engaged in erecting the factory, whose contract was recorded a few days before the sale, and then became a lien, not impairing the mortgages. The sum bid by the purchasers at the sale was intended to be sufficient to pay the mortgages and all other debts of the company. By the terms of the sale one-third of the purchase money was to be paid in cash, and the remainder on time secured by mortgage of the property; but after the sale, the purchasers being unable to make the cash payment, Langley & Co. accepted their notes secured by a conveyance of the property to Cogswell in trust and their bond of indemnity for \$100,000 and mortgages of their individual property. The deed of trust provided that in case of default in the payment of the notes given to Langley & Co. for the purchase money, they should sell the mortgaged property and pay the notes from the proceeds. Default being made in the payment of these notes, the property was sold and William C. Langley became the purchaser, and subsequently the property mortgaged by Cogswell, Evans and Mordecai was also sold. Markey & Co. and others, who had become creditors of the Kalmia Mills after the first foreclosure sale, contested the application of the proceeds of these sales to the payment of the mortgages. Other facts sufficiently appear in the opinion of the court.

Opinion by MR. JUSTICE SWAYNE.

The statement of facts agreed upon by the counsel of the parties has abridged our labor in this case. We shall confine our remarks to the points which, in our judgment, require consideration, referring to the facts only so far as is necessary for the elucidation of our views.

§ 1170. *Where a mortgagee sells property under a power authorizing such sale, and all concerned acquiesce, the sale is valid.*

The validity of the two mortgages executed to Langley & Co., by the corporation known as the Kalmia Mills, is not questioned; nor can it be doubted that the power to sell, which they contained, was sufficient to warrant the sale of the mortgaged premises in the manner prescribed. *Olcott v. Bynum*, 17

Wall., 63. The good faith of Langley & Co. in making the sale, and of Cogswell, Evans and Mordecai in making the purchase, are undisputed. No ground is disclosed for doubt as to either of these points. All concerned acquiesced at the time, and were apparently satisfied. This litigation has grown out of the large and unexpected depreciation of the property upon which both the appellants and appellees supposed their debts were abundantly secured, and out of the proceeds of which they expected to be paid, if a sale became necessary. Upon the default of the mortgagor, the mortgages gave the mortgagees authority "to put the mortgaged premises into the hands of some good broker and auctioneer, to be sold for cash or credit, at the option and direction of the mortgagees, at public sale to the highest bidder, according to the custom of vendue, after advertising," as directed; and further, "to do and perform all and every other act and acts, thing and things, which shall or may be necessary and proper for the full and complete effecting and performing of the covenants and agreements herein contained."

§ 1171. *Where the mortgagees are empowered to sell for cash or credit, a sale for part cash and part credit, particularly where such is advantageous to the mortgagor, cannot be complained of; and such an arrangement is competent after as well as before the property is struck off.*

The terms of sale advertised were a cash payment of one-third of the amount bid, and the balance in six, nine and twelve months, secured by notes and a mortgage upon the premises. At the sale, the auctioneers announced that they were authorized to state "that the purchasers would be able to negotiate more favorable terms with the sellers, provided it was to their mutual interests." The property was sold to Cogswell for himself, Evans and Mordecai, upon a bid of the amount due Langley & Co., and \$20,000 in addition. One-third of the amount bid to be paid in cash was \$71,445.69. The buyers thereupon represented to Langley & Co. that it was impossible for them to make the cash payment, and asked for indulgence, and a change of the terms of the sale with respect to the times when the payments were to be made. Langley & Co., rather than re-advertise the property and take the risk incident to offering it for sale again, entered into an agreement with the purchasers, whereby it was stipulated as follows: That the purchasers should give to Langley & Co. their four several promissory notes, one for \$180,000, payable on the 12th of January, 1868 (being for the principal of the debt then due to them), with interest; and three others, each for \$4,779.92, payable respectively at five, six and seven months, with interest (being for interest then due on the principal debt); and, in addition, another note for \$20,000, payable with interest on the 3d of April, 1868.

The title to the mortgaged premises was to be conveyed to Cogswell, first to pay the several notes for the purchase money, and then in trust for such uses and purposes as Cogswell, Evans and Mordecai should appoint. They were also to give to Langley & Co. their bond, secured by several mortgages upon their individual property, conditioned to pay any residuum that might be left due on the notes after exhausting the property covered by the deed of trust to Cogswell. This agreement was in all things carried out by the parties. The note of \$20,000 was intended to meet the liabilities of the Kalmia Mills to its creditors, other than Langley & Co. The debt due to Markey & Co. was one of those intended to be thus provided for. A few days before the sale, Markey & Co. put on record a contract with the Kalmia Mills, under which they had been working upon the mortgaged premises. This gave them a mechanic's lien.

They threatened to enjoin the proceedings to sell by Langley & Co. Cogswell, Evans and Mordecai thereupon gave them a guaranty, that, if the guarantors became the purchasers of the premises, they would continue the contract under which Markey & Co. had been working, and indemnify them against any loss arising from the Kalmia Mills failing to pay the amount due on the contract. This being arranged, Markey & Co. interposed no obstacle to the sale. After the sale, they entered into a contract with Cogswell, the trustee, whereby it was stipulated that they should be paid the sum of \$18,000 for their work done and to be done. They continued to work under this contract, and received payments from time to time.

The enterprise in which Cogswell, Evans and Mordecai had engaged, with the premises they had bought as its basis, having failed, they requested Langley & Co. to take possession of the premises conveyed by the trust deed to Cogswell, and of the premises covered by the mortgages given by Cogswell, Evans and Mordecai, and to proceed to sell under the powers contained in those instruments. Langley & Co. thereupon advertised the Kalmia Mills property to be sold on the 10th of March, 1868. Markey & Co. and other creditors threatened to interpose by injunction. Langley & Co. thereupon filed this bill to settle their rights and those of the adverse parties. On the day fixed for the sale, the Kalmia Mills property, by consent of parties, was bought by Langley for \$160,000. Forty thousand dollars of the fund was reserved by order of the court to await the result of this litigation. Subsequently, by the like consent of parties, the property mortgaged by Cogswell, Evans and Mordecai was sold, and yielded the net sum of \$52,148. The proceeds of both sales were less than sufficient to satisfy the amount due Langley & Co. by \$6,152.13, leaving nothing to be applied to any other liability of the Kalmia Mills.

The contest in the court below was as to the application of the proceeds of these sales. The defendants claimed that Langley & Co. should be charged with the amount of the cash bid of Cogswell at the sale under the original mortgages, \$71,449.69, as so much paid to them, because they had no right to waive its payment at the time of the sale, and include it in the notes given for the purchase money. This, if done, would leave a residuum of the proceeds of the sales large enough to pay the balance due Langley & Co., and also the amount due on the trust note of \$20,000. Failing this, the defendants insisted that this note should be paid out of the proceeds of the Kalmia Mills property, and of the property mortgaged by Cogswell, Evans and Mordecai severally, *pro rata* with the other notes given for the purchase money.

The court below decided against them upon both points. Here the same propositions have been urged upon our attention. The first one cannot be maintained, for several reasons. The mortgagor makes no objection to the sale as made. If it were defective, this would cure the defect and give it validity. *Taylor v. Chowning*, 3 Leigh, 654; *Benham v. Rowe*, 2 Cal., 387. If the power require the sale to be for cash, and it is made for part cash and part credit, the departure from the power is beneficial to the mortgagor, and the sale is valid. *Hubbard v. Jarrell*, 23 Md., 75. When the power is to sell for cash, and the sale is made accordingly, the mortgagee may allow time for the payment of the purchase money; and whether this arrangement is made before or after the sale is immaterial. *Mahone v. Williams*, 39 Ala. (N. S.), 202. Where mortgaged premises were offered for sale for cash, under a power which required the sale to be so made, they were struck off for \$2,375. The

purchaser tendered \$1,200 cash, and offered to give any security that might be required for the payment of the balance when the sale was confirmed. The mortgagee declined to receive the money and the security, as not in conformity with the terms of the sale. The property was offered for sale again, and bought by the mortgagee for \$1,600.

The court said: "In determining upon the approval or rejection of the sale in such cases, the true question to be considered is, not so much whether there has been *a literal or technical, as a fair and reasonable, compliance with the terms of sale* and a *bona fide* disposition of the property. Without intending to charge the mortgagee in this case with the wilful violation of his trust, the circumstances disclosed by the proof show reasonable ground for the inference that he misapprehended the nature of his duty as trustee, which required *an advantageous sale of the property for the benefit of all the parties interested.*"

The sale was vacated. *Horse v. Hough*, 38 Md., 139. See, also, *Gibson's Case*, 1 Bland Ch., 144; *Olcott v. Bynum*, 17 Wall., 63. Where a power coupled with a discretion has been exercised, a court of equity, in the absence of fraud, very rarely interferes. *Olcott v. Bynum*, *supra*. In this case the mortgagees were expressly authorized to sell for cash or on credit. This gave them authority to do either, or to combine them in the sale. What was done was a simple exercise of the discretion with which they were clothed. It was in pursuance of the notice given at the vendue. It was intended to promote the sale of the premises upon the best terms that could be procured. Such an exercise of the power was as competent after as before the property was struck off. In this respect the power is without restriction. The arrangement was apparently greatly beneficial to Markey & Co. and the unsecured creditors, as well as to Langley & Co. It does not appear that there was any bidder but the purchasers. It is clear that they could not have made the cash payment. If insisted upon, the sale would have fallen through. Besides the mortgaged premises, a large amount of additional property was pledged for the payment of the purchase money. The light thrown backward by subsequent events shows clearly that it was the only way to secure the payment of the debt due to Langley & Co., and leave anything for the other creditors. The arrangement seemed to furnish the means of satisfying all demands. That it failed to do this was not the fault of Langley & Co.

§ 1172. *A mortgagee acting within the scope of his authority will not be held responsible for mere errors of judgment, or unfortunate results which he could not reasonably have anticipated.*

A mortgagee, in such circumstances, is a trustee for the benefit of all concerned. He must regard the interests of others as well as his own. He should seek to promote the common welfare. If he does this, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment, if they have occurred, or for results, however unfortunate, which he could not reasonably have anticipated. *Hext v. Porcher*, 1 Strob. Eq., 172.

The second proposition is also untenable. The liens of the mortgages and the mechanic's lien attached to the proceeds of the sales in the same manner, in the same order, and with the same effect, as they bound the premises before the sales were made. *Astor v. Miller*, 2 Paige, 68; *Sweet v. Jacocks*, 6 id., 355; *Brown v. Stewart*, 1 Md. Ch. Decis., 87; *Olcott v. Bynum*, 17 Wall., 63. In the view of equity, the new securities stood in substitution for the old ones; the liens of Langley & Co. being prior in point of time to all others, and first

to be paid. As the case is developed in the record, such appears plainly to have been the intent of the parties. The note of \$20,000 was the last to mature. If the sale to Cogswell had been made by a master or a trustee other than those named in the power of sale, for cash or on credit, the money, when received, would have been paid over according to the priorities of the liens of the parties entitled to receive it. Langley & Co. would have been first paid.

The fact that the sale was made by the mortgagees, acting as trustees and performing the functions of a master, does not change the principle involved, nor affect its application. It appears that a question was raised in the court below as to the right of the unsecured creditors of the Kalmia Mills to share with Markey & Co. in the proceeds of this note. As there can be no such proceeds, we need not consider that subject.

Decree affirmed.

FAIRFAX v. HOPKINS.

(Circuit Court for District of Columbia: 2 Cranch, C. C., 184-187. 1817.)

Opinion by CRANCH, C. J.

STATEMENT OF FACTS.—The facts of this case appear to be as follows: On the 27th of September, 1811, Ferdinando Fairfax, being indebted to John Hopkins in the sum of \$7,294, made a deed of trust to B. Taylor and T. Parker, for twelve hundred and sixty-seven acres of land in Jefferson county in Virginia, with power to them or either of them to sell the same for ready money to the highest bidder, after giving two months' notice of the time and place of sale in the newspaper printed in Charleston, in case F. F. should not pay the debt on the 1st of October, 1812. Mr. F. failed to pay on that day, and on the 9th of the same month the property was advertised for sale under the trust. At the sale there was no real bidder but Mr. Turner, the agent of Mr. Hopkins. Mr. Humphreys and Mr. Dixon admit that they had not the money. Their bids, therefore, would not have been received. The land was, of course, struck off to Mr. Turner for Mr. Hopkins, at the price of \$5,320. Mr. Hopkins, in his letter to Mr. Turner, of the 13th of November, 1812, admits that the land was good security for the debt, and authorized Mr. Turner to bid to the full amount of the debt, interest, costs and commissions. On the 13th of April, 1813, B. Taylor, one of the trustees, conveyed the land directly to Mr. Hopkins. After crediting the purchase money (\$5,320), the balance stated to be due to Mr. Hopkins was \$2,780.95, for which he brought suit on the bond. Mr. Fairfax was arrested, and, not being able conveniently to give bail, made another deed of trust in lieu of bail (not admitting anything to be due) for two hundred and fifty acres of land in Loudon county. Judgment was recovered, and not being satisfied, the trustees of the Loudon land advertised it for sale at Leesburgh, on a court day. Only two bids were made; one by some person, as it seems, merely to set it up, at \$5 an acre; the other by Mr. Hopkins, Jr., in behalf of his father, to whom it was struck off at \$6 an acre. The only real bidder was Mr. Hopkins. The proceeds of this sale being credited (\$1,500) Mr. Hopkins took a *ca. sa.* against Mr. Fairfax for the balance, being about \$1,900. Mr. Fairfax filed this bill and obtained an injunction, which it is now moved to dissolve, upon the coming in of Mr. Hopkins' answer.

Mr. Hopkins admits that he has sold these last two hundred and fifty acres of land at about \$10 per acre, and that for the Jefferson land remaining unsold, being about one thousand acres, he would take the same price at long credits. Without taking into account the two hundred and sixty-seven acres

of Jefferson land which Mr. Hopkins has sold, he has one thousand acres worth \$10 an acre, \$10,000, and has sold the Loudon land for about \$2,500, making \$12,500. The whole debt and interest to the 27th of September next would be a little less than \$10,000, so that he has already received \$2,500 more than his whole debt and interest. If we add the two hundred and sixty-seven acres of Jefferson land sold by Mr. Hopkins, perhaps at \$10, it will make upwards of \$5,000 more than the whole debt and interest.

§ 1173. *Duty of a trustee appointed by a debtor to sell mortgaged premises in case there is no real competition.*

A mere statement of the facts of this case shows its injustice. That a creditor should have the power of appropriating to himself, at his own valuation, the property of his debtor, strikes every one as unjust in the extreme, yet this has been the fact in the present case, and may be the fact in many like cases, if, by mere compliance with exterior forms, we can tie the bandage of law over the eyes of equity. In the present case, although the forms of the contract may have been pursued, so that, if a stranger had been the purchaser, his title would have been protected at law, yet, in substance, as between these parties, the contract has not been complied with. The land was to be sold to the highest bidder; meaning, unquestionably, the highest *bona fide* bidder; and unless there be at a sale more than one such bidder, the sale cannot be made to the highest bidder; because where there is only one there can be no comparison. The word "highest" was used in order that there should be no sale unless there should be a real competition. Such is undoubtedly the intention of the parties; and where the intention of the parties has not been fairly executed, a court of equity will interfere in cases where third persons have not acquired legal rights without notice of the equity.

§ 1174. *If creditor has bought property at his own price, and recovered judgment for balance of his debt, equity will enjoin its collection until real value of land is found.*

In the present case the rights of third persons do not interfere. The transaction has been entirely between the debtor and creditor. The creditor has under the forms of law appropriated to himself, at his own valuation, the property pledged. He has stood by and seen the property of his debtor sacrificed in consequence of his own pressure, and has even taken to himself the whole benefit of that sacrifice. He has gained all that his debtor has lost. Not contented with this he seizes the body of his debtor, and when this debtor asks a court of equity to look into his case, the creditor presents to the court his shield of legal forms. We are told in the answer that we cannot question either the legality or the equity of the sale of the Jefferson lands, because that subject has been acted upon by the chancery court at Winchester. This may be so as it respects the title to those lands. The creditor may keep them, and perhaps his title may be unquestionable by this court. But this court is not bound, while inquiring whether the creditor shall be permitted further to prosecute his debtor, to shut its eyes to the facts in evidence before us. We are not forbidden to see that the creditor has, in fact, appropriated to himself those lands which he admitted to be good security for his debt; nor that he has also acquired other lands of his debtor at a very inadequate price. If those lands were good security while in the hands of the debtor, why should they not, in equity, be considered as good payment when they get into the hands of the creditor? We are not forbidden to see that the debt is in fact paid which the creditor seeks to enforce. We may not, perhaps, set aside the conveyance of

the property to the creditor; we may not, perhaps, on final hearing, compel the creditor to account for a surplus, but we think we ought to continue the injunction till final hearing. It may then be time enough to inquire whether we can decree a perpetual injunction.

In cases like this, the trustee appointed by the parties is substituted for a master in chancery under the decree of a court of equity. The one is as much bound as the other, not only to see that the sale is fairly made, that is, that no fraud or deception be used, but to ascertain that there is a real competition; not a mere sham sale. He is not to suffer a creditor to bring with him a few nominal bidders, for the purpose of enabling him to take to himself the property at his own price; he is as much bound to take care of the interest of the debtor as of the creditor; and if he finds only sham competitors he ought not to proceed with the sale, but adjourn and give new notice. For these reasons the opinion of a majority of the court is that the injunction should be continued till final hearing. (a)

THRUSTON, J., concurred. MORSELL, J., doubted.

RICHARDS v. HOLMES.

(18 Howard, 143-149. 1855.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court for the District of Columbia. The appellants filed their bill in that court to set aside a sale, made to satisfy a prior incumbrance on land, upon which they claimed to have a second incumbrance. In the court below, some question appears to have been made concerning the priority of the incumbrances; but none is made here, it being conceded that though that claimed by the complainants was the earliest in date, the other was first recorded, and takes precedence. The sale in question was made under a deed of trust, whereby Holmes, the debtor, conveyed to the defendant, Philip R. Fendall, in trust to secure the payment of a promissory note, bearing date May 1, 1846, payable in two years from date, for \$2,800 and interest, payable annually.

§ 1175. *Deed of trust authorizing sale of property on default of payment of interest.*

It is objected that the sale, which was made on the 21st of October, 1847, after one year's interest had become due, but before the principal sum was payable, was premature. This depends upon the meaning and effect of the power of sale contained in the deed. It was competent for the parties to agree to a foreclosure by sale for non-payment of interest, and the question is, whether they did so agree. The event in which the trustee is empowered to sell is thus described in the deed: "But if the hereinbefore described promissory note, with the interest legally due thereon, shall not be fully paid off and discharged when said note shall be due and payable, and payment of the same shall be demanded, or if any note or notes given in substitution for or renewal of the hereinbefore described promissory note shall not be fully paid off and discharged according to the tenor and effect of the said substitute or new note or notes, together with the interest legally due on such substitute or note or notes, so that any default be made in payment of any part of the aforesaid debt of \$2,800 and interest, then so soon after such default," etc.

(a) At a subsequent hearing the bill was dismissed.

The omission to pay the first year's interest was a default within the express words of this power. That interest was part of the interest secured by the note, and a failure to pay it was a "default in payment of part of the aforesaid interest." The deed authorizes the trustee to sell for any such default, and, consequently, the sale was not premature. It was argued that the trust deed does not describe the note as bearing annual interest, and, consequently, that the subsequent incumbrancer has a right to insist that, as against him, there was no power to sell for non-payment of such interest. It is true the deed does not purport to describe the interest which is to become due on the note; but it clearly shows that it bore interest at some rate, and payable at some time or times, and this was sufficient to put a subsequent incumbrancer on inquiry as to what the rate of interest and the time or times of its payment were. The deed, in effect, declares, and its record gives notice to subsequent purchasers, that its purpose is to secure the payment of such interest as has been reserved by the note; the amount, and date, and time of payment of which are mentioned. We do not think the mere omission to describe in the deed what that interest was to be is a defect of which advantage can be taken by the complainants.

§ 1176. *Trustee required to advertise property may adjourn sale from time to time under advertisement.*

The complainants further insist that the property was not duly advertised. The provision in the deed of trust upon this subject is as follows: "It shall be the duty of the said Philip R. Fendall or his heirs to enter upon the hereinafore conveyed piece or parcel of ground and appurtenances, and sell the same at public auction to the highest bidder, or at private sale, for cash or credit, according to his or their discretion, after having given public notice of such sale, by advertisement, at least thirty days previously thereto, in the National Intelligencer, or in some other newspaper printed or published in the city of Washington aforesaid." Inasmuch as the trustee was empowered to sell at private sale, as well as at public auction, his power extended to a private sale made at any time after thirty days' notice. Having given notice for the space of thirty days that he was about to sell the property, he might, at any time after the expiration of that thirty days, have proceeded to sell it at private sale. But this notice should be such as to call for purchasers at private sale. The notice given was of a sale at public auction. This did not call for purchasers, except at the time and place mentioned in the notice. No sale was made at the time and place designated in the thirty days' notice published in the National Intelligencer. At that time and place the attendance of bidders was so small that the trustee believed an attempt to sell for a fair price would be fruitless; and he adjourned the sale for the space of fourteen days, giving notice of such adjournment in the same newspaper of the next day. At the time and place thus fixed for the adjourned sale another postponement took place, for the same reasons, for one week; and the place of sale was changed from the premises to the rooms of the auctioneer. Of this postponement, also, public notice was given on the next day in the same newspaper. There is no reason to suspect the least unfairness on the part of the trustee, or any one concerned. His conduct seems to have been dictated solely by an honest desire to obtain the best price for the property. Nor is there any ground for believing that either of these postponements prejudiced the interest of the complainants. They stand upon the objection that though the trustee might

have sold on the first day, of which thirty days' notice was given, he could not on that day adjourn the sale.

But we consider that a power to a trustee to sell at public auction, after a certain public notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property. If he has not this power, the elements or many unexpected occurrences may prevent an attendance of bidders, and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf under the circumstances supposed, and which he may well be presumed to intend to confer on another. This power of sale does not undertake to prescribe the particular manner of making the sale. It is to be at public auction, and "after having given public notice of such sale by advertisement at least thirty days;" but it assumes that the sale will be conducted as such sales are usually conducted. A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect, the sale of which previous public notice was given. The courts of several states have gone further in this direction than we find necessary, though we do not intend to intimate any doubt of the correctness of their decisions. They have held that a public officer, upon whom a power of sale is conferred by law, may adjourn an advertised public sale to a different time and place, for the purpose of obtaining a better price for the property. *Tinkom v. Purdy*, 5 Johns., 345; *Russell v. Richards*, 11 Me., 371; *Lantz v. Worthington*, 4 Barr, 153; *Warren v. Leland*, 9 Mass., 265. If such a power is implied where the law, acting *in invitum*, selects the officer, *a fortiori* it may be presumed to be granted to a trustee selected by the parties.

§ 1177. *Beneficiary under trust deed may purchase property at public sale.*

The remaining objection is, that the defendant Harper, the creditor for whose benefit the sale was made, through the trustee, requested the auctioneer to bid for him the sum of \$2,500; that the auctioneer did so, and there being no higher bid, the property was struck off to Harper. It is insisted that this renders the sale void. We do not deem it necessary to examine the numerous and somewhat conflicting decisions upon the subject of by-bidding, or bidding by persons standing in fiduciary capacities. This case stands clear of those decisions and of the principles upon which they rest. No decision lays down a positive rule that such sales, though affected by such bidding, are, *per se*, and as between all persons, void. They may be avoided by parties whose just interests have been injuriously affected by such misconduct, provided the rights of innocent third persons are not thereby disturbed. It was for the advantage of these complainants, as subsequent incumbrancers, that this property should sell for the best price which could be obtained. Even improper practices to enhance the price, if any such had been resorted to, could not be complained of by them. It is only some practice to prevent bidding or procure a sale for less than the property would have otherwise brought, which can be relied on by them to avoid the sale. We have no doubt the creditor, for the satisfaction of whose debt the sale was made, had a right to compete fairly at the sale; but whether he had or not, his doing so could not be injurious to the complainants.

§ 1178. — *and he may authorize the auctioneer to bid for him, and if his bid is the highest, he is entitled to the property.*

It is true he employed the auctioneer to bid for him; but this fact alone could not depreciate the price. Such an authority may be used for fraudulent

purposes; but if fairly used, its tendency is to enhance the price; and in this case there is no evidence that it was intended to be, or in fact was, unfairly used. On the contrary, there seems to be no room for doubt that the price bid by the auctioneer for Harper was more than any other person was willing to give. It must be remembered that the auctioneer was not employed as the agent of the creditor to purchase the property for him at the least price at which it could be obtained. Such an agency an auctioneer should not undertake. It is inconsistent with his relation to the seller, and with the faithful discharge of his duty to the seller. But an agency simply to bid a particular sum for a purchaser, amounting to no more than receiving from the purchaser, before the auction, a bid which is to be treated as if made there by the purchaser himself, is not necessarily inconsistent with any duty of the auctioneer, and does not enable any one to avoid the sale. And the same remark applies to the trustee. It was his duty to obtain for the property the best price he could by the use of due diligence in a fair sale. It would have been improper for him, in behalf of the creditor, to employ the auctioneer to buy at anything short of that best price. But there was no impropriety in his employing him to bid a particular sum for the creditor, to prevent a sacrifice of the property. We have considered all the objections to this sale made by the complainants, and finding neither of them valid, the decree of the court below is, in that respect, affirmed.

§ 1179. *An assignment by deed of a negotiable note renders the assignor liable simply on his covenants in the deed.*

As to so much of the complainants' bill as seeks relief against their assignors, in the event of not obtaining satisfaction from the land, we are of opinion that these assignors are under no such liability as is asserted by the complainants. The complainants purchased a negotiable note which was overdue. The assignors did not indorse it, but simply assigned it by deed. They entered into certain specific covenants concerning the subject-matter assigned; and their liability depends exclusively on these covenants. Neither of these covenants appears to have been broken. The only one concerning which any doubt has been raised is the following: "And we do in like manner covenant, promise and agree that the said note of \$3,000, hereinbefore assigned, shall be and is entitled to payment out of any sale of the premises conveyed in and by the deed of trust aforesaid, before the other note therein specified, and shall have a prior lien on the said premises, or the proceeds thereof."

We think the purpose and effect of this covenant was, not to secure payment out of any sale which might be made by any party under any title to the premises, but only to assure the priority of payment of the note assigned, in preference to the other note, out of any sale made under the particular title to the premises described in the deed of assignment. The covenant that the note assigned is due is shown to have been kept by the note itself, in the absence of other evidence. The answer admits the receipt of moneys from the maker on account of other debts, but denies any payment on account of this note; and there is no evidence to the contrary. The decree of the circuit court is affirmed, with costs.

§ 1180. *An error in stating the amount of an attorney's fee stipulated for in the mortgage will not, in the absence of fraud or prejudice to the owner of the land, invalidate the sale.* *Swenson v. Halberg*, 1 McC., 96; 1 Fed. R., 444 (§§ 809-811).

§ 1181. *Sale in separate parcels.*—The statutory provision of Minnesota, requiring the sale of separate and distinct tracts in separate parcels, is directory, and the sale will not be

disturbed, unless it was made fraudulently, or it is shown that the mortgagor or owner of the equity of redemption was damaged thereby. *Ibid.*

§ 1182. *Trustee may depute agent to attend sale.*—In the absence of a statute requiring the trustee to be personally present at the sale, he may depute a competent agent to attend the sale and conduct it; and such sale will be valid. *Connolly v. Belt*, 5 Cr. C. C., 405 (§§ 1164-69).

5. *Who May Purchase at Sale under Power.*

SUMMARY—*Trustee purchasing from intermediate purchaser*, § 1183.—*Beneficiary under trust deed*, § 1184.—*Purchaser's memorandum of sale*, § 1185.

§ 1183. That a trustee, several years after the execution of a sale under the trust, comes into possession of the property by purchase from his purchaser, is not necessarily fraudulent. *Stephen v. Beall*, §§ 1186-1189.

§ 1184. A corporation which is the payee of the note secured by a deed of trust may purchase at a sale fairly conducted in every respect, although the trustee was the actuary of the corporation, in case he acted in his individual capacity. *Clark v. Trust Company*, §§ 1190, 1191.

§ 1185. A bidder at a foreclosure sale is not bound by his bid, unless there was a memorandum of sale signed by him or by the auctioneer acting as the agent of both parties. *Cook v. Hilliard*, § 1192.

[NOTES.—See §§ 1193-1200.]

STEPHEN v. BEALL.

(23 Wallace, 829-841. 1874.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—A deed of land was made to a Mrs. Bell and her three children, who were named in the deed. Mrs. Bell afterwards married Beall, and he with his wife executed a deed of trust conveying the whole tract to secure a debt contracted by Beall in the purchase of land from Stephen, trustee of Magruder. When the notes for the purchase money fell due, Stephen caused the Magruder land to be sold to Crowley, and its proceeds failed to pay the debt. He thereupon filed a bill against Beall and wife to obtain satisfaction of the balance unpaid of the Magruder purchase money. In their answer Beall and wife set up the interests of the children, denied that Mrs. Beall could charge her land for her husband's debts, and in a cross-bill charged that the sale of the Magruder land to Crowley was fraudulent, being in reality a sale by the trustee to himself. The fraud was denied by Stephen. The bill was dismissed and Stephen appealed.

Opinion by MR. JUSTICE HUNT.

The counsel for the appellee sustains the decree below dismissing the bill upon three grounds: 1st. Because the complainant failed to join the necessary parties defendant. 2d. Because a wife could not, at the date of the deed in question from Mrs. Beall, incumber her estate for the benefit of her husband. 3d. Because the complainant acted in bad faith.

§ 1186. *A person holding in joint tenancy one-fourth of a tract of land can by a conveyance of the whole pass that interest and no more to the grantee.*

We will consider the different grounds in their order. 1. As to the necessity of further parties defendant. Mrs. Beall was the owner of one-fourth of the property referred to, and no more. This one-fourth she could convey, and no more. Whether the terms of her deed purported to convey this portion only, or the whole, is not important. She could not convey the remaining three-fourths, nor could the general language of her deed create a cloud upon the title of her children. The record showed exactly what title she had, and

exactly what title the children had. No relief was asked against the children, and no claim made by the trustees that their rights were affected by the deed of their mother. The bill was filed against Mrs. Beall and her husband only, and judgment only asked against them. No judgment could be taken against the children or that would affect their estate, nor would a sale of their interest have any legal effect. *Ward v. Dewey*, 16 N. Y., 519; *Heywood v. City of Buffalo*, 14 id., 534; *Cox v. Clift*, 2 Comst., 118; *Story's Eq.*, § 700. If the grantees were tenants in common, it is not denied that Mrs. Beall could convey her portion or interest without affecting the rights of her co-tenants, and that her deed in this case would effect that purpose. It is said, however, that as the law of Maryland stood in 1801, and was thence carried into the District of Columbia, the conveyance to Mrs. Beall and her children created a joint tenancy, and that being a joint tenant, her conveyance in 1857 did not bind her interest only, but affected, also, that of her co-tenants.

We cannot recognize this conclusion. We find the law on this point thus laid down, in *Coke Littleton* and in *Bacon's Abridgment*: "If there be three joint tenants and one aliens his part, the other two are joint tenants of their parts that remain, and hold them in common with the alienee." *Coke Littleton*, 189; *Bacon's Abr.*, title "Joint Tenants," E. "If one joint tenant bargains and sells his moiety, and dies before the deed is enrolled, yet the deed, being afterwards enrolled, shall work a severance *ab initio*, and support, by relation, the interest of the bargainee. But if one joint tenant bargains and sells all the lands, and before enrollment the other dies, his part shall survive, for the freehold not being out of him the jointure remains, and though afterwards the deed is enrolled, yet only a moiety shall pass, for the enrollment by relation cannot make the grant of any better effect than it would have been if it had taken effect immediately." *Coke Littleton*, 186, 186a; *Bacon's Abr.*, title "Joint Tenant," I, 3.

§ 1187. *In a proceeding to enforce the mortgage of a joint tenant, his co-tenants are not necessary parties.*

It is laid down in the same authorities that if one joint tenant agree to alien, but do not, and die, this will not sever the joint tenancy, nor bind the survivor. But it is held in *Hinton v. Hinton*, 2 Ves., 634, that in equity it may be enforced if the articles amount to an equitable severance of the jointure. We think it clear upon these authorities that the attempted conveyance by Mrs. Beall of the entire premises had no effect upon the interest of her co-tenants, conceding them to have been joint tenants. The law is well settled that no cloud is cast upon a title by a proceeding or claim, where the record through which title is to be made shows a defense to the claim. *Ward v. Dewey*, 16 N. Y., 519; *Heywood v. City of Buffalo*, 14 id., 534; *Cox v. Clift*, 2 Comst., 118; *Story's Eq.*, § 700. It would not be proper under such circumstances that the children should be parties defendants. See *Reed v. Vanderheyden*, 5 Cow., 719; *Bailey v. Inglee*, 2 Paige, 278. We dismiss, then, as unfounded the argument of a want of parties defendant.

§ 1188. *A married woman can by deed duly executed and acknowledged bind her separate estate for the payment of a specified debt of her husband.*

2. The dismissal of the bill is defended upon the further ground that the debt sought to be secured is the debt of the husband, and that it was not competent for the wife to incumber her individual property to secure her husband's debts. In support of this argument *Steffey v. Steffey*, 19 Md., 5, in the court of appeals of Maryland, is cited; but that case does not bear upon the ques-

tion. That was not the case of an attempt to encumber the separate property of the wife for the debt of the husband. It was a case in which both husband and wife had joined in an agreement to sell the lands of the wife. Upon a bill for specific performance the interest of the husband was adjudged to be bound, but the execution of a contract simply was held to be inoperative to convey the estate of or to bind the married woman under the statutes of Maryland. Nor is *Central Bank of Frederick v. Copeland*, 18 Md., 305, in the same court, and also cited, an authority to the point insisted upon. It was there held that a mortgage by a wife for her husband's debts, obtained from her by threats, and the exercise by the husband of an authority so excessive as to subjugate her will, was not binding upon her. There is nothing in these authorities to indicate that the law of Maryland or of the District of Columbia on this subject is in any respect peculiar. The case rests upon and must be governed by the general principles applicable to the subject.

As to a wife's individual property generally, it is well settled that she may, by joining in a deed with her husband, convey any interest she has in real estate. Such a deed conveys the interest of both. 1 Washburn on Real Property, *280. The doctrine that a married woman has the power to charge her separate estate with the payment of her husband's debts, or any other debt contracted by her as principal or as surety, has been uniformly sustained for a long period of time. *Hulme v. Tenant*, 1 Brown's Ch. Cas., 16; *Stanford v. Marshall*, 2 Atk., 69; *Bullpin v. Clarke*, 17 Ves. Jr., 365; *Jaques v. Methodist Episcopal Church*, 17 Johns., 548; *Yale v. Dederer*, 22 N. Y., 450; S. C., 18 id., 276; *Corn Exchange Ins. Co. v. Babcock*, 42 id., 615; *Story's Eq.*, §§ 1396, 1401a. The question has been in respect to the manner in which the conceded power should be exercised, and in respect to the requisite evidence of its due execution. Whether the simple execution of an obligation by a married woman operates to charge her estate, or whether she must declare such to be her intention; whether an oral statement of such intention is sufficient, or whether it must be in writing; whether such intention must be manifested in the contract itself or may be separately manifested; whether a declaration of an intention to bind her separate property is sufficient, or whether the property intended to be charged must be specifically described, have been the subject of discussion at different times. But that a married woman, by an instrument in writing by which she expressly charges her separate property for the payment of a debt, which charge is contained in the instrument creating the debt, and where the property is specifically described, and which instrument is executed in the manner required by law, may create a valid charge upon such property, is agreed in all the books. The instrument before us contains all these requisites, and we cannot doubt its validity. Whether the property is her separate estate or her individual property merely, the result is the same.

§ 1189. *That a trustee, several years after the execution of a trust, comes into possession of the property by purchase from his purchaser is not necessarily fraudulent.*

3. It was farther contended that the bad faith of the complainant should bar his recovery. The defendants in a cross-bill allege fraud in the original sale to Mr. Beall, in that the complainant deceived and defrauded them by promising to execute a deed of the Magruder property as soon as they made the purchase, and by misrepresentations of the value of the land. This is denied by the complainant in his answer to the cross-bill. It will be remembered also that the order of sale expressly prohibited the giving a deed until the whole pur-

chase money should be paid. Fraud is alleged again in that the purchase by Crowley at the resale was for the benefit of Stephen, the complainant, upon an agreement that the property should be transferred to him, and that the same had been conveyed to him. All fraud is denied in the answer. The alleged agreement or understanding between Crowley and the complainant Stephen is denied in all its parts. It is admitted by Stephen that subsequently, without any previous understanding, and in good faith, and for a fair price paid, the complainant purchased of Crowley the property bought by him at the resale. The interval between the purchase by Crowley at the resale and the purchase from him by the complainant does not appear. Crowley's purchase was made in May, 1859. In February, 1872, thirteen years having elapsed, it is alleged and admitted that a conveyance had been made by Crowley to the complainant. On the principle that every pleader states his case as favorably to him as he is able to do, we may assume that this time had mostly elapsed before the purchase was made by the complainant. No proofs were taken. The case was heard on bill and answer. It narrows itself down to this: there being no understanding or agreement between the purchaser at a public sale and the trustee making the sale, there being no collusion between them, there being no fraud in fact, the duties of the trustee in respect to the sale being ended and his doings confirmed by the court having the subject in charge, does the circumstance that, years afterwards, the trustee bought the property from the purchaser in good faith, and for a fair price paid to him, vitiate and annul the public sale by the purchaser?

If there was a fraud on the part of the complainant in making the sale at which Crowley was the purchaser, it arose from an act, an intention or an omission then done or existing. A subsequent purchase may afford evidence that the original sale was made to permit that purchase, and that the end illustrates what the parties all the while intended. But to make a fraudulent sale it is necessary to go back to the acts, the intents or the neglects existing at the time of the sale. It would seem to be a self-evident proposition that when it is conceded that a sale was in fact fair, honest and just when made, that no unlawful act or intent then existed, that a fraudulent intent or an unjust dealing as to that time could not be imputed to the party from subsequent occurrences. It stands upon pleadings here that at the time of the sale the complainant had no understanding that he should ever have any interest in the property; in other words, Crowley bought it for himself and for his own exclusive benefit. There was no collusion; that is, the property was fairly sold and for all that could be obtained for it. The sale was reported to and confirmed by the court. This constituted a discharge of the duty of the trustee in making the sale. It is quite difficult to conceive that any subsequent facts (leaving these in full force) can establish that such a sale is fraudulent.

It is a general rule that a trustee cannot deal with the subject of his trust. If one acting as trustee for others becomes himself interested in the purchase, the *cestuis que trust* are entitled, of course, to have the sale set aside, unless the trustee had fairly divested himself of the character of trustee; and the fact that the purchase was made through the intervention of a third person makes no difference. *Jewett v. Miller*, 10 N. Y., 402; *Slade v. Van Vechten*, 11 Paige, 21; *Van Epps v. Van Epps*, 9 id., 237; *Bank of Orleans v. Torrey*, 7 Hill, 260; *Hawley v. Cramer*, 4 Cow., 717; *Hill on Trustees*, *536, *h*. We should be unwilling to weaken the obligation of good faith and fidelity required by the law of a trustee. We have frequently enforced such obligations

in the most rigid manner. It would, however, be a great straining of a good principle to hold that a purchase by a trustee from the purchaser at a public sale, under the circumstances before us, is necessarily fraudulent. There is a class of cases, undoubtedly, in which transfers of property are adjudged to be fraudulent, although there be no actual fraud meditated by the parties. Such are the cases of an assignment by an insolvent debtor reserving portions of the assigned property for his own benefit, requiring releases from creditors as a condition of participating in the fund, and the like.

The case we are considering bears no resemblance to these cases. There is in a purchase by a trustee nothing that of itself and necessarily vitiates the original sale. Whether culpable or commendable depends upon the circumstances of each case. It may be wrong, and it may be right. It may be approved by the parties interested and affirmed. It may be condemned by them and avoided. When it is found that the transaction is itself perfectly fair and honest, that the purchase was not contemplated at the original sale, but was first thought of years afterwards, and was then made for a full and fair consideration actually paid by the trustee, and after the fiduciary duty was at an end, we find no authority to justify us in pronouncing the original sale to have been fraudulent. Upon the whole case the decree must be reversed, and the record remanded, with directions to enter a decree in conformity with this opinion, with leave to the parties to amend their pleadings if they shall be so advised.

Reversal and remand accordingly.

CLARK v. TRUST COMPANY.

(10 Otto, 149-153. 1879.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The preliminary question in this case involves the validity and effect of the sale made at public auction by Eaton, or rather by the auctioneer under his directions and as his agent. McGhan and wife, by indenture dated August 15, 1864, and duly acknowledged on 18th November, 1864, conveyed the premises in controversy to Edward Clark, in trust for the sole use and benefit of Mrs. McGhan, for and during her natural life, permitting her to use and occupy the same, and to receive and apply the rents and profits thereof, and in trust also to sell and convey absolutely in fee-simple or by way of mortgage, to such person or persons and for such use and purposes as Mrs. McGhan should in writing request and direct, her then or any future coverture notwithstanding. The indenture also contained a provision, that, upon the death of Mrs. McGhan, the premises, or so much thereof as remained undisposed of, should be conveyed to the husband, his heirs or assigns.

By an indenture executed and duly acknowledged on 20th June, 1870, McGhan and his wife, together with Clark, the trustee, conveyed the property to Daniel Eaton, of the city of Washington, in trust to secure the payment of a debt due from McGhan and wife to the Freedman's Savings and Trust Company, for the sum of \$10,000, evidenced by their joint and several promissory note to that company, of like date with the indenture, and payable twelve months thereafter to the order of the company, with interest at the rate of ten per cent. per annum, interest payable half-yearly. That conveyance was in part upon these trusts: 1. To permit Mrs. McGhan and husband to occupy

the premises, and the rents and profits to have and apply to their sole use and benefit, until default be made in the payment of the note or interest thereon, or any proper charge or expense in and about the property; and, upon payment of the note, interest and costs, to release and reconvey the premises to Clark, the trustee, for Mrs. McGhan; 2. Upon default in any of the said respects (quoting from the deed itself), "to sell the said piece or parcel of ground and premises at public auction upon such terms and conditions, and at such time and place, and after such previous public advertisement, as the said party of the second part or his heirs in the execution of this trust shall deem advantageous and proper, and to convey the same in fee-simple to the purchaser or purchasers thereof at his, her, or their cost or expense; and of the proceeds of said sale or sales first to pay all proper costs, charges and expenses, and to retain as compensation a commission of five per cent. out of the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to the said Louisa McGhan, her heirs or assigns."

On or about April 5, 1872, the note held by the company being unpaid, and interest to the amount of \$1,400 having accrued thereon, Eaton, the trustee, made public advertisement that he would sell the mortgaged property at public auction to the highest bidder, at a designated hour, on April 24, 1872, giving the terms of such proposed sale. The sale was postponed from time to time until July 1, 1872, when it took place, the Freedman's Savings and Trust Company, by one of its officers, becoming the purchaser at the price of \$13,000. We find in the record a writing signed by Eaton, purporting to be an indenture executed July 1, 1872, whereby, in consideration of the sum of \$13,000 in hand paid, he conveyed to the purchaser the property so sold at public auction. It purports to have been "signed, sealed and delivered in presence of — Brainerd H. Warner," and to have been acknowledged before said Warner as a notary public for the District of Columbia. As printed in the transcript, that writing shows no seal attached to the signature of Eaton, and the certificate of acknowledgment before the notary is without date. That writing was placed upon record on the 4th of February, 1873; but for the want of a seal to Eaton's signature, complainants claim that it was ineffective for any purpose. Subsequently to that sale the Freedman's Savings and Trust Company commenced proceedings in ejectment against McGhan and wife and Clark to recover possession of the property. The defendants in that action failing to appear, judgment by default was entered against them on November 7, 1872, and, under a writ of possession, McGhan and wife were ejected and the company put in possession of the property.

In 1873 Bradley purchased the same property from the company and subsequently sold and conveyed it to Shepherd. Eaton died on the 16th of February, 1873, and McGhan died on October 27, 1874. In this action, commenced April 5, 1875, by Mrs. McGhan and by Clark as trustee in the deed, already referred to, it is sought to redeem the property sold by Eaton under the deed of June 20, 1872. To that end the complainants, among other things, prayed that the deed from Eaton to the Freedman's Savings and Trust Company and the subsequent conveyance under which Bradley and Shepherd (who are alleged not to have been *bona fide* purchasers) claim, be declared null and void, and the notes given by Bradley to that company be canceled; that an accounting be had of the rents, issues and profits of the premises, and that the amount thereof be applied on account of the said note of \$10,000; and that the lease

of the premises may be decreed to inure to the benefit of the complainants. The court below having dismissed the bill, this appeal has been prosecuted and the assignments of error present several propositions of law for our consideration. But in the view we take of the case it is only necessary to determine the preliminary question already stated in reference to the validity and effect of the sale at public auction by Eaton, the trustee, on the 1st of July, 1872.

§ 1190. *Inadequacy of price will not invalidate a judicial or trust sale unless it is so gross as to shock the conscience.*

That sale is attempted to be impeached upon several grounds, viz.: 1. That a proper opportunity was not afforded to persons desirous to purchase the property to bid at the sale; that had there been the property would have brought at least \$2,000 more. Upon a careful examination of all the evidence, we find nothing of a positive, substantial character sustaining this position. While there is some little conflict in the evidence as to what occurred upon the occasion of the sale, the overwhelming preponderance of testimony shows that the sale was duly advertised and was fairly and properly conducted. 2. It is next contended that relief should be given because the price which the property brought was grossly inadequate. That fact alone does not constitute a sufficient reason to impeach the genuineness or validity of the sale. Besides the inadequacy was not such as to shock the conscience or raise a presumption of fraud or unfairness. *Hill, Trustees*, 152, note; *Cooper v. Galbraith*, 3 Wash., 546; *Hubbard v. Jarrell*, 23 Md., 66.

§ 1191. *That a trustee is an officer of a corporation that buys at his sale will not invalidate the sale.*

3. The sale is assailed upon the further ground that Eaton, at the date of the deed to him as well as when the sale was made, was the actuary of the Freedman's Savings and Trust Company, and that consequently no sale made by him under the authority conferred by the deed of June 20, 1870, would cut off the equity of redemption. Touching this objection, it is sufficient to say that the deed was not made to Eaton in his capacity as an officer of the company, nor did he act in that capacity when exerting the authority conferred upon him. The fact that he held official relations to that company did not incapacitate him from accepting the trust set out in the deed of June 22, 1870, or discharging the duties thereby imposed. It is true that his relations to the company would make it the duty of the court to scrutinize very closely all that he did in the execution of the trust; but we find nothing in the evidence to justify the belief that he acted otherwise than honestly and faithfully in the discharge of his duty. The evidence does not justify the charge that he bid off the property for the company. What we have said leads to the conclusion that the sale of July 1, 1872, was a valid sale, which the purchaser was entitled to have consummated by a conveyance executed and acknowledged in proper form. It is, therefore, of no consequence in this suit to inquire whether the writing executed by Eaton to the company in pursuance of the sale made at public auction was or was not sufficient to pass the title from him. If he was bound, as we hold that he was, to have executed a sufficient conveyance, the court should not, by granting the relief asked, defeat the sale altogether. An ineffectual attempt upon the part of Eaton to consummate the sale does not authorize a decree setting aside the sale, which, as we have said, was in conformity to the deed and was free from fraud or imposition, or such inadequacy of price as, upon recognized principles of equity, constitutes ground for relief.

Decree affirmed.

COOK v. HILLIARD.

(Circuit Court for Illinois: 9 Federal Reporter, 4-6. 1881.)

Opinion by BLODGETT, D. J.

STATEMENT OF FACTS.—This is a bill for foreclosing a trust deed given by Mr. and Mrs. Hilliard, on the 19th day of November, 1873, to H. F. Vallette, trustee, on lots 48, 49, 50, 51, 52, 53, 54 and 55, Hilliard and Dobbins' addition to Washington Heights, in this county, to secure the payment of \$10,000, payable to the Protection Life Insurance Company in five years from date, with seven per cent. interest. It is admitted that the insurance company has been adjudicated bankrupt, and that the note has come into the hands of complainant as assignee of the insurance company. The only point made by the defendant is disclosed in the answer of Mrs. Hilliard, who avers that Mr. Vallette, the trustee, advertised the property in question to be sold at public auction by him, under the powers of sale contained in the trust deed on the 26th of March, 1879, and that in pursuance of such advertisement he proceeded to make such sale by offering lot 48, and that the sum of \$650 was thereupon bid for said lot by and in behalf of Charles B. Wright, and the same was struck off and sold to him, and that after this lot was so struck off to Wright, the amount of his bid was duly tendered to the trustee, and a deed demanded, but that the trustee declined to receive the money and to make the deed.

Defendants concede that the complainant has the right to a decree for the amount due on the note after deducting the \$650 bid for lot 48, and is entitled to a foreclosure on all the lots except lot 48. There is a conflict of evidence as to whether this lot 48 was struck off to Wright on his bid. The proof shows that the property was offered by Vallette under the powers contained in the trust deed. It is admitted that the eight lots in question together made up the tract of land on which was situated the dwelling-house, out-houses, garden, etc., occupied by Mr. and Mrs. Hilliard as their home. And it appears that about the time for opening the sale the question was raised between the trustee and assignee as to whether the property should be sold in separate lots according to the subdivision description, or whether they should be sold together as a whole or one single tract. It is conceded, however, that the trustee proceeded to offer lot 48, and that several bids were made upon it, and that the last bid made was this bid of \$650 by Mrs. Hilliard for Wright, and the complainant insists that while the trustee was still crying the lot he directed the assignee to stop, declare the sale off, or stop the sale, and the trustee thereupon stopped the sale without striking off the lot or accepting the bid, or in any way declaring the lot sold; while the defendants insist that just at the juncture when the trustee was directed to suspend the sale he said, "sold," or "gone," or used some term indicating that the lot was struck off on the bid by Mrs. Hilliard.

§ 1192. *An illegal sale of part of mortgaged land is no bar to foreclosure proceedings. What constitutes a valid sale at auction. Necessary parties.*

I do not think this testimony on the part of defendant, even if it was not contradicted, shows a valid sale. It is not such a selling as could be enforced by a bill for specific performance. It is evident from the defendants' testimony that the trustee did not consider that he had accepted the bid. He took no steps to consummate the sale, and he did not recognize the bid as a sale. The minds of the parties had not met. The transaction was not sufficiently complete to take it out of the statute of frauds. In *Burke v. Haley*, 2 Gil., 614, the court says: "All the recent decisions seem to admit the principle, and we think with sufficient reason in their favor, that sales made by auctioneers stand

upon the same footing as those made by private individuals, and require that some note or memorandum should be made and signed by the party to be charged, to render them valid and obligatory upon the purchaser. . . . The auctioneer, it is true, is by law the agent of both vendor and purchaser, and a memorandum signed by him would be binding on the latter, provided it was sufficient either in itself, or when connected with other written or printed evidence, to show what was the contract of the parties."

Here there is an entire absence of any such memorandum, and the affirmative proof shows that the trustee who acted as auctioneer did not understand that a sale was made or the lot struck off on Mrs. Hilliard's bid. The rule above quoted is affirmed in *Doty v. Wilder*, 15 Ill., 407, and has ever since been followed by the courts of this state. It is urged upon the part of the defendant that Wright was a necessary party to this suit. I cannot see how that can be under the facts in the case, because there was nothing of record showing Wright's interest, and no binding contract extant showing any interest in him. The only rule that I know of is that the complainant must make those parties who are known to him to have a legal or equitable interest in the property, or whom the pleadings or proof discloses have such an interest as that the court cannot proceed to a decree without bringing them into the case. The complainant in this case is not obliged now, on this alleged sale, to amend his bill and make Wright a party any more than he would if it had been disclosed on the hearing that Mr. Hilliard had made a verbal agreement, void under the statute of frauds, to sell the property to some third person. I therefore think there is nothing shown in the case which should deprive the complainant of his decree. There will, therefore, be a decree entered against the defendant.

§ 1193. Mortgagee cannot purchase.—A mortgagee with a power of sale cannot sell the mortgaged property to himself directly or indirectly. He is a trustee for the mortgagor in respect to the sale. If the mortgagor becomes a bankrupt the mortgagee in making the sale is a trustee for the assignee. *Lockett v. Hill*,* 1 Woods, 552.

§ 1194. Beneficiary may purchase.—Under a trust deed, when the sale is made by a disinterested trustee, the beneficiary may ordinarily purchase. The holder of a note secured by a trust deed may buy at the sale. He may leave a bid with the auctioneer, and the purchase under it will be valid if it is the highest that can be obtained. *Richards v. Holmes*, 18 How., 148 (§§ 1175-1179).

§ 1195. A purchaser under a deed of trust need not give the grantor notice to quit before bringing ejectment for the premises. Notice to quit is necessary only when the relation of landlord and tenant exists. *Waters v. Butler*,* 4 Cr. C. C., 371.

§ 1196. A party holding the strict legal title selling lands to an innocent purchaser without due authority must account for its proceeds to the holder of the equity of redemption. *Shillaber v. Robinson*, 7 Otto, 69 (§§ 1148-1148).

§ 1197. A mortgagee who takes possession of the mortgaged premises under a void sale is liable for the rents and profits received by him upon a subsequent redemption by the mortgagor. But to make him liable he must have had actual possession, or such a possession as would give him the enjoyment of the profits. Such mortgagee would also be liable for waste committed or suffered by him while in actual possession of the premises. But if he is not in possession, and the injury done was not any act of his, or one which he could prevent, as, for instance, a destruction of buildings by the Confederate army, he is not responsible for it. *Bigler v. Waller*, 14 Wall., 297 (§§ 1149-1153).

§ 1198. The fact that a subsequent mortgagee is a bankrupt is no objection to the execution of a power of sale in a prior mortgage. *Long v. Rogers*, 6 Biss., 416 (§§ 1155, 1156).

§ 1199. Mere inadequacy of price is no ground for vacating a sale fairly concluded, unless the inadequacy is such as to shock the conscience, or raise a presumption of fraud or unfairness. *Clark v. Trust Co.*, 10 Otto, 149 (§§ 1190, 1191).

§ 1200. Notice of claims to the surplus money must be given to the mortgagee, or he must have actual notice of the incumbrances on which such claims may be founded, or he will not be responsible for not applying the surplus towards the payment of them. *M'Lean v. Lafayette Bank*,* 4 McL., 430.

C. RAILROAD MORTGAGES.

[See the title *Railway Companies* under CORPORATIONS.]

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| <p>I. POWER OF RAILROAD COMPANIES TO MORTGAGE THEIR PROPERTY AND FRANCHISES, §§ 1201-1216.</p> <p>II. FORM AND CONSTRUCTION OF RAILROAD MORTGAGES, §§ 1217-1261.</p> <p>III. PROPERTY COVERED BY RAILROAD MORTGAGES, §§ 1262-1276.</p> <p>IV. AFTER-ACQUIRED PROPERTY OF RAILROAD COMPANIES, §§ 1277-1292.</p> <p>V. LEGAL NATURE OF ROLLING STOCK OF RAILROADS, §§ 1293-1326.</p> <p>VI. MORTGAGE BONDS AND COUPONS, §§ 1327-1362.</p> <p>VII. RIGHTS AND DUTIES OF MORTGAGE TRUSTEES, §§ 1363-1370.</p> <p>VIII. PAYMENT AND REDEMPTION, §§ 1371-1401.</p> | <p>IX. REMEDIES AND JURISDICTION OF COURTS, §§ 1402-1423.</p> <p>X. FORECLOSURE PROCEEDINGS UNDER RAILROAD MORTGAGES, §§ 1424-1494.</p> <p>XI. APPOINTMENT AND JURISDICTION OF RECEIVERS, §§ 1495-1523.</p> <p>XII. RECEIVERS' DEBTS AND CERTIFICATES, §§ 1524-1537.</p> <p>XIII. EQUITIES AFFECTING PRIORITIES OF RAILROAD MORTGAGES, §§ 1538-1571.</p> <p>XIV. LIENS AFFECTING PRIORITY OF RAILROAD MORTGAGES, §§ 1572-1590.</p> <p>XV. FORECLOSURE SALES UNDER RAILROAD MORTGAGES, §§ 1581-1661.</p> <p>XVI. RIGHTS OF PURCHASERS AT FORECLOSURE SALE, §§ 1662-1681.</p> |
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I. POWER OF RAILROAD COMPANIES TO MORTGAGE THEIR PROPERTY AND FRANCHISES.

SUMMARY — *Legislative authority necessary*, §§ 1201, 1202.

§ 1201. A railroad company cannot without legislative authority mortgage its franchises; and authority to mortgage its road, income and other property does not authorize a mortgage of its franchises. But a mortgage without such authority may be valid so far as concerns its property. *Pullan v. Cincinnati & Chicago R. Co.*, §§ 1203-1211.

§ 1202. Authority to a railroad company to mortgage its road is authority for making a mortgage of a part of it. *Ibid.*

[NOTES.—See §§ 1212-1216.]

PULLAN v. CINCINNATI & CHICAGO AIR-LINE RAILROAD COMPANY.

(Circuit Court for Indiana: 4 Bissell, 85-50. 1865.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This is a bill filed by James Pullan against the Cincinnati & Chicago Air-line Railroad Company, and others. Pullan sues as a trustee for divers bondholders under a deed of trust in the nature of a mortgage. The matter now before the court is a motion for a temporary injunction, and for the appointment of a receiver. The facts and pleadings on which this motion is founded are substantially as follows: On the 16th of February, 1848, the legislature of Indiana enacted a charter authorizing a company to make a railroad from Richmond to New Castle, Indiana. The style of the corporation was the New Castle & Richmond Railroad Company, and the length of the road twenty-seven miles. In January, 1851, the charter was amended so as to enable the company to extend their road either to the Indianapolis & Peru Railroad, or to the Lafayette & Indianapolis Railroad. This amendment also authorized the company to borrow money on mortgage of their "road, income and other property." To effect a loan of money for the completion of the road, the company issued coupon bonds to the amount of \$300,000, dated February 25, 1852, payable February 25, 1867, with interest at

seven per cent., payable semi-annually. The bonds were \$1,000 each. To secure their payment a trust deed was executed by the company. By this trust deed, the company conveyed "all the present and in-future-to-be-acquired property of the said The New Castle & Richmond Railroad Company; that is to say: the first section of their road from Richmond to New Castle as aforesaid, with the superstructure and all rails and other materials used therein, and all rights therein, tolls and income, and any rights thereto or interest therein, together with the tolls or income to be had or levied therefrom, and all franchises, rights and privileges of the said The New Castle & Richmond Railroad Company, of, in, to, or concerning the same." Such is the verbose language of the deed. It was made to Joseph B. Varnum and George Carlisle, and to the survivor of them, and to the heirs of such survivor, in trust that if the company should fail duly to pay either interest or principal on said bonds, the trustees might enter on and take possession of the mortgaged property, and use the same, and apply the proceeds of such use to the payment of the principal and interest of the bonds; and that, if it should become necessary, the trustees might sell the mortgaged property at auction and apply the proceeds to the payment of such principal and interest.

Carlisle, one of the trustees, died in March, 1868. And Varnum, the other trustee, becoming old and unwilling to perform the trust, the Wayne circuit court, in 1864, appointed the complainant, James Pullan, a trustee in the place of Carlisle. The name of the company was, in April, 1853, changed to that of "The Cincinnati, Logansport & Chicago Railway Company." And in 1858 it was again changed to that of "The Cincinnati & Chicago Railroad Company." In April, 1853, the corporation executed to said Carlisle another mortgage in the nature of a deed of trust to secure the payment of other bonds. This mortgage was foreclosed in this court in 1860. It covered all the property of the company, which, under the decree of foreclosure, was sold by the proper officer to Choteau, Murdock, Schuchardt, Thompson and Morgan for \$30,000. These purchasers, in July, 1860, under an act of March 5, 1859, of the Indiana legislature, being the owners of said property, became a corporation under the style of The Cincinnati & Chicago Air-line Railroad Company.

This foreclosure and sale in no manner affected the rights of the bondholders under the deed of trust first aforesaid. It appears that ever since said new organization, the defendant Judson has been president, and the defendant Tenny secretary, and the defendant Morgan treasurer, of the Cincinnati & Chicago Air-line Railroad Company. It seems that on the 16th of October, 1856, the last-named company attempted to lease to one John W. Wright & Company, for a term of ten years, all their property. It appears also that the last-named railroad company has since attempted to consolidate with other railroad companies, both within and without the state of Indiana. But whether these doings were valid or not seems immaterial to the present case. Even since the commencement of this suit there has been an attempt at consolidation, including the Cincinnati & Chicago Air-line Railroad Company, and several others, under the name of The Chicago & Great Eastern Railway Company. It is conceded that the deed of trust and bonds first aforesaid form the first lien on so much of the road in question as lies between New Castle and Richmond, and that on these bonds no interest has been paid for about two years past.

Under the circumstances, the trustee, James Pullan, has filed his bill in equity to enforce the mortgage of February 25, 1852. The bill, besides charg-

ing most of the facts above stated, alleges, *inter alia*, that the Cincinnati & Chicago Air-line Railroad Company, by their said purchase under judicial sale, took the road with the burden of said first mortgage bonds, and were bound to provide for the payment of the interest on them, but have neglected and refused to pay it; that for some time past, the earnings of the road have been large and far above the current expense of running it; that the surplus earnings ought to have been, but were not, applied to the payment of said interest; that the same had been wrongfully applied in building a bridge across the Wabash at Logansport, beyond the terminus of the Cincinnati & Chicago Air-line Railroad, as it was located by the New Castle & Richmond Railroad Company, at the time when the first mortgage bonds were executed, and in building and completing another railroad and furnishing it with rolling stock, and in buying up some of said first mortgage bonds on speculation and at reduced prices, and in discharging individual liabilities of the defendants Judson, Tenny and Ripley; that the officers of the road have been permitted by the company to use corrupt and oppressive measures to force the holders of the bonds in question to exchange them at a sacrifice for other securities of the company; that the company are paying interest on certain sinking fund bonds issued by them at a later date than those represented by the complainant; that Judson and Tenny, officers of the company, threaten that, unless the holders of the bonds of February 25, 1852, accede to certain terms proposed by the company, they will build a road parallel to so much of their road as lies between New Castle and Richmond, and turn the business thereon so as to depreciate said security for said \$300,000 of bonds; that the officers of the company have, by false representations of the security for said bonds, greatly reduced their value in the market; that the company are making no provision for the payment of said interest; and that its officers refuse to permit either said trustees or the bondholders to examine the books of the company, with a view to ascertain the amount and appropriation of its earnings. The bill prays an injunction against the building of said parallel road, and for a receiver, and for general relief. The bill is sworn to.

The Cincinnati & Chicago Air-line Railroad Company have filed an answer supported by affidavit. This answer denies the power of the New Castle & Richmond Railroad Company to execute the trust deed and bonds in question; but it states facts in support of that denial. It denies any obligation on the part of the respondent to pay the interest on said bonds; but it admits that the company has all along received and appropriated the earnings of the road. It denies that said earnings have been misapplied, or applied towards the construction of said bridge across the Wabash, or for any purpose charged in the bill. It denies that the president and other officers of the company, "as such officers," have by threats endeavored to force the bondholders to surrender the bonds on any terms, or that, "as such officers," they have decried the value of the bonds, as charged in the bill.

The answer attempts to excuse the failure to pay the interest in question by stating that the company had offered to the holders of the bonds on which the interest had accrued other bonds issued by them to the full amount of those on which said interest had accrued, if the holders would throw off the interest, and alleging that all the earnings had been expended in improving and repairing the road and providing the necessary rolling stock, etc., to run it. The answer also states that, under the laws of Indiana and Illinois, the railroad leading from Richmond to Logansport and the "Chicago & Great Eastern

Railway" were consolidated, and that these now form one continuous line of two hundred and twenty-four miles from Richmond to Chicago. Whether it is claimed that these two form now one body corporate is not clearly stated. If such a consolidation is meant to be claimed, I do not see how the thing could be effected under the rulings of the supreme court in the case of the Ohio & Mississippi R. Co. v. Wheeler, 1 Black, 286. I suppose that a consolidation for running arrangements between roads in different states may be lawful. But I suppose that two railroad corporations of different states cannot be consolidated into one new corporation. The complainant now moves for the appointment of a receiver and for an injunction. Affidavits and other documents have been filed, both in support of this motion and in opposition to it; and very able and exhaustive arguments have been made on both sides of the question.

§ 1203. *Power of a railroad company to mortgage its property.*

Several preliminary points arise on this motion, which it may be well first to notice. 1. It is contended that the New Castle & Richmond Railroad Company had no power to make the trust deed in question. I recognize the rule that a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly or as incident to its very existence." *Head v. Providence Ins. Co.*, 2 Cranch, 127 (CORPORATIONS, §§ 1046-48); *Beaty v. Knowler*, 4 Pet., 152 (CORPORATIONS, §§ 862-866); *Dartmouth College v. Woodward*, 4 Wheat., 518, 636 (CONST., §§ 2099-2117); *Jefferson Branch Bank v. Skelly*, 1 Black, 436. Under the Indiana constitution, every statute is a public law of which the courts must take official notice, unless it is otherwise declared in the statute itself. Article IV, § 27. I must therefore, *ex officio*, take notice of the charter powers of the New Castle & Richmond Railroad Company, though its charter is neither pleaded nor proved. So it is decided in the case of *Covington Draw-bridge Co. v. Shepherd*, 20 How., 227, though a contrary doctrine is held in *Charleston, etc., Turnpike Co. v. Willey*, 16 Ind., 35. The original charter provided that the company might "negotiate any loan or loans of money at any rate of interest deemed expedient," and that "the principal and interest of all debts so contracted shall be a lien, in their order, on all property and effects of the company." And the amendment to the charter provided that, for constructing and equipping the road, the company might borrow money, issue its bonds or notes therefor, and, to secure the same, mortgage its "road, income and other property." Undoubtedly here is a power to make a deed of trust in the nature of a mortgage.

§ 1204. — *a power to mortgage all its property does not include its franchises.*

But it is said that the deed of trust in this case undertakes to mortgage the company's franchises; and that the charter gives no power to do that. It is true that the deed does attempt to mortgage, among other things, "all franchises, rights and privileges" of the company. And it seems to be well established that no corporation can, without express legislative authority, either sell or mortgage its franchises. The charter, indeed, empowers the company to mortgage its "road, income and other property;" and this language is equivalent to authority to mortgage *all* the company's property. Franchises are, in some sense, property; and it may thus be plausibly argued, that power to mortgage *all property* is, therefore, power to mortgage *all franchises*. I think, however, that the argument is not sound; and that this deed of trust, so far as it attempts to mortgage franchises, is void. But it does not follow that

the deed is void as to the mortgage of the road itself, and its tolls, income and real estate. In my opinion the mortgage is valid as to these. And whatever may be said of the franchises is quite unimportant to the present motion, since, if it be even allowed to any extent, it certainly would be rash and improper and useless to turn over the franchises to a receiver.

§ 1205. *A lien given to mortgagees by charter may be waived by them.*

2. It is contended that, at most, this deed of trust only embraces so much of the road as lies between New Castle and Richmond, and the tolls and income arising therefrom, and that it does not embrace any rolling stock. By the language of the deed, it seems to me obvious that only such portion of the road as lies between those two points, with the "bridges, depots," and other things thereon, and the tolls and income arising therefrom, are mortgaged. I cannot conceive that any part of the road or its fixtures, situate between New Castle and Logansport, is touched by the mortgage. I think that without a deed of trust, the original charter would have made this \$300,000 a lien on the whole road and on all its fixtures and other property. But the creditors having elected to take the security which this deed of trust gives, must, perhaps, be deemed to have waived the lien given by the original charter,— especially so, as the bill in this case makes said deed the foundation of the present action.

§ 1206. *A mortgage of the tolls and income of a railroad includes its rolling stock.*

Whether by this instrument any rolling stock at all is mortgaged is a more difficult question. The tolls and income are expressly mortgaged. Without rolling stock there could be neither tolls nor income. Now it is a maxim that whosoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect. *Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit.* 11 Coke, 52; Broom's Legal Maxims, 464.

§ 1207. *Omission to specify a thing along with others that are enumerated.*

In my opinion the spirit of this maxim ought to be applied to the point in question. The description of the mortgaged property is at first in general terms, thus: "All the present and in-future-to-be-acquired property" of the company. Then it proceeds to specify: "That is to say, the first section of their road from Richmond to New Castle, including the right of way and land occupied thereby from Richmond to New Castle as aforesaid, with the superstructure, and all rails and other materials used therein or procured therefor, bridges, viaducts, culverts, fences, depot grounds and buildings erected thereon, and all rights therein, tolls and income — any rights thereto and interest therein,— together with the tolls or income to be had or levied therefrom." I agree with defendant's counsel that the first general statement in this description is controlled and limited by the subsequent specific description, in which rolling stock is not even mentioned; and that *expressio unius est exclusio alterius*. But I think that the omission to specify a thing along with other things which are enumerated does not exclude it, if any of the enumerated things could be of no use without it. And that seems to me to be the case here. None of the things specified could be of much value to the mortgagees without the rolling stock. On a foreclosure, the lands, superstructures and fixtures might, indeed, be sold; but the tolls and income could not be. Besides, the deed of trust provides another remedy to the mortgagees in case of a default by the mortgagors,— the very remedy which the complainant is now seeking through a receiver. It provides that, in case of a default, the trustees may enter and take

possession of the mortgaged property, and use and operate the same, and apply the proceeds thereof to the payment of the interest and principal of the bonds intended to be secured by the mortgage. Now, in pursuing this remedy, of what avail would all the other property be if the rolling stock cannot be used? Nay, could the remedy be pursued at all without the use of the rolling stock? The reason of the rule that when a man grants a tract of land in the center of a larger tract owned by him he also grants, by implication, a right of way into it, fully applies to the case in question; and it strongly applies to the mortgage of tolls and income. It is truly said by Mr. Justice Twisdén, that "when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use." *Pomfret v. Ricroft*, 1 Saund., 321. And Mr. Justice Story approves and adopts this language in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet., 629 (Const., §§ 2058-2082). So in *Whitney v. Olney*, 3 Mason, 280, an analogous principle is sustained. It was there held that the devise of a mill, *eo nomine*, carried with it the mill yard so far as the same was necessary to the use of the mill. A like doctrine is maintained in *Blaine v. Chambers*, 1 Serg. & R., 169, and in *Common Council v. State*, 5 Ind., 334.

If it be said that the present is the case of a mortgage, and not of a grant or devise like the cases just cited, it may well be answered that the reason is the same in them all, and therefore the rule ought to be the same. I am of opinion that, at least so far as concerns the present motion for a receiver, the rolling stock ought to be regarded as being reached by the mortgage. If this case ever comes to a decree of foreclosure, it will then perhaps be the proper time to determine whether this is so far a mortgage of any rolling stock as to justify the court in ordering its sale. And, as a final determination of the point is unimportant to the pending motion, as I view it, the question is left open for argument on the final hearing.

§ 1208. *The power to mortgage the whole includes the power to mortgage a part.*

3. It is argued that this deed of trust is void, because the company had no power to mortgage its road in parcels, as was here attempted. I think the power to mortgage the whole road, manifestly given in the charter, necessarily gives the power to mortgage any part of it. This power, I think, would exist without express legislation, as the power to contract is incident to the very existence of such a corporation. Besides, the second mortgage and the judgment of foreclosure on it expressly recognize the validity of this deed of trust. The defendants hold the road under a sale to them on this judgment; and they are therefore estopped to deny the validity of this deed of trust. *Bronson v. La Crosse*, etc., R. Co., 2 Wall., 283 (§§ 1460-66, *infra*).

§ 1209. *Volunteers who become interested pendente lite are not necessary parties.*

4. It is objected that, as the Chicago & Great Eastern Railroad Company has, since the commencement of this suit, by consolidating with the Cincinnati & Chicago Air-line Company, become interested in the subject of this litigation, the former company ought to be made a party to it. Volunteers who become interested *pendente lite* are not necessary parties. Without being brought into court, the judgment binds them. Story's Eq. Pl., §§ 156, 351. Let us now proceed to inquire whether, upon the case made, an injunction and a receiver ought to be ordered.

I. As to a temporary injunction. We have seen that, according to the bill, the defendants have threatened that unless the bondholders submit to certain

oppressive terms, that portion of the road lying between Richmond and New Castle "shall be practically cut off" from the residue of the line, "by the construction of a road from New Castle to Connersville, Indiana, by which the whole business upon the road above New Castle shall and will be diverted from the part of the road from New Castle to Richmond." And the bill charges that the defendants "are secretly aiding and encouraging the building of such road for such purpose."

§ 1210. *An injunction will lie to prevent an irreparable and threatened wrong.*

The answer denies that the officers of the company, "as such officers of said company," have made the threats charged; and it especially denies "that any threats have been made by the defendant or by any one authorized to speak in behalf of this defendant [the company]; that if the said parties represented by the complainant would not take the bonds issued under the mortgage issued by this defendant in exchange for the bonds so held by said parties, that this defendant would construct a road from New Castle to Connersville, Indiana, and practically cut off that part of the road upon which the complainant claims that the said mortgage rests;" but the answer, nevertheless, claims in substance that the company may lawfully do so if they please. Whether the company intends to do so is not stated in the answer. These denials in the answer are very carefully guarded. They look so much like a negative pregnant that they naturally raise in my mind some suspicion; and taking this circumstance together with the affidavits filed on both sides, I think it fair to conclude that the threat has been made in substance, and that the complainant has just ground to fear that it may be carried out. I shall therefore order the temporary injunction. And I do this with the less hesitation, since, if the company and its officers have no such design, the order can do them no harm, and since, in my opinion, the defendants are grossly mistaken in affirming in their answer that they have a right to do what the threat imports, if they please. To me it appears that any attempt to divert business from the road between New Castle and Richmond would, under the circumstances of this case, be most unjust and inequitable.

§ 1211. *The power of the courts to appoint receivers is a discretionary power, to be exercised with great caution.*

II. Let us next inquire how the case stands on the motion for a receiver. The power of courts of chancery to appoint receivers is a discretionary power, to be exercised with great caution. *Railroad Co. v. Soutter*, 2 Wall., 510. To dispossess the owner of property of its possession before a final hearing is a strong measure, not to be adopted but in a strong case. I think it should never be done unless, without it, the complainant would be in danger of suffering irreparable loss. Is the present such a case? The bill charges that no interest on the bonds in question has been paid for about ten years past; and the answer admits this allegation. This of itself is a very strong circumstance in favor of the motion. These are first mortgage bonds, and have precedence of all other liens on the company's property; and it is startling to find so long a delay to pay interest. At first blush it would raise the suspicion that the owners of the road had been very unfortunate, or very reckless, or very unmindful of their duty. The fact that the property mortgaged has changed hands once or twice since the bonds were executed does not tend to remove that suspicion. The new owners took the property *cum onere*, and ought, if they could, to pay the interest. In the case of *Williamson v. New Albany & Salem R. Co.*,

1 Biss, 198 (§§ 1514—18, *infra*), in October, 1857, before Judge McLean, it appeared, on a motion like the present, that the defendant had failed to pay the semi-annual interest which fell due in April, 1857. And principally, if not solely, for that single and recent failure, the chancellor, while in form he overruled the motion for a receiver, did what was nearly equivalent to appointing one, he placed the road so far under the control of the court as to require that company to make monthly reports to the court of the net income of the road and to pay a certain proportion thereof into court every month for the use of the bondholders.

Another important fact established in the case at bar is that the trustee, Var-num, as also some of the bondholders, on several occasions applied to the president of the company for leave to examine their records, with a view to the amount of the company's income and to the disposition made of it. This application the president at first evaded and finally denied. He said he would not give the bondholders a club to break his own head with, and denied that the trustee was the proper person to make the application. This response cannot be justified. Of all men, the trustee in the discharge of his duty was the proper person to make the examination asked. It was not only his right but his duty to make it; and the president's letter denying him the privilege was unjustifiable. If the company's records were honest and fair, and if they meant to deal righteously by the trustee and bondholders, and had really done so, it is difficult to see how the information sought could be "a stick to break anybody's head with." To persons thus withholding necessary and proper information, courts will apply the maxim, *Omnia præsumuntur contra spoliatores*.

The answer, too, is in some respects a little evasive. In attempting to meet the charge of threats and of attempts to decri the value of the bonds in the market, it cautiously and guardedly denies that the company's officers, "*as such officers*," have done these things. To do so could hardly, under any circumstances, be official acts. The attempt, in the defendant's answer and affidavits, to excuse the non-payment of the interest in question, I think is entitled to little weight. Even honest inability to pay a debt is a poor excuse when one is sued for it. But here, as it seems to me, a still poorer excuse is attempted by averments that the company have had to provide for other roads with which they have in some way consolidated, and, to effect this, have expended and must expend large sums of money,—matters with which the bondholders have nothing to do. Thus it is urged (by way of excuse, I suppose) that the company, at great expense, in 1861, had constructed an addition to their road from Logansport to Valparaiso; that to stock their road thus extending from Richmond to Valparaiso, they purchased rolling stock to the value of \$370,000; that afterwards a still more important extension of the road was effected, so as to make a continuous line to Chicago by a union with other roads, at a cost of about \$1,500,000; and that to equip this long road, as it must be equipped, will cost about \$1,500,000 more. Here, then, is an aggregate of about \$3,370,000 with which the different companies succeeding to the ownership of the New Castle & Richmond Railroad have burdened themselves. And by the answer it seems to be implied that this furnishes some excuse why the interest in question remains unpaid, or at least why a receiver should not be appointed. To my mind this is no excuse. Whatever the Air-line road did in this regard was done at its risk; and if, by assuming such burdens, it became the less able to pay the interest, this is, I think, one reason for appointing a receiver.

But the most remarkable feature in the answer, as it seems to me, is that it does not, that I can see, present any feasible scheme for paying this interest at all. Indeed, so far as appears from the answer, it does not seem that the interest will ever be paid voluntarily. A strong desire is evinced to extend the road and raise vast sums for equipping it; but no corresponding anxiety is shown to do anything for the first mortgage bondholders. The answer evidently evinces a design to postpone this matter till the very last. Under all the circumstances, I think the appointment of a receiver would be very proper, if the bill had averred that the mortgaged property was not a sufficient security for the debt; and that, without a receiver, the bondholders are in danger of irreparable injury. I suppose that in no case of a mortgage ought a court of chancery to appoint a receiver, if the mortgaged property is of such value as to render it clear that, on a foreclosure and sale, the debt could all be made. In the present case, the mortgaged property would probably not bring so much on sale.

I will therefore appoint a receiver, whose duty it shall be to examine the books and affairs of the road, to ascertain its net earnings monthly, to receive one-fourth of the net earnings of the road from Richmond to Logansport from the company every month, and to pay it into this court for the use of the bondholders. And I order that the company, its officers and agents, give to such receiver all proper facilities for examining the books and papers of the company touching the gross and net incomes and earnings of said part of said road; and that the company, by their proper officer or officers, do under oath render full and fair monthly statements to such receiver of the gross and net income and earnings of said part of said road, and pay over to him every month said fourth part of said net proceeds.

§ 1212. A railroad which has power to sell its property may mortgage it. The power to mortgage is the lesser power, and is included in the power to sell. *Branch v. Atlantic & Gulf R. Co.*, 8 Woods. 481, 486.

§ 1213. All business corporations have an implied power to incur debts and borrow money for the purposes of the corporation. *Ibid.*

§ 1214. Whether a railroad may, without legislative authority, mortgage its property and franchises or not, it is clear that an act of the legislature recognizing the validity of such mortgage precludes the possibility of holding it to be contrary to public policy. *Hall v. Sullivan R. Co.*, * 21 Law Rep., 138.

§ 1215. A director of a corporation is a trustee for stockholders and creditors. Therefore if, by his office, he obtains for himself any advantage over other stockholders and creditors in securing, by mortgage, an existing indebtedness of the corporation to himself, equity will treat the transaction void or charge him as trustee. *Corbett v. Woodward*, 5 Saw., 403 (§§ 641-647).

§ 1216. A corporation is estopped from pleading that a mortgage and bonds received by it are void because its directors loaned the money, when it appears that the transaction was sanctioned by a stock vote. *Hotel Co. v. Wade*, 7 Otto, 13 (§§ 1440-46).

II. FORM AND CONSTRUCTION OF RAILROAD MORTGAGES.

SUMMARY—*Equitable charge upon proceeds of bonds*, § 1217.—*Statutory lien must be clearly stated*, § 1218.—*Release of statutory lien; constitutional provision against*, § 1219.—*Corporate seal; authority to affix*, § 1220.—*Foreclosure upon default in paying interest coupon*, § 1221.—*Reservation of right to company to make sales of lands*, § 1222.—*Power reserved to create a prior lien*, §§ 1223-1225.

§ 1217. An equitable charge upon the proceeds of bonds secured by a mortgage of a railroad does not exist in favor of a contractor who has constructed a portion of the road under a contract with the corporation which does not create such a charge either directly or by necessary implication. The fact that the contractor's labor has added to the security of the bondholders does not subordinate their lien to one in his favor; neither does a provision in

the mortgage that the expenditure of all sums, realized from the sale of the bonds secured, shall be made with the approval of one of the trustees, whose assent in writing shall be necessary to all contracts made by the corporation, before the same shall be a charge upon any of the sums received from such sale, create a charge in favor of such contractor. *Dillon v. Barnard*, §§ 1226-1228.

§ 1218. A statutory lien exists only where the statute in positive terms expresses an intention to create such a lien. A statute giving a city authority to aid a railroad company, and to receive security by mortgage or by pledge of stock, creates no lien in favor of the city as against other mortgages, after the city has accepted a pledge of the company's stock as security for such aid. *Cincinnati v. Morgan*, §§ 1229, 1230.

§ 1219. The legislature of a state has full power to release a statutory lien in favor of the state unless it is restrained by its constitution. A provision of the constitution of Missouri, that the general assembly shall have no power, for any purpose whatever, to release the lien held by the state upon any railroad, but shall provide by law for the sale of the road and the company's franchises, does not prohibit the legislature from discharging its lien upon a railroad upon receiving its full value. In such case the legislature is necessarily the judge of such value. *Murdock v. Woodson*, §§ 1231-1235.

§ 1220. The fact that a mortgage deed has the seal of a corporation attached does not make it the deed of the corporation, unless the seal was placed upon it by some one duly authorized. The seal being affixed to the deed, there is a presumption that it was rightfully affixed; but this presumption may be overthrown by parol evidence to the contrary. *Koehler v. Black River Falls Iron Company*, §§ 1236-1240.

§ 1221. Restrictions or provisions in a statute authorizing a corporation to issue bonds secured by mortgage enter into the contract, and bind the parties to it, although the mortgage itself contains inconsistent provisions. Thus where a mortgage is made to secure bonds with interest payable semi-annually, under the authority of a statute which declares that the bonds shall not mature at an earlier period than thirty years, a provision in them that, upon a failure to pay any coupon when presented for payment, and a continued default thereon for six months, the whole sum mentioned in the bonds shall become due and payable, is void. In such case, however, the mortgage may properly provide that it shall be foreclosed upon non-payment of interest. When a foreclosure suit is brought in consequence of such default, and the sum ascertained to be due on the coupons is paid within such reasonable time as the court shall appoint, no further proceedings in the suit can be had until there is another default. If the sum be not so paid, a sale of the property, with a foreclosure of all the rights subordinate to the mortgage, should be ordered, with a direction to bring the proceeds into court. *Howell v. Western R. Co.*, §§ 1241, 1242.

§ 1222. Where a railroad company in a mortgage of lands reserved the right to make sales of the lands and pay over to the mortgage trustees the proceeds after deducting the expenses of executing the trust, the company had the right to retain the reasonable expenses incurred by it in making such sales, and also the legal taxes as paid upon such lands. *Nickerson v. Atchison, Topeka & Santa Fe R. Co.*, §§ 1243, 1244.

§ 1223. Where a power was reserved in a mortgage by a railroad corporation to create a lien prior to such mortgage in favor of a state, in case it should make a loan to the corporation, and the state by an act of its legislature authorized the corporation to make a mortgage to secure a loan from other parties, provided the company would relinquish its claim to a loan from the state, and a mortgage was made accordingly, it was held that so far as the new mortgage did not invade any substantial or vested rights under the prior mortgage, it was valid and the substitution might be made. *Campbell v. Texas & New Orleans R. Co.*, §§ 1245-1250.

§ 1224. The fact that substituted bonds were made to run for a longer time was regarded as immaterial; as was also the fact that the substituted mortgage did not require a sinking fund as was the case with the bonds which were to be given to the state. *Ibid.*

§ 1225. But a variance in the rate of interest, a higher rate being imposed in the substituted bonds, is to the extent of the increase in such rate an invasion of the rights of bondholders under the first mortgage, and makes the bonds invalid to that extent. *Ibid.*

[NOTES.—See §§ 1251-1261.]

DILLON v. BARNARD.

(Circuit Court for Massachusetts: 1 Holmes, 886-895. 1874.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—This case is presented on a demurrer to the bill in equity. The material averments of fact which the demurrer admits are as fol-

lows: That the Boston, Hartford & Erie Railroad Company, a corporation duly existing under the laws of Massachusetts, Rhode Island, Connecticut and New York, was, prior to the 1st day of March, 1866, authorized to construct, maintain and operate a railroad in each of said states, and owned the railroad and franchises described in the bill; that, for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the railroad of said corporation, and for the purpose of completing and equipping its railroad, then only partly constructed, the corporation, by a mortgage deed or indenture in trust, on the 19th day of March, 1866, conveyed to Robert H. Berdell and others, trustees, all its property then owned and after to be acquired, in trust, upon the terms and for the purposes set forth in the mortgage deed, which indenture in trust or mortgage was ratified and validated by the legislation of the several states of Massachusetts, Rhode Island, Connecticut and New York.

The bill alleges that, among other things, it was provided in the indenture that certain bonds or evidences of debt, to an amount named in said indenture, should be issued, sold and disposed of, as the means and for the purpose of raising money to complete and equip the road; that such bonds, attested by the trustees, should be secured by said indenture, and become a lien upon the property therein described and conveyed, and also upon all the property afterwards purchased, and on the increase of value in the railroad given to it by the expenditure of the money raised by the sale of the bonds. It is also alleged that it was agreed by said indenture, and was a part of the trusts and terms under which the trustees held and were to hold the trust estate, that the expenditure of all sums of money realized from the sale of the bonds issued under the mortgage should be made with the approval of at least one of the trustees, whose assent in writing should be necessary to all contracts made by the railroad corporation for the purposes aforesaid, before the same should be a charge upon any of the sums received from such sales; and also alleges "that such contracts, to be assented to, should and would be a charge upon such sums so received and realized by or from such sales." This last averment must be understood as the allegation of what complainant claims to be the legal inference resulting from the terms of the contract, as no such provision is anywhere expressed in terms in the mortgage, which is made part of the bill and the record in the case.

Afterwards, on the 24th of October, 1867, the complainant Dillon entered into a contract with the corporation, in writing, which was approved and assented to in writing by the trustees, for the construction of a certain portion of said road. It is alleged to have been the purpose, object and intention of the corporation, the trustees and the complainant, that the sums becoming due under the construction contract should be a charge on the sums to be received from sales of the bonds; that the complainant performed work and expended large sums of money under the contract, relying for his compensation on the sums of money to be derived from sales of bonds, and upon a lien thereon, by virtue of the premises, and that his reliance thereon was well known to the corporation and the trustees; that his work under the contract was performed and accepted, and approved in accordance with the stipulations in the contract; and that a balance is due to him of \$1,030,693.29, with interest. The bill alleges that instead of devoting the proceeds of the sale of the bonds to the payment of complainant, the corporation and the trustees suffered the money to be expended in acquiring new property to be held under the indenture, and

in improving and increasing the value of the property already held under it; and that the value of the new property acquired and the increased value of the old property held under the indenture greatly exceeded the amount due to the complainant. The defendants Hart, Oliphant and Clark became legally the successors of Berdell and others, as trustees under the mortgage, and, before the filing of the bill, entered into possession under the mortgage of all the property covered by it, and commenced proceedings to foreclose the same. The corporation is alleged to be insolvent and without means, except the property covered by the mortgage, and in bankruptcy, and the assignees in bankruptcy are made defendants.

§ 1226. *A demurrer admits facts well pleaded, but not conclusions of law, nor averments as to the construction of documents and parol agreements.*

In substance, the claim of the complainant is, that the money received from the sales of the Berdell bonds was to be expended in building and equipping the railroad, which was to be held by the trustees in mortgage as security for the bondholders; that a part of the money due to the complainant for building the railroad, which has passed into the possession of the trustees under the mortgage, has been withheld from him and applied to the purchase of other property, which the contract did not contemplate should be bought and conveyed to the trustees, but which has been conveyed to them; and the complainant seeks to follow this property, upon the ground, as he claims, that the contract between him and the corporation, in connection with the terms and conditions of the mortgage, constituted in equity a charge upon the sums received from the sales of the bonds. As far as possible, the averments of matters of legal inference and of conclusions of law, and of the construction of documents, have been omitted in the statement of the allegations in the bill of complaint. The demurrer does not admit the truth of such allegations, but only such facts as are well pleaded. 2 Mitford, Eq. Pl., 227; Story, Eq. Pl., sec. 452; Daniell, Ch. Pl., 560; Commercial Bank of Manchester v. Buckner, 20 How., 108; Ford v. Peering, 1 Ves. Jr., 72. So far as the allegations in the bill are concerned which set up what are alleged as understandings between the parties, whether they refer to matters contained in the written agreement or indenture, and may be taken to be averments of conclusions of law from the agreements, or whether they refer to parol agreements incompatible with the written agreements, the questions as to the correctness of the legal conclusions in the one case, or the admissibility of the parol evidence in the other, are open to the defendants on demurrer. Lea v. Robeson, 12 Gray, 280.

§ 1227. *The mortgage in question contains a covenant to the effect that the corporation will so expend the moneys received from the sale of the mortgage bonds as to add to the security.*

The mortgage in trust, after reciting the authority given to the directors of the company to make a mortgage upon the whole or any portion of the road, and to issue and dispose of their mortgage bonds to the amount of \$20,000,000, payable in New York, excepting such portion as the directors should authorize to be payable in London in sterling currency, declares the purpose of the mortgage to be to secure the "bonds to be issued, for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road, and of laying down a third rail, so as to form an additional track corresponding with the gauge of the Erie Railway of New York." The form of the bonds to be secured by the mortgage was recited in the

mortgage deed. Each bond to be issued contained a statement on its face that it was one of a series of twenty thousand bonds issued for the purpose of paying the existing debt of the company, and of completing and equipping their road. The bond also on its face purported to be secured by a mortgage of the railroad and franchises, furniture and equipment of the company to the trustees, "which is to be the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees." Again, the indenture itself declares "that the parties of the first part, for the better securing and more sure payment of the sums of money mentioned in the said mortgage bonds, and each of them, according to the tenor thereof," . . . have granted, etc., to the parties of the second part (*i. e.*, the trustees) all and singular the railways, etc. (describing the railways and lands of the corporation), with all the personal property, and privileges, franchises, leases and charters; "also, all the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be controlled by the party of the first part." The indenture then witnesseth that it is made, and the mortgage bonds and obligations intended to be secured by it are made, executed and delivered, upon the terms, conditions and agreements following, the most important of which, and the one upon which the complainant principally relies, is the sixth condition in the indenture, which is: "That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales."

The allegation in the bill is, that it was agreed by the indenture "that such contracts so assented to should and would be a charge upon such sums so received and realized from such sales." There are no such words in the indenture. The allegation, therefore, is one of those allegations of conclusions of law or legal construction of a document which are not admitted by, but are open on, the demurrer. Upon a careful consideration of the whole indenture, its scope, intent and purpose, and especially of the sixth clause, in which alone the word "charge" is used, it must be determined whether that word was used in its strict and technical sense, or only in a more general sense, in a covenant that the corporation itself would make no expenditures of any money realized from the sale of the bonds, or any contract calling for such expenditure, without the approval of one of the trustees. This sixth clause in the indenture is a covenant on the part of the corporation, party of the first part, with the trustees for the bondholders, party of the second part; a covenant the intent and purpose of which was in aid of what is declared to be the purpose of the indenture itself, "for the better securing and more sure payment of the sums of money mentioned in said mortgage bonds, and each of them, according to its tenor."

Therefore, as the money from the sale of the bonds was to be raised for the purpose of retiring existing mortgage debts and prior liens on the mortgaged property, and for the purpose of completing and equipping the road and laying down a third rail, the corporation provided for the application of a portion of the bonds to the retiring of existing prior incumbrances, by the provision in the indenture for placing the bonds requisite for that purpose in the control of

the trustees, thus adding to the security by the extinguishment of prior liens, and requiring the assent of the trustees to expenditures and contracts for expenditures, that they might have the power so to control them that the proceeds of the bonds should be expended in such a manner as to further the purpose of the mortgage by adding to the security of the bondholders. The trustees were bound to see that the expenditure would tend to "the better securing and more sure payment of the mortgage debt," and also that it was for one of the purposes declared in the mortgage. There is no allegation that the expenditures approved by the trustees were for purposes other than those declared to be the purposes of the indenture, or that they did not tend to "the better securing and more sure payment of the sums of money mentioned in said mortgage bonds." It is not charged that the expenditures were for purposes other than those "of completing and equipping the road and laying down a third rail," or that they impaired the security of the bondholders. On the contrary, the averment is that they "caused the same to be expended in acquiring new property to be held under said indenture, and in improving and increasing the value of property already and since always held by said trustees under said indenture." This was the very purpose of requiring the assent of the trustees to the contracts and expenditures, that they should be devoted to acquiring new property and adding new values to the old property held and to be held under the mortgage. Examining the question, therefore, first in the light given in relation to the duties of the trustees by the terms of the trust indenture itself, their full duty would seem to have been faithfully discharged when they approved only such expenditures or contracts as extinguished prior incumbrances, or otherwise bettered the security of the bondholders, by such "completing and equipping their railroad" as added to the value of the old or resulted in the acquisition of new property to be held under the mortgage. The mortgage itself clearly does not contemplate that if the trustees approved several distinct contracts for the completion of distinct portions of the road, and also others for equipping the road, that either the trustees or the bondholders were to see that the assets were marshaled and the sums realized from the sales of the bonds ratably apportioned among the several contractors, or paid to them in the order in which their contracts were executed, or in the succession in which they became due and payable; or that the trustees were to receive or have control of the bonds, or the proceeds of the sales of the bonds, so as to be able to make such appropriation, except, perhaps, in the case of the bonds set apart for the retiring of the then existing mortgage debt and debts which constituted a lien on the property. The corporation itself only covenanted that it would so expend the moneys received from the sale of the mortgage bonds as to add to the security. This is the substance of their covenant; and it is not the subject of complaint in this bill that the mortgage security has been diminished, but that it has been added to and increased (as complainants claim, wrongfully increased), not, however, to the injury of any parties to the indenture, but of one of the persons who, subsequently to the trust mortgage, contracted with the mortgagor.

§ 1228. *The mortgage does not create any charge upon the proceeds of the sales of the bonds.*

The sixth condition in the mortgage does not of itself create any charge upon the money proceeds of the sales of the bonds. If the word "charge" in this proviso is to be construed as used in its strict and technical sense, then it is simply a covenant on the part of the corporation that it will not create such

a charge upon the money proceeds without the assent of the trustees. It is not a creation of a charge by the assent of the trustees, but a covenant not to create a charge by the act of the corporation without the assent of the trustees. The corporation had the power, by taking the requisite steps, to create a charge upon the money proceeds. The money was to be expended by the corporation, not by the trustees. It was in the power of the corporation to expend the money for any contract it should choose to make, approved by the trustees, for equipping and completing the road. It was in its power to create, by agreement between all the parties, a charge upon the moneys in favor of any one or of all the contractors; but, under the limitation of the sixth clause, it could not do so without the assent of the trustees. But, even with the assent of the trustees, to create such a charge upon so fugitive a subject of charge as money, which has no ear-mark, would require evidence of the most unmistakable language in whatever agreement or indenture is relied upon to establish the charge. There certainly is no such agreement in this indenture. It is not enough to create such a charge that the property may have been acquired or the fund created through the efforts or outlays of the party claiming the lien. *Wright v. Ellison*, 1 Wall., 16. Where, then, are we to look for the evidence that the corporation itself has agreed to create such a charge, and that the trustees have assented to such agreement?

The complainant was not a party to the indenture, and prior to the filing of the bill does not claim to have asserted any rights under it. The contract of the complainant with the corporation for the construction of a portion of the road does not undertake to create, and does not create, any charge upon the money proceeds of the bonds. No agreement is therein made for any such charge or lien, nor can it be seriously contended that any such charge or lien is created by any necessary implication from the terms or the scope of the contract. The assent of the trustees to the contract, therefore, was no assent to an agreement for a charge on the funds, there being no such agreement in the contract. Nor was it in the power of the corporation and the trustees combined to create a charge or lien on the property covered by the mortgage, which would take precedence of that of the trustees of the bondholders, which, by the express declaration in the indenture itself, was to be "the first and only lien on the property and franchises of the company." The bondholders advanced their money upon the faith of the security on the existing property and value of the road and its appurtenances, and the property and value to be added by the expenditure of the money advanced by them. The mortgage assumed to secure them on "the like estate, roads, railroads and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be controlled by" the corporation. These several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. *Galveston R. R. v. Cowdrey*, 11 Wall., 459 (§§ 1297-1304, *infra*); *Dunham v. Railway Co.*, 1 Wall., 254 (§§ 1557-58, *infra*); *Pennock v. Coe*, 23 How., 117 (§§ 1305-1309, *infra*).

As no property has been acquired under the mortgage, except such as by its terms was to be subject to the first and only lien under the mortgage in favor of the bondholders, the "charge" in favor of complainant, if any agreement for such charge had been made, and if such agreement had been assented to by the trustees, would have been subordinate to the first lien created by the indenture. The advances made by the bondholders were made upon the faith of

such security, and the fact that complainant's labor had added to the security of the bondholders would not subordinate their lien to his, if he had one. *Mason v. Y. & C. Railroad Co.*, 52 Me., 82; *Willink v. Morris Canal Co.*, 3 Green Ch., 377; *Galveston Railroad v. Cowdrey*, 11 Wall., 459; *Dunham v. Railway Co.*, 1 Wall., 254.

Demurrer sustained. Bill dismissed, with costs.

CINCINNATI CITY *v.* MORGAN.

(8 Wallace, 275-293. 1865.)

STATEMENT OF FACTS.—The city of Cincinnati was authorized by the Ohio legislature to loan its bonds to certain railroads, among others the Ohio & Mississippi, and, in order to secure the payment of such bonds by the railroad, to take mortgages or hypothecations of stock, or such other liens, etc., as might be agreed on. The city issued bonds to this company, and took as security an hypothecation of part of its capital stock. The railroad subsequently mortgaged its road, rolling stock, etc., to other parties, and a bill was filed to foreclose one of these mortgages. The city of Cincinnati, having been made a party, set up a claim of priority of lien by virtue of the act of the legislature authorizing the city to lend its credit to the railroads. There was a decree in favor of the mortgagees, to the effect that the city of Cincinnati had no lien on the property of the railroad company, except upon the stock hypothecated by the railroad as security for the bonds. The city of Cincinnati appealed to this court.

Opinion by MR. JUSTICE NELSON.

There is no doubt but that every part of this transaction was within the competency of the city council on the one side, and the railroad company on the other, as derived from the act of the legislature of Ohio, already referred to, of the 20th March, 1850, and was valid and binding upon both the parties. The seventh section of this act confers the authority in express terms. The city council is authorized to contract with the railroad company, to secure, by mortgages, transfers or hypothecations of their stock, or by such other liens or securities, real or personal, as may be mutually agreed upon, for the payment of the amount of the principal of the bonds as they become due, and for the reimbursement of any interest that might be paid by the city. The question in the case is, what are the rights acquired by the city, on the one hand, and obligations assumed by the railroad company, on the other, by this arrangement? If we look simply to the contract between the parties, it is impossible to entertain any doubt about them. The city holds \$1,000,000 in the stock of the company, as a security for the loan of \$600,000 in city bonds, with a power of sale of the stock upon the terms mentioned. The whole transaction consists in a loan of bonds and a pledge of stock.

§ 1229. *A statute to confer a lien in favor of one party upon the property of another should be explicit and positive.*

It is argued, however, that this seventh section of the act of 1850 impresses upon the transaction an effect and operation over and beyond the mere rights and obligations arising out of the contract; that the section transmutes the pledge of stock into a lien or mortgage upon the road and fixtures of the company, and makes it not only a charge upon them, but a charge prior in date to the second, and even the first mortgage; that, in effect, the pledge overrides all liens or incumbrances upon the road and fixtures, whether prior or subsequent in time, and postpones them to this alleged statute security of the loan

of the city bonds. Certainly a statute that can have such a peculiar and strikingly inequitable effect and operation should be very explicit and positive, in order to obtain the assent of a court of law or equity. The lien is supposed to be given by the latter clause of the section, which is, in substance, as follows: "And for the further purpose of securing said city against all loss or losses which the same may suffer, whether by payment of the principal or interest, or any damages arising therefrom, that the above liens, mortgages or other securities shall have priority or precedence of all claims or obligations subsequently contracted by such company, and over other liens, securities or mortgages which were not duly entered into between said company and other persons, before the respective issues and loans."

§ 1230. *Where a statute gives a party a choice of securities, and he makes his election, he can thereafter claim no other.*

It will be remembered that the first clause in the section gave to the city council an option as to the security they might take for the advance of the bonds. They might take mortgages or hypothecations of stock of the company, or such other lien or security, real or personal, as the parties should mutually agree to between themselves. The liens and securities, therefore, real or personal, that the city council might require, depended upon their own views of what would be best for all the parties interested in the enterprise of building the road. They could have exacted a mortgage upon the road or fixtures, or both, or be satisfied with personal security, such as the hypothecation of stock. They did at first decide in favor of a mortgage on the road, but soon afterwards changed their opinion in favor of the hypothecation of stock — exacting a \$1,000,000 of stock for the \$600,000 in their bonds. Now, "the above-described liens, mortgages and securities," referred to in the subsequent clause of the section, and to which priority and precedence are given over claims and obligations subsequently entered into, is to be taken distributively; that is, if the city council should stipulate for a lien by way of mortgage upon the road, or upon personal property belonging to the company, or which might be acquired in the future, such liens or mortgages should have priority and precedence over claims and obligations subsequently contracted by the company.

The only answer to this view is, that it makes the clause a work of supererogation, as this would be the legal effect of the lien itself. That is true. The clause would be but declaratory of the law as it stood. This, however, is not a strange circumstance in legislation. A large portion of the modern codes is but declaratory of the common law as expounded by the courts. We prefer this interpretation to the one that gives a lien against the stipulations of the parties, and where both were free to enter into them as authorized by a previous clause of the same section. Under this liberty, given to the city council and the company, the former rejected the lien upon the road by mortgage, preferring the personal security by a pledge or hypothecation of the stock. The first clause of this section would be quite as idle and absurd a piece of legislation, which conferred upon the parties the authority of agreeing upon their own terms as to the nature and character of the security for the loans, as the latter, if, by the latter clause, whatever might be the security agreed upon, it must operate as a mortgage on the road, and have precedence over all others. Why give this choice of securities if this would be the result? There was no necessity to stipulate for a mortgage on the road if the statute gave the lien without it; nor propriety or sense in the choice between a mortgage and the pledge of

stock, if a lien on the road followed either security. The thirteenth section of the general law incorporating railroads, referred to as helping out this lien, we think received its proper answer in the court below, as not applicable to this company; and the same in respect to a clause in the act of February 10, 1851, incorporating the Cincinnati Western Railroad Company. We think the decree of the court below, against the claim of the city, was right, and should be affirmed.

WOODSON v. MURDOCK.

(22 Wallace, 351-381. 1874.)

APPEAL from U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—The state of Missouri, in 1851 to 1855, issued bonds in aid of the Pacific Railroad upon the usual conditions, among which was a lien upon the road to secure the payment of the bonds. The amount was about \$7,000,000, on which the railroad company paid the interest up to 1859. In 1864 the legislature permitted the company to borrow \$1,500,000 on bonds known as the Dresden bonds, and to give a first mortgage on the road to secure them. In 1865 a new constitution was adopted, and an ordinance providing that taxes on the income of the roads should be levied for the purpose of paying its bonds; that in case of default the railroads should be sold; that in case the state should become the purchaser of any railroad it should not be restored to the company except upon payment of all interest due from the company, and that no sale should be made without reserving a lien, etc. In 1868 the legislature directed a sale of the Pacific Railroad by an act the fifth section of which provided that if the Pacific Company should within ninety days pay \$350,000, and within ninety days more enough to make the whole sum \$5,000,000, the road should be released from all demands against it by the state. The company made these payments, and in order to do so issued \$7,000,000 of bonds, making Murdock a trustee, giving him a mortgage on the whole road. The company subsequently made another mortgage for \$3,000,000, and still a third for \$800,000. In 1873 the legislature directed the governor to sell the road under the original statutory lien, on the ground that the fifth section of the statute of 1868, under which the \$5,000,000 had been paid, was unconstitutional. This bill was filed by Murdock and others on behalf of the holders of the \$7,000,000 of bonds to enjoin the sale.

Opinion by MR. JUSTICE STRONG.

It has not been contended here that the complainants are not entitled to the injunction decreed by the circuit court, if the act of the Missouri legislature, approved March 31, 1868, was a legitimate exercise of the legislative power. But it is insisted that the fifth section of that act is in conflict with the constitution of the state, and, therefore, that the arrangement made under it with the Pacific Railroad Company cannot be held to operate as a discharge of the company from the debt due by it to the state, or as a release of the railroad from the lien of the state's mortgage. The question presented, then, is this: Was the fifth section of the act mentioned prohibited by the constitution of the state? By the first section the governor was directed to sell the Pacific Railroad and its appurtenances, in accordance with the provisions of section 5 of the act, and of an act approved February 22, 1851, entitled "An act to expedite the construction of the Pacific Railroad and the Hannibal & St. Joseph Railroad." By the second section the price for which the railroad was directed to be sold was required to be not less than \$8,350,000, payable to the

state treasurer, in bonds of the state or in money, within ninety days from the day of sale. If that sum was not obtained the governor was required to buy in the railroad for the state. By the third section it was made a condition of the sale that the purchaser or purchasers should bind himself or themselves to change the gauge of the road within ten years from the date of sale, so as to conform to the gauge of the Union Pacific Railroad. The fourth section enacted that upon the payment of all the purchase money, and upon the delivery of an obligation, in conformity to the requirement of the third section, the governor should execute a deed to the purchaser or purchasers conveying all such right, title and interest in and to the said Pacific Railroad, its franchises, appurtenances and the property belonging thereto, as were subject to the lien of the state. Then followed the fifth section, which is the one mainly in contest. It enacted that if the Pacific Railroad Company should, at any time within ninety days after the 1st day of April, 1868, pay into the treasury of the state the sum of \$350,000, in the bonds of the state or in money, then, and in that event, the governor should not advertise the road for sale; and if the company should, within ninety days thereafter, pay into the state treasury an additional sum equal to \$5,000,000 in all (either in cash or in Missouri state bonds), the governor should, upon the production of the receipts of the state treasurer for the said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title and interest which the state of Missouri had in and to the railroad, its property and appurtenances, and that the Pacific Railroad Company should, from and after the delivery of the deed, be fully discharged from all claims or debts due the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of their railroad.

Within ninety days after the passage of this act the company paid into the state treasury \$350,000, and within ninety days after such payment \$4,650,000 more, in all \$5,000,000, the sum specified in the fifth section, and received from the governor a deed conveying all the right, title and interest of the state, and discharging it from all liens and claims of the state, and from all liability growing out of the issue of state bonds to aid in the construction of its road. That this was a compromise of the claims of the state against the company; practically, a sale to the company of the state's interest growing out of its advance of state bonds under the statutes of 1851, and the following years, is very plain, and such was its obvious intention. The principal of the debt was not then payable. The bonds issued by the state had not then fallen due. All of them were either twenty or thirty-year bonds, and the company was under no obligation to pay the principal until the bonds became payable. The extent of her obligation was measured by the provisions of the act of 1851. That act required the company to make provision for the payment of the principal and interest of the bonds in such manner as to exonerate the state from any advances of money for that purpose, and, had the interest been paid up to 1868, the state could then have exacted no more. The interest, it is true, was in arrears from July 1, 1859. To that extent the state had an immediate claim upon the company, but as the whole debt, according to the agreed statement of facts, was \$7,000,000, the aggregate of unpaid interest in 1868 was less than \$4,000,000. The arrangement then made, by which \$5,000,000 was received in full satisfaction, and the deed given, included, therefore, not only interest due, but principal which had not fallen due, and hence it may properly be regarded as a commutation or a sale of the rights of the state to the company.

§ 1231. *The constitution of Missouri does not prohibit the legislature from releasing the debts due by railroads to the state, but only the liens securing those debts.*

We come then to the question whether anything in the constitution of the state prohibits such a transaction. A new constitution was adopted in 1865, the fifteenth section of the fourth article of which is as follows: "The general assembly shall have no power, for any purpose, to release the lien held by the state upon any railroad." This provision, it is insisted by the appellants, denied to the legislature the power to make such a disposition of the interests of the state as was made in 1868 in virtue of the fifth section of the act of March 31st of that year. The language of the prohibition is remarkable. It is not that the general assembly shall not release the *debt* due to the state by any railroad company. Legislative control over the debt is left untouched. The provision has reference only to a security for the debt. Had it been intended to put the debt beyond the disposition of the legislature, it would be difficult to find a reason for confining the prohibition to a release merely of the lien. But it is easy to see why it should be ordained that, while the debt remained, the security for it should not be given up. And that such was the intention appears quite plainly in view of the state of things which existed when the constitution was framed and adopted. Prior to its adoption it may be said to have become almost a legislative habit to release the liens held by the state upon railroads without discharging the debts. In numerous cases statutes had been enacted by which railroad companies were authorized to borrow money, and to mortgage their roads as security for the loans, the state releasing its lien, to give the mortgagees a priority. The purposes for which these releases were made were various, and they were generally avowed in the statutes. Thus, in 1864 the legislature released the state's lien upon a part of the Pacific road, avowedly for the purpose of enabling the company to complete its main road to Kansas City. At the same time the lien of the state on the North Missouri Railroad was released for several avowed purposes,—to enable the company to complete their main road to the Iowa state line; to enable the company to construct its west branch; and to enable it to build a bridge across the Missouri river. And again, in 1865, February 16th, the legislature released the first lien of the state upon the road of the same company for the same purposes, retaining, however, a second lien. All this took place very shortly before the constitution was adopted. That such releases were contemplated when the convention framed the constitutional inhibition, and when the people ratified it, can hardly be doubted. The constitution was plainly intended to prohibit them, and therefore language was employed denying the power to release the lien and saying nothing of the debt. Certainly there is no expressed restriction of legislative power over the debt itself. If any exists it must be supplied by implication. Keeping in mind, then, that the constitutional prohibition is directed only against a release of liens, what should be regarded as its meaning? We agree it is not to be frittered away by doubtful construction, but like every clause in every constitution it must have a reasonable interpretation, and be held to express the intention of its framers. It must be held to have been intended for the public protection, for the preservation of the public property, and to make available claims the state held against railroads. But if it is to be construed reasonably, and in accordance with what must have been the intentions of those who adopted it, it cannot be construed literally. It cannot mean that the lien of the state upon a railroad

shall not be released upon full payment of the debt, to secure which the lien was created. If it does it is equivalent to a prohibition against the state's receiving payment. Surely it will not be contended to deprive the legislature of power to make use of the lien to enforce satisfaction of the debt, though thereby the lien be discharged. That would be to destroy the value of the lien. Nor can it mean that the lien may not be employed to obtain from the property bound by it all that the property is worth and all that the indebted company can pay, though that be less than the entire amount of the debt. It is not a restriction upon the power of the legislature to make the most which in its judgment is possible from the security. In terms the legislature is left unrestricted as to the mode of receiving payment or settling with its debtors. Composition, accord and satisfaction, and full payment in cash, are left within the legislative discretion, at least so far as the liquidation of the debt is concerned. So there is nothing in the clause of the constitution quoted which can be regarded as a restriction upon the power of the legislature to sell any claims held by the state against a railroad company. It is not an ordinance that the legislature shall not deal with debts due to the state from railroad companies as it may deal with debts due from other debtors. It is that the *lien* shall not be released *for any purpose whatever*, that is, for the accomplishment of any object the legislature might have in view; and unless we can hold this means it shall not be released even by full payment of the debt, it can mean no more than this, that, while the debt remains, the legislature may not let go the security for it. Such a construction accounts for the peculiarity of the language employed. There is a very palpable distinction between the lien which the state holds upon a railroad and the debt, obligation or duty which the lien was created to secure. The two could not have been confounded by the framers of the constitution. If it was intended that, under all circumstances, every dollar due from a railroad company should be exacted, and that no settlement should be made, or sale authorized, without payment of the uttermost farthing, it is incredible that the constitution would not have so declared. That such was not the intention is plainly shown by the railroad ordinance adopted with the constitution, and a part of the organic law of the state. By that ordinance the legislature was authorized and directed to sell the railroads on their failure to pay a tax levied, and when the sale should be made to others than the indebted companies, no limitation was directed to be affixed to the price, and such a sale, we have no doubt, would have discharged the road from the state's lien. The state itself was empowered to become a purchaser at the sale at any price at which it could buy, and whenever it purchased, the lien, of course, was merged in the title, and the general assembly was required to provide by law in what manner the railroad or franchises or other property should be sold for the payment of the indebtedness of the company in default. But the ordinance does not require that at such sale the purchaser from the state shall pay the full amount of that indebtedness. A lien is required to be reserved for all sums remaining unpaid; that is, very clearly, for all that part of the purchase money from the state at her sale which remains unpaid. If this is not the meaning, the state may never be able to sell at all, and the plain purpose of the ordinance may be entirely frustrated. And that such is its meaning has been determined by the supreme court of Missouri. See 37 Mo., 129. The fifth section of the ordinance does, indeed, require that no railroad or other property or franchise purchased by the state shall be restored to the company in default until it shall have first paid in money or in Missouri state bonds, or in

bonds guarantied by the state, all interest due from said company, and requires that all interest coming due thereafter shall be paid semi-annually in advance; but even this is no assertion that such a restoration shall not be made for a sum less than the original indebtedness. Whether it may or not it is unnecessary to decide, for the provision applies only to a case where the road has been sold, and where the state has become the purchaser, which is not this case.

§ 1232. *The state can sell the railroad or compromise the debt.*

Neither the clause in the body of the constitution, therefore, nor any provisions of the railroad ordinance forbid the legislature to sell the railroad, or compromise the debt claimed by the state, for less than the entire indebtedness. It follows, then, that though the legislature had no power to release the lien while the debt remained, it was not prohibited from selling the claim or commuting the debt. And there is no inconsistency in this. The legislature may well have been trusted with the management of the obligation, responsible only to its constituents, while the security for the fulfillment of the obligation may have been withdrawn from its control. A trustee may have no right to give up a security for a claim, and yet be at full liberty to settle and adjust the claim itself or to sell it. It need hardly be added that if the legislature had power to accept a commutation of the claim of the state, or to sell the debt for what in its judgment it deemed best for the public interests, it had also power to make a formal relinquishment of the lien after the debt had been liquidated. The constitutional provision was not designed to continue in existence liens that the law had extinguished. For these reasons we hold that the fifth section of the act of the legislature of March 31, 1868, was not in conflict with that provision of the constitution which forbids, for any purpose whatever, a release of the lien held by the state upon any railroad.

§ 1233. *The act of March, 1868, is not in conflict with the railroad ordinance.*

Nor do we perceive that there is any conflict between it and the railroad ordinance. The appellants insist that the ordinance forbids any sale of a defaulting railroad except at public auction for a price equal to the full amount of the debt of the defaulting company, and without a reservation of a lien upon the property sold, not merely for the unpaid part of the purchase money, but for all that remains unpaid of the debt for which the property is sold. Such is not our reading of the ordinance, nor is it that of the supreme court of the state. We have already said that the lien required to be reserved is only to secure the unpaid balance of the purchase money. This is too clear for argument. It is equally clear to us the ordinance does not require that the sale shall be for a price equal to the whole debt, or that it shall be at public auction. The first, second and third sections impose upon each of three railroad companies, of which the Pacific Railroad Company is one, an annual tax of ten per centum of the gross receipts for two years, and fifteen per centum thereafter, until the principal and interest of the bonds for which the companies were liable should be fully paid. Then followed the fourth section, as follows: "Should either of said companies refuse or neglect to pay said tax as herein required, and the interest or principal of any of said bonds, or any part thereof remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchise of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company." There is nothing in this which takes away from the leg-

islature the power to determine the time, the manner, or the price of the sale which it was directed to cause to be made. It is true the sale is ordered to be made under the lien reserved to the state, referring, doubtless, to the mortgage taken under the act of 1851; and it is also true that by that act it was enacted that if either of the companies to which bonds might be issued should make default in the payment of either principal or interest of the said bonds, the governor might sell their road by auction, giving six months' notice, or buy it in for the use of the state; but these provisions were no part of the lien. They were means specified for enforcing it. The legislature was at liberty to provide other means of collecting the debt and enforcing the lien. The sale directed by the ordinance was for non-payment of the tax imposed, and the direction to sell under the lien reserved was simply an order to proceed to collect the mortgage. The lien is not to be confounded with proceedings for its foreclosure.

§ 1234. *The act of March 31, 1868, is not unconstitutional as embracing subjects not expressed in its title.*

Finally, it is insisted by the appellants that the fifth section of the act of 1868 is unconstitutional, because its subject is not embraced in the title of the act, and because the constitution ordains that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject be not embraced in the title, such act shall be void only as to so much thereof as is not expressed." The title of the act of 1868 is "An act for the sale of the Pacific Railroad, and to foreclose the state's lien thereon, and to amend the charter thereof." That the subject of the fifth section is embraced in this title is very apparent. If the subject is not the foreclosure of the state's lien, it is impossible to say what it is. And we think it cannot be justly said the act embraces more than one subject. It has many details, but they all relate to one general subject, which is the sale of the railroad and the foreclosure of the state's lien thereon. Cooley's Const. Lim., 141 *et seq.* We cannot sustain this objection.

Nothing, then, in our judgment, warrants the conclusion that the fifth section of the act of March 31, 1868, was not a legitimate exercise of the legislative power of the general assembly of the state. It follows that the arrangement made in pursuance of it with the Pacific Railroad Company, and the deed of the governor to the company, extinguished the debt due to the state, and, consequently, put an end to the lien. The \$5,000,000 paid to the state were raised upon bonds of the company and a mortgage, of which the complainants in the court below are trustees. The money was advanced on the faith of the legislation of 1868, and so were \$3,000,000 more, for which a subsequent mortgage was given. If that legislation was not unconstitutional, as we have endeavored to show it was not, it would be a gross wrong to the bondholders who thus advanced their money, were the defendants permitted to sell the railroad, its property and franchises, for the satisfaction of a claim or lien which has no longer any existence.

Decree affirmed.

Dissenting opinion by MR. JUSTICE MILLER, MR. JUSTICE DAVIS concurring.

I cannot agree to the judgment of the court, and think the principle involved of sufficient importance to justify an expression of my views.

§ 1235. *The history of the ordinance in controversy and the causes which led to its adoption.*

For many years previous to the late civil war the principal railroads in the state of Missouri had been the objects of the special care of the people, and

had received large pecuniary aid from the state. This aid had been given at various times and in divers sums, in the shape of the bonds of the state, to the extent, in the aggregate, of \$25,000,000 or more. For these sums, which were treated as loans, the railroad companies had consented to statutory liens in the nature of mortgages, with conditions to pay the bonds of the state, interest and principal, as they fell due. If the terms of the loan were not precisely as I have stated in all cases, they were substantially so, and any variations in special instances do not affect the question under consideration. The state of Missouri was, almost as much as any state in the Union, the seat of the worst calamities of that war. Its people were divided among themselves; regular armies marched and countermarched over its soil, and each side used or abused the railroads to their utmost capacity when within their control. But, above all, the local guerrilla warfare to which the disputed control of her territory and the divided allegiance of her people subjected them, was the cause of immense destruction and damage of her railroads. These companies, therefore, emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling stock so deteriorated that new supplies were indispensable. Their credit was low, their means exhausted, and their property apparently worth but little. They were unable to meet their obligations to the state, and were largely in arrears for the interest on the state bonds. The state itself was in little better condition. To the heavy burdens of increased taxation, imposed by the federal government to support the war and pay its debt, was now added the necessity of paying the interest on the large debt of the state incurred in aid of the railroad companies.

The question forced itself upon the people of the state and the railroad companies, what is to be done in this emergency? The people of the state felt the injustice, in their overburdened condition, of being called on to pay, without aid from the corporations, the debt incurred for their benefit, and this hardship was not diminished by the consideration that the roads were owned and controlled by stockholders, very few of whom were citizens of Missouri. The railroad companies felt that if their roads were to be made capable of accomplishing the purpose of their creation, all their means and all their credit must be devoted to repairing and rebuilding the roads and refurnishing the rolling stock. The railroad companies and that part of the people of the state who felt a stronger interest in the roads appealed to the generosity of the legislature to relieve the roads from the burden of the debt to the state. Those who believed that the credit of the state and the relief of the people from the burden of excessive taxation were of paramount importance thought the state should relieve herself as far as possible by enforcing her lien at the expense of the stockholders, and by sale of the roads realize all they would bring, and, appropriating this to the payment of the bonds of the state, diminish to that extent the taxation necessary to pay the interest on her large public debt.

The appeal for leniency to the railroad companies had many and able advocates, and was warmly urged by them, and assisted by all the appliances which that class of corporations use with so much effect. The legislature had, in several instances, released liens altogether on some roads, and had postponed liens to let in subsequent ones, thus showing what might be expected of that body. It was in the midst of the discussion of this question that the members of the constitutional convention of 1865 were elected, and in the face of the difficulties which it presented that the convention assembled. They took cognizance of the matter. They understood that they were expected to adopt

some plan of relief, and whatever plan was adopted must be based mainly, if not exclusively, on one or the other of the two propositions we have named. We are now called upon to give judicial construction to what they did, and, by all the rules of sound interpretation, it must be done in view of the condition of affairs which their action was intended to relieve and of the public sentiment which they intended to represent.

It was very clear then, it is equally clear *now*, looking alone to what was incorporated into the constitution by that convention, that it wholly rejected the idea of leniency to the railroad companies, and that its sole care was to conserve the pecuniary interest of the state. As the constitution stood when the convention assembled it was in the power of the legislature—of any legislature—at any time, under the pressure of any influence, to release the lien of the state on the roads, or to make any other compromise of the claim of the state. If the convention was fully determined against this policy, it was their first duty to take this power from the legislative body altogether. The first thing to be done was to forbid the legislature from granting this relief. In the effort to carry out this purpose the convention placed in the body of the constitution, article IV, section 15, the declaration that “the General Assembly shall have no power *whatever* to release the lien held by the state upon any railroad.”

It seems to me strange that this provision should be the subject of a divided opinion as to its meaning. The release here meant could not have been the execution of a technical instrument called a release. No such absurdity can be imputed to the convention, because if the debt was paid or otherwise discharged, so that the lien no longer existed, the making of such an instrument was of no value to any one. The thing prohibited was the discharge or remission in any shape of the specific lien which the state had on the roads for the repayment of the bonds she had advanced or loaned to the companies. To make this more emphatic all power *whatever* on this subject was taken away. No pressing exigency, no motive, however pure or generous, and no consideration even of pecuniary wisdom in which the legislature might indulge or believe, was to justify this discharge of the lien which the state held as security for her advances. How can it be maintained in the face of this, that, while the legislature could not release from motives of grace and for the purpose of a gratuity, it could release on a purpose of compromise by accepting one-third or one-half of the debt secured by the lien? If one-third could be accepted, then one-tenth. If five millions could be accepted when ten were due, then five dollars could be accepted. It is to be borne in mind that we are considering the constitutional power of the legislature to release the lien, and on this question we are not at liberty to consider whether it acted wisely or reasonably. If they could release at all, or for any consideration, the court cannot say they have exceeded their power. But the constitution seems to place all this beyond question by saying it shall not have any power *whatever* to do this thing.

The work of the convention was, however, to be submitted to a vote of the people. If it received a majority of the votes cast it became the fundamental law of the land. Otherwise it passed for nothing. Other propositions were submitted separately, and might be adopted or rejected without hazarding the whole instrument. But so important did the convention deem this provision that they put it into the body of the new constitution so that the latter could not be adopted without including the former. If, however, the question of releasing the road from its debt to the state was thus settled in the negative,

there still remained the question of the present enforcement of the lien by sale or otherwise. This question was left by the convention to a vote of the people in a separate ordinance which might be adopted or rejected without defeating the constitution itself, but which, if adopted, became part of the constitution.

Both the constitution and this ordinance were submitted at the same time, and both were adopted and became part of the fundamental law of the land at the same time. This ordinance throws a flood of light on the intention of the men who framed the constitution in adopting the section we have just discussed. It imposed a tax of ten per cent. on the gross receipts of the three principal roads from October, 1864, to October, 1868, and fifteen per cent. thereafter; to be devoted to the payment of the principal and interest of the bonds loaned by the state; and it required that if either of said companies neglected or refused to pay said tax, the general assembly should provide by law for the sale of that road. The fifth section of this ordinance is as follows: "Whenever the state shall become the purchaser of any railroad or other property or the franchises sold as hereinbefore provided for, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default; but no railroad or other property or franchises purchased by the state shall be restored to any such company until it shall have first paid in money or in Missouri state bonds, or in bonds guarantied by this state, all interest due from said company, and all interest thereafter accruing shall be paid semi-annually in advance; and no sale or other disposition of any such railroad or other property or their franchises shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in the bonds or other obligations of this state."

The manner in which this ordinance was put to the people is significant. The ballot was to be, "Shall the railroads pay their bonds? Yes." "Shall the railroads pay their bonds? No." The former was a vote for adopting the ordinance; the latter was a vote against it. It is thus seen that if this ordinance was adopted, both the convention and the people were in earnest in their determination not to release any claim the state had in those companies. The peculiar provision of the above section makes this very clear. If the state became the purchaser the legislature should provide for the manner of its resale; but in no event was it to be restored by resale or otherwise to the company who had owned it until that company had first paid in money, or bonds of the state of Missouri, all the accrued interest due from said company; and all interest thereafter to accrue was to be paid in advance semi-annually. It was also provided that no sale or other disposition of such railroad should be made without reserving a lien upon all the property and franchises thus sold or disposed of *for all sums remaining unpaid*.

The sale or disposition here spoken of had reference to a sale to other parties than to the defaulting company. And even in that case the ordinance provided that none should be made which did not secure the state for all her liabilities on account of the road. The clause can have no other meaning but this, though it is ably argued that it means such part of the consideration of the new sale as may be on credit. But, taking the constitutional provision, the prohibition in the ordinance against a restoration of the roads without payment of what is due, and security for what is to become due, it seems to me hardly to admit of a doubt that *in no event* was the road to pass from the control of the state

without security against any loss by reason of these bonds. But however this may be, the constitutional prohibition against releasing the lien, the provisions of the ordinance for the levy of a severe tax on the gross receipts, the direction for a sale if it was not paid, and the two provisions against restoration to the same company until full payment, indicate to my mind the unmistakable determination of the convention and the people that the companies should, in the language of the prescribed ballot, "*pay their bonds*,"—pay them in full,—or lose their roads, their property and franchises.

The answer made to all this is, that while the legislature could not release the *lien* they could remit the *debt*. That while they could not restore the road to the same company after the state had bought it in, they could sell to the company the debt which that company owed the state at any price it chose. That while the state could not release the lien by any legislative act, it could compromise or sell the debt, and thus defeat, destroy or part with that lien. It is said if the convention intended to prohibit the legislature from dealing as it chose with the *debt*, it could easily have said so, instead of using the word *lien*. If the convention had said that the legislature shall have no power to discharge the *debt* without full payment, it could then be argued with much more force that the *lien* might be released though the debt could not be touched. On the other hand, so long as the lien remained the debt must remain, for there could be no lien without the debt. It seems to me, therefore, that the convention used the stronger and better term, the one which included both, and which expressed precisely what they meant, namely, that both the debt and the lien of the debt should remain inviolate except by payment. If there could be any doubt of this, the form of submission of the ordinance on which the people voted, that the "roads should pay their bonds," makes it too clear for dispute.

But of what avail are constitutional restrictions of legislative power, or legislative restrictions of municipal power, if they are disregarded by the legislatures and municipalities? It may be said that there remains to the people the protection of the courts. But language is at best a very imperfect instrument in the expression of thought, and the fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive. The ingenuity of casuists and linguists, the nice criticism of able counsel, the zeal which springs from a large pecuniary interest, and the appeal of injured parties against the bad faith of the legislatures who violate the constitution, are easily invoked, and their influence persuasive with the courts, as they always must be.

And if language as plain as that we have been considering, a purpose so firmly held and clearly expressed, is to be frittered away by construction, then courts themselves become but feeble barriers to legislative will and legislative corruption, and the interest of the people, which alone is to suffer, has but little to hope from the safeguards of written constitutions. These instruments themselves, supposed to be the peculiar pride of the American people, and the great bulwark to personal and public rights, must fall rapidly into disrepute if they are found to be efficient only for the benefit of the rich and powerful, and the absolute majority on any subject will seek to enforce their views without regard to those restrictions on legislative power which are used only to their prejudice. (a)

(a) This case affirms *Murdock v. Woodson*, * 2 Dill., 188.

KOEHLER v. BLACK RIVER FALLS IRON COMPANY.

(2 Black, 715-721. 1862.)

APPEAL from U. S. District Court, District of Wisconsin.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—This was a bill in chancery, brought in the district court of Wisconsin by Jacob Koehler, Daniel Koehler and Harry Pfiffner against the "Black River Falls Iron Company," to foreclose a mortgage. The bill alleges that, on the 13th of August, 1858, at La Crosse, in Wisconsin, the "Black River Falls Iron Company"—a corporation created by the laws of Wisconsin—executed and delivered their promissory note to Daniel Koehler and Caspar Bircher for \$15,000, payable in nine months, to secure which a mortgage of even date, under the corporate seal, was also executed and delivered, which mortgage was witnessed, acknowledged and recorded; that on the 21st day of September, 1858, Caspar Bircher, by an instrument of writing under seal, for the consideration of \$7,000, transferred to Jacob Koehler and Harry Pfiffner his interest in said note and mortgage, which was also witnessed, acknowledged and recorded; and that the note and mortgage being overdue and unpaid, the aid of the court is asked to decree a foreclosure.

§ 1236. *If the seal of a corporation is fraudulently attached to a mortgage, the instrument is unsealed and not a legal mortgage.*

William M. Hubby, having filed his petition stating that he was a stockholder, and that in his opinion the directors did not intend to make defense, was allowed to appear and defend. Leave was given to the complainants to amend their bill so as to make Julius W. Haas and others, junior mortgagees, party defendants. Answers and replications were filed, proofs taken, and the cause was heard at the October term, 1860. The court dismissed the bill without prejudice and the complainants appealed. The answers deny that the "Black River Falls Iron Company" ever executed under its corporate seal this mortgage, which denial, if sustained by the evidence, is decisive of this case. If the seal of the corporation was not affixed to the instrument by proper authority, but was surreptitiously obtained, then the deed is not the deed of the corporation, was not duly executed as the bill charges, and is not a legal mortgage, and cannot be foreclosed as such. The mere fact that a deed has the corporate seal attached does not make it the act of the corporation, unless the seal was placed to it by some one duly authorized. *Jackson v. Campbell*, 5 Wend., 572; *Damon v. Granby*, 2 Pick., 345, 353; *Bank of Ireland v. Evans*, 32 Eng. L. & E., 23; *Angell & Ames on Corp.*, sec. 223. This mortgage had the corporate seal attached, and the presumption was that it was there rightfully, and the court properly admitted it to be read in evidence; but the presumption thus raised was not conclusive, and parol evidence was admissible to overthrow it. *St. Mary's Church*, 7 Serg. & R., 530; *Berks & Dauphin Turnpike v. Myers*, 6 Serg. & R., 16. The evidence is conclusive that the corporate seal was affixed to the mortgage wrongfully.

The mortgage purports to have been executed on the 13th of August, 1838, and signed by Charles Hauser, president, and J. M. Levy, secretary *pro tem.*, who both swear that the corporate seal was not present, that they did not then, nor did they ever, place the seal to the instrument, and have no knowledge how it came to be sealed. It was recorded shortly after being given, and no seal was to it. Henry Richter, the secretary of the company, was the custodian of the seal, and testifies that he was not present when the mortgage was

given, that he had the seal in his possession, and did not then, or at any time afterwards, affix the seal or authorize any one to do it for him.

§ 1237. — *the burden of proof is on the party producing the mortgage, if there is proof that the proper officers did not affix the seal.*

When the defendants proved that neither the president nor the secretary *pro tem.*, who signed the mortgage, nor the regular secretary, who was the rightful custodian of the seal, had any knowledge of the way in which the mortgage became sealed, then the burden of proof was thrown on the complainants to show the circumstances under which the instrument was in fact sealed, and that it was rightfully and properly done. Failing to do so, the conclusion is irresistible that the seal was fraudulently abstracted from the lawful custodian of it, and wrongfully affixed to the mortgage.

§ 1238. *In Wisconsin a seal is necessary to the validity of a deed of conveyance.*

The Revised Statutes of Wisconsin of 1849 were in force when this mortgage was given, and section 1 of chapter 59 prescribes the manner in which conveyances of real estate can be made, and it is as follows: "Conveyances of lands or of any estate or interest therein may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other ceremony whatever."

Section 30 of this same chapter defines what is meant by conveyances as thus used, and is as follows: "The term conveyance, as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands." This mortgage, not having been sealed by the iron company, or under its authority, was not executed in conformity with law, and is therefore invalid and of no force and effect as a legal mortgage.

§ 1239. *Under a bill asking a foreclosure of a legal mortgage it cannot be shown that the instrument is an equitable mortgage.*

It is argued that, if not a legal mortgage, it is an equitable one, and that the court should not have dismissed the bill, but granted such relief as equity could give. But *this* bill seeks a foreclosure on the *sole* ground that a legal mortgage was given. If the complainants have any rights under this instrument as an equitable mortgage, they can be tested on a proper bill filed in another suit. The defendants in their answers further insist that this mortgage was given without authority of law, and by fraud and collusion on the part of the directors. The Black River Falls Iron Company was incorporated by the general assembly of Wisconsin, March 31, 1856, to explore for minerals, and to mine, manufacture and vend them. The administration of the affairs of the company was lodged in the hands of directors chosen from the stockholders to hold office for one year, and to be controlled by the rules and by-laws adopted by the stockholders. The power to sell and mortgage, and procure a common seal, was given.

By-laws were adopted fixing the place of business at New Danemora, Jackson county, limiting the number of directors to five, who should appoint a secretary having no vote, and providing "that all documents, orders for the payment of money and receipts, to be valid, must be signed by the president and

secretary." A stockholders' meeting was held May 19, 1858, and the following memorandum was entered among the minutes: "May 19th, afternoon session — Mr. C. W. Schmidt makes the motion that the directory hereafter to be appointed shall be authorized to endeavor, before all, the effecting of a loan of the highest possible amount, and in case of success to close it, and they are empowered to incumber for the same the works with buildings and appertaining lands; carried." At the same meeting a board of directors was elected, viz.: Charles Hauser, president, and John C. Fuhr, H. Pfiffner, Jacob Koehler and John M. Levy, who chose Henry Richter as secretary. The company was evidently embarrassed and in great need of money, and as the necessity was urgent and pressing, the directors were instructed (neglecting all other business) to obtain as large a loan as they could, and to secure it by a mortgage on the lands and works. The stockholders clearly contemplated a loan of money to carry on their business, and if a loan could not be effected without real security, power to mortgage was given to the directors. No authority was given to them to secure pre-existing indebtedness, and certainly none to secure themselves in preference to other creditors. Did these directors, as guardians of an important trust committed to their care, endeavor in good faith to accomplish the object which their principals so much desired? They met on the 13th day of August, 1858, at La Crosse, and not at their usual place of business, and failed to notify their regular secretary, who had the records in his charge, and who had acted as secretary since the organization of the company, to attend. No reason is assigned why the secretary was not notified, but as he was a large creditor, and was not to be favored, it is barely possible that the directors thought his presence would be embarrassing.

§ 1240. *Directors of corporations are trustees and will not be permitted to fraudulently prefer themselves to other creditors.*

As the by-laws required that all instruments of writing should be signed by the president and secretary, it was found necessary to appoint a secretary *pro tem.*, and one of the directors was selected, who, unlike the regular secretary, was fortunate enough to have his debt provided for. A note and mortgage were given to Daniel Koehler and Caspar Bircher for \$15,000, who were to let the company have \$1,200 in money, and \$800 in provisions, and to pay the following debts of the corporation:

Metzer, Koehler & Swab, a note and interest.....	\$3,570
John C. Fuhr.....	1,900
Jacob Koehler.....	1,256
John M. Levy, two notes and interest.....	\$2,428
Less \$124 charged.....	124—2,304

John C. Fuhr, Jacob Koehler and John M. Levy, who were so lucky as to have their debts to the amount of \$5,500 provided for, were themselves directors, and it might be inferred that Koehler, the director, was interested in the firm of Metzer, Koehler & Swab, but there is no evidence of it. It is a little singular that the mortgagees, in order to get security for the \$2,000 which they agreed to advance, were willing to assume the payment of \$9,130. Such is not the usual course of dealing with those who in good faith make advancements and require security. The mortgage was signed and delivered by Hauser, the president, to Koehler, the director, for the mortgagees, who were neither of them present, and who did not actually make the advancements in money or provisions until some time afterwards. And Bircher, one of the mortgagees, as if to fix the true character of this transaction beyond cavil, in a few weeks from

the giving of the deed, for the expressed consideration of \$7,000, transfers his entire interest to Koehler and Pfiffner, two of the directors. Instead of honestly endeavoring to effect a loan of money, advantageously, for the benefit of the corporation, these directors, in violation of their duty, and in betrayal of their trust, secured their own debts, to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation. In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy." Angell & Ames on Corporations, edition 1861, sec. 312; Charitable Corp. v. Sutton, 2 Atk., 404; Robinson v. Smith, 3 Paige, 220; Hodges v. New England Screw Co., 1 R. I., 321; York & North Midland R'y Co. v. Hudson, 19 Eng. L. & E., 361. The decree dismissing the bill is affirmed.

HOWELL v. WESTERN RAILROAD COMPANY.

(4 Otto, 463-467. 1876.)

APPEAL from U. S. Circuit Court, Eastern District of North Carolina.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The appellant in this suit is the owner of five bonds of \$1,000 each, issued by the defendant corporation, and he seeks the foreclosure of a mortgage on the railroad and its appurtenances given to secure their payment. These are part of an issue of like bonds to the amount of \$900,000, made at the same time, to wit, October 31, 1870, payable thirty years after date, with coupons for interest attached, at the rate of eight per cent. per annum. Very few of these bonds were ever sold or put into circulation. All that have been, except these held by plaintiff, have either been taken up or are under the control of the company. The face of each bond contained a provision that, on the failure to pay any coupon when presented at the place of payment, and continued default thereon for six months, the whole sum mentioned in said bond became due and payable; and the mortgage deed contained a provision that a like failure as to any one coupon of any single bond should make all the bonds become due and payable. On the back of each bond was printed the act of the legislature of North Carolina which authorized the corporation to make these mortgage bonds, which declares that "said president and directors are hereby authorized and empowered to issue the mortgage bonds of said company in sums of not less than \$100 each, and not exceeding in amount \$900,000, and to be negotiated at not less than par, and not to mature at an earlier period than thirty years," etc.

Many issues are raised by the pleadings which are not necessary to be considered here. We shall confine ourselves to two questions, which are all that we deem appropriate to our purpose. The first of these is whether the plaintiff is a *bona fide* holder for value of the bonds on which he sues. There is some reason to infer that Rogers, who was one of the trustees of the mortgage,

and the banker who was expected to negotiate the bonds and with whom they were deposited, was not a rightful holder of them, though it is asserted that they were paid to him for services to be performed as trustee in the mortgage. He, however, never performed any services, no bonds were ever negotiated, and the arrangement by which he held these bonds as his own does not appear to have been authorized or approved by the board of directors of the company. This, however, is immaterial; for, from the testimony before us, we are compelled to hold that Howell, the complainant, was a *bona fide* purchaser of them for value of Rogers without notice of any defect in his title. The only evidence on this subject found in the record is his own deposition, in which he states unequivocally that on a settlement made by him with Bayne & Co., who were his bankers, he took these bonds in absolute payment of money due him, at the rate of seventy-five cents on the dollar, and had no notice of anything wrong in the title of Rogers. This testimony is uncontradicted and conclusive.

§ 1241. *Provision that whole debt shall become due on default in payment of interest.*

The other question relates to the validity of the bonds as affected by the provision of the statute that they should not mature at an earlier period than thirty years, whereas the bonds provide that on failure to pay a single interest coupon they shall mature in six months thereafter, if it is still unpaid. The provision was, as we have said, printed on the back of the bond, and imparted to every purchaser or holder of it the fullest notice of its nature. The provision, in our opinion, differs widely from a mere direction as to the length of the time the bonds should run or the period when they should be made payable. Such a direction or provision in an act authorizing a corporation to issue bonds is not in general inconsistent with a contract that if the interest is not paid as agreed the holder may treat the whole sum as due. The language of this statute is not that these bonds are to be made payable in thirty years or payable at a given time, and there is no direction as to the terms in which that is to be expressed. They may be made to run fifty or a hundred years; but however worded or expressed they are "not to mature at an earlier period than thirty years." We construe this as an express enactment that they shall not mature earlier. No matter what device the parties interested may resort to, nor what form of language may be inserted in the bond, the principal sum of the bond shall not become due until the expiration of that period. The legislature had an undoubted right to annex to the power which it conferred of making these mortgage bonds this absolute condition, and they have used language which we can construe in no other way. We do not see how a condition of the contract by which the bonds can be made to mature in one year can be valid when the only authority to make the contract at all is the statute we have cited. But while this condition is invalid it does not avoid the remainder of the contract, which is complete without it, and the agreement to pay interest semi-annually is specifically authorized by the statute.

§ 1242. *Railroad company may provide for the foreclosure of the mortgage for non-payment of interest coupons.*

The company, therefore, had a right to mortgage their property for the payment of these instalments of interest as well as principal, and to make it one of the provisions of the mortgage that it might be foreclosed if these instalments were not paid as they fell due. There can, in fact, be but one decree of foreclosure of the same mortgage on the same property, and it is a necessity of that foreclosure, under the principles of the court of chancery, that all the sums

secured by that mortgage must be protected according to their priority of lien. We are of opinion, then, that there is due from the railroad company to plaintiff the amount of his overdue and unpaid coupons. For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice,—a decree which will ascertain the sum so due and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal. In this manner full justice will be done the appellant and no wrong to the appellees.

Decree reversed and the case remanded with directions to proceed in conformity to this opinion.

NICKERSON v. ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

(Circuit Court for Kansas: 8 McCrary, 455-460. 1881.)

STATEMENT OF FACTS.—The railroad company executed a deed of trust on a body of land, to secure certain bonds, which provided as follows: (1) That the party of the first part was to continue to use and manage the lands the same as if the deed of trust had not been executed. (2) After deducting the expenses of executing the trust, the proceeds of the sale of lands were pledged to the payment of the bonds and interest coupons. (3) Any surplus at any time in the hands of the parties of the second part in excess of the amount of land grant bonds outstanding was to be paid to the party of the first part. (4) The company had the power to sell the mortgaged land and receive land grant bonds in payment, all moneys received to be paid to the trustees, to be applied according to the provisions of the deed; and all land so sold was to be released by the trustees from all incumbrances. (5) The trustees were empowered to employ clerks to assist in executing the trust.

§ 1243. *Construction of a right reserved by a railroad company in a mortgage of lands to make sales of the lands.*

Opinion by McCRARY, J.

The sole question to be decided upon this demurrer is, whether the expenses attending the sale of the lands by the railroad company are properly to be classed as "expenses of executing the trust;" in other words, we are to determine from an inspection of the whole instrument whether the parties intended that the railroad company should make sales of the lands and pay over the gross proceeds to the trustees, deducting nothing for expenses. It is very clear, we think, that the sale of the lands was regarded by the parties as a part, and a very important part, of the execution of the trust. The debt secured was very large and the bonds are not to mature until October 1, 1900. The evident intention of the parties was that the land should be sold as rapidly as possible and the proceeds applied, after paying expenses of sale, to the discharge of interest as it accrued and the creation of a sinking fund for the payment of the principal. By the terms of the mortgage the railroad company was to retain

possession and control of the land with power to dispose of the same for cash, or partly for cash and partly on credit, on reasonable terms. In effect, the railroad company was constituted the agent of the trustees and bondholders to sell the land and pay over the proceeds, "after deducting the expenses of executing this trust," to the trustees, to be applied upon the payment of the mortgage debt. The proceeds of the sales, "after deducting the expenses of executing" the trust, were pledged for the payment of the bonds and interest, and of course only the moneys so pledged were to be paid over to the trustees. It is true that certain duties were devolved upon the trustees, and their expenses, including sums paid to clerks, agents and attorneys, were to be paid, but we cannot assent to the proposition that these were the only expenses to be deducted from the proceeds of the sales. The parties saw fit to so frame the contract as to devolve upon the railroad company many important duties in connection with the execution of the trust, and we must presume that the large expenditures on the part of the company, made necessary by the contract, were, in the intention of the parties, to be included in the expenses of carrying out the agreement.

The mortgage abounds in provisions regulating the sale of the lands and the application of the proceeds thereof. This feature of the contract set forth in the mortgage is so prominent as to make it very apparent that its execution must be regarded as part and parcel of the execution of the trust expressed therein. We are therefore of the opinion that the railroad company was authorized to retain, out of the proceeds of the sale of lands embraced in the mortgage, its reasonable expenditures incurred in making such sales. The bill does not aver that the expenditures of the railroad company were unnecessary or unreasonable, and it must therefore be considered as only raising the question whether the railroad company was entitled to make any charge for selling the land and to deduct the same from the proceeds of the sales. The bill further alleges that a large sum has been paid by the company, out of the proceeds of sales of land, for taxes upon the same. As legal taxes were liens upon the land prior and paramount to any claim under the mortgage, it is difficult to see upon what ground their payment can be regarded as an expenditure outside of the trust. The railroad company, by the terms of the mortgage, was to be suffered and permitted to possess, manage, use and enjoy the lands in the same manner and with the same effect as if the deed of trust and mortgage had not been made, except as in the instrument otherwise provided; and it was, as we have already seen, to be allowed to manage the matter of selling the lands. The control, management and sale of the lands by the railroad company was therefore provided for as a part of the contract and of the trust. The payment of the taxes accruing from year to year was plainly a part of the proper management of the estate. If it had been neglected, the whole property would have been lost, and the bondholders would have been the chief sufferers. If the land had been sold, subject to the taxes, the price received for it would have been correspondingly less, and therefore no damage has resulted to any of the parties interested by reason of their payment. We are therefore clearly of the opinion that the payment of the taxes was properly within the duties devolved upon the company in the management and sale of the lands. If we were in doubt as to either of the questions raised by the demurrer, the fact that the parties themselves who made the contract at once adopted the construction above suggested, and have for many years acquiesced in and acted

upon it, would lead us, without hesitation, to resolve our doubts against the claims of the complainants.

§ 1244. *Contract; construction adopted by the parties will be followed.*

The trustees, acting upon the theory that the company was entitled to retain the expenses in question, including sums paid for taxes, have from time to time received the net proceeds of sales ascertained upon that basis, and have voluntarily executed releases in accordance with the terms of the mortgage. It is not necessary to determine whether such action continued for so long a period is an absolute estoppel, which deprives them of the privilege of now being heard to assert that this construction was erroneous. It is enough to say that the construction which the parties themselves placed upon their own contract, and upon which they have so long acted, is the one which the court ought to adopt. The demurrer to the bill is sustained.

FOSTER, D. J., concurs.

CAMPBELL v. TEXAS & NEW ORLEANS RAILROAD COMPANY.

(Circuit Court for Texas: 3 Woods, 262-272. 1872.)

STATEMENT OF FACTS.—The Texas & New Orleans Railroad Company, in 1858, executed a first mortgage of its property with a special reservation that whenever the company should procure from the state of Texas a loan of \$6,000 per mile out of the school fund, and should execute its bonds to the state for the same, they should constitute a lien upon the property mortgaged prior and superior to the lien of the above mentioned mortgage. This reservation was made in pursuance of the law of 1856, which entitled the company to this school fund loan, and by which it was expressly provided that the bonds given to the state should constitute a lien upon the road and charter rights of the company, including the road-bed, right of way and all property owned by the company as necessary for its business; and that they should have a priority over all other claims against the company. Early in 1861 forty miles of the road remained still unfinished and the resources of the company were exhausted. The school fund loan for this portion of the line, on which the company had relied, was essential to enable it to complete the work, but the state could not advance any more school fund bonds, or at least did not. In this situation of affairs an act was passed entitled "An act for the relief of the Texas & New Orleans Railroad Company," by which it was provided, among other things, that the company might issue a first mortgage upon this uncompleted portion of its road to the amount of \$6,000 per mile, which should be a prior lien to the mortgage of 1868, provided the company would relinquish all claims to the state loan for that portion of the road. The mortgage was executed accordingly. The question afterwards arose whether the mortgage of 1858 or the mortgage of 1861 should have priority; the holders of the bonds of 1858 contending that although the company might have given such lien to the state upon borrowing money of it, yet that it had relinquished this right, and therefore that these bonds and the mortgage thus became the first lien on the road and its appurtenances.

Opinion by BRADLEY, J.

Without rehearsing the facts of this case, which was done in a previous opinion, I will proceed to state the conclusions to which I have come. 1. On the main point involved in the case, the claim of priority on behalf of the bonds

issued in 1861, my opinion is that the said bonds, and the mortgage given to secure the same, are entitled to priority over the bonds of 1858, commonly called the land grant bonds, upon the property covered thereby, namely, the railroad, road-bed, turnouts and depots, between Houston and Trinity river, together with the locomotive engines and rolling stock, etc., appertaining thereto. It seems clear from the evidence that, at the commencement of the year 1861, that portion of the road at least remained still unfinished, and that the resources of the company were exhausted; that the school fund loan for this portion of the line, on which the company had relied, was essential to enable it to complete the work; and that the state could not or did not desire to advance any more school fund bonds. In this situation of affairs, on the 7th day of February, 1861, the act was passed entitled "An act for the relief of the Texas & New Orleans Railroad Company," by the first section of which it was enacted that the company should have until the 1st of January, 1863, to locate its land certificates and return the field notes of the same to the general land office; and by the second section, that the company should have the power, and was thereby authorized, to issue a first mortgage upon its railroad from the west bank of Trinity river to the city of Houston; provided, that the company should relinquish all claims to the state loan on that section of its road. Now, the mortgage of 1858 had in it a special reservation, that, whenever the company should procure from the state the loan referred to, being \$6,000 per mile, to be loaned from the school fund (which it declared its intention to obtain), and should execute its bonds to the state for the repayment thereof, they should constitute a lien upon the property mortgaged prior and superior to the said mortgage of 1858. This reservation was made in pursuance of the law of 1856, which entitled the company to this school fund loan, and by which it was expressly provided that the bonds given to the state therefor should constitute a lien upon the road and charter rights of the company, including the road-bed, right of way, grading, etc., and all property owned by the company as necessary for its business; and that they should have a priority over all other claims against said company. Pasch. Dig., arts. 3501-3505.

Now, what relief could it have been to the company to destroy this right to raise money by putting a first lien of \$6,000 per mile on their road? The holders of the bonds of 1858 contend that, although the company might have given such a lien to the state upon borrowing money of it, yet that it relinquished this right, and, by relinquishing it, made their bonds and mortgage the first lien on the road and its appurtenances. This certainly could never have been the intention of the parties, for it would have been, on the part of the company, a piece of the greatest fatuity thus to surrender this most valuable resource for raising the means which were necessary to enable it to complete its road and works. And to my mind it is proved quite conclusively, as far as parol proof and the contemporary acts of the company and all dealing with it at that time can go to prove a matter of this kind, that the act of February 7, 1861, was regarded and intended as a permission and authority, given by the state to the company, to substitute some other lender in its place, and to subrogate its right of priority to such substituted creditor. The question is, Could this be done?

§ 1245. *A corporation may reserve a power to place upon its property a lien antecedent to an existing lien.*

There seems to be no doubt that the state might have advanced the loan, received the company's bonds, and assigned such bonds to any other party, and

might thus have substituted another party in its stead. The state might have proposed to A. thus: "Advance this loan to the Texas & New Orleans Railroad Company for us, and you shall have the company's bonds to be received therefor." No reasonable objection to such a transaction could have been made by prior mortgagees or bondholders. If either of these things could be done, why could not the state, in the exercise of its legislative power, have substituted another party in its place as lender, and authorized a subrogation of all its rights of priority to such lender? No substantial rights of any other persons or parties would have been thereby invaded. And acts of state legislation are to be sustained if they do not invade any substantial and vested rights. If the legislature of the state, by the act of 1861, did this, I can see no objection to the validity of the transaction. The company, upon the footing of this law, formally relinquished its claims to the state loan as required, and provided for the issue of four hundred and eighty bonds of \$500 each (being just \$6,000 per mile for the forty miles of railroad yet to be constructed), and amounting in all to \$240,000, payable in fifteen years, with interest at eight per cent. per annum, and, to secure the same, executed to Benj. A. Shepherd and William J. Hutchins, as trustees, a mortgage on the said forty miles of road, its turnouts, depots, etc., and the locomotive engines and rolling stock, etc., appertaining thereto. These bonds and the mortgage were dated the 1st of January and issued the 18th of March, 1861. The bonds expressly stated that this issue of bonds and the mortgage was made in lieu of the issue of the same amount on the said section of railroad which the company was authorized to issue and deliver to the state under the act of August 13, 1856; and the mortgage in like manner refers to the act of 1861, and formally relinquishes all claims to the state loan, and professes to be a first mortgage on this part of the road by virtue of that act. The bonds thus executed were issued to various parties, contractors and others, and the proof is sufficiently conclusive that they were received for value to the amount of their face, and were negotiated and received as a first lien on that portion of the railroad. In my judgment, these parties are entitled to stand in the place and stead of the state, and have a first lien on the line in question, according to the terms of the act of 1856, and the reservation contained in the mortgage of 1858. I believe it to have been the intent of the parties, the intent of the legislature, and the understanding of the holders of the bonds of 1858 themselves, as evinced by their declarations and conduct.

§ 1246. *The substituted prior bonds may vary as well in the time they run as in the payee, if the difference does not affect third persons.*

2. But it is objected by the defendants that the bonds which were given vary from those which were to be given to the state; and hence they cannot, even by legislative aid, be substituted therefor without impairing the obligation of the contract between the company and the bondholders of 1858, as first, they run for a longer time — fifteen years, instead of ten years. I do not regard this as belonging to the essence of the contract. The term of ten years is mentioned in the act of 1856 as the time for the bonds to run, it is true, this period being directory to the state officers as to the time they were to allow the bonds to run. But there was no specific mention of the time of credit in the reservation made in the mortgage of 1858; and the substantial circumstance as between the company and the holders of the bonds of 1858 was, that the former had a right to lay a loan of \$6,000 per mile on their road, to have priority of the mortgage securing the bonds of the latter.

§ 1247. *That substituted prior bonds are not, as originally stipulated, secured by a sinking fund is immaterial.*

Another variance relied on is the fact that the bonds and mortgage of 1861 do not require a sinking fund to be reserved, as was to be done with the bonds to be given to the state. This, again, does not belong to the substance of the right as between these parties. It was one of the terms in detail which the officers of the state were to require of the company. It was a mode of payment, or rather a mode of providing for payment, which came to the same thing in the end as payment of the entire amount at the day of maturity. If that sinking fund were annually put up, just so much would be abstracted from the funds of the company which might otherwise have gone into improvements, making the property of the company so much more valuable. It would make the company neither richer nor poorer. If the substitution could be made at all, the legislative power to authorize it to be done could not be made to depend on a strict and literal compliance with all the terms which the state officers were required to observe in taking the company's bonds. Had the arrangement with the state itself been carried out, surely the legislature could have authorized the school fund board to receive bonds at fifteen years, instead of ten years, without losing the state's priority of lien. The great, controlling, substantial stipulation between the company and the bondholders of 1858 was this: "We expect to make a loan from the state of \$6,000 per mile on our road, at six per cent. interest; that loan must be a first lien." All the rest is matter of detail between the state and the company, of no essential concern to the bondholders. This strikes me as the sound and sensible view of the subject.

§ 1248. *That substituted prior bonds bear eight per cent. interest instead of six, as stipulated, is pro tanto an invasion of the rights of the deferred incumbancers.*

A third variance complained of is the promise to pay eight per cent., instead of six per cent., on the bonds of 1861, six per cent. being the amount to be paid to the state. I regard the additional two per cent. per annum as an additional burden imposed on the road, beyond what was stipulated for. The company had no right to interpose ahead of the bonds of 1858, anything more than \$6,000 per mile, drawing six per cent. interest. As this is matter of amount merely, it ought to affect the holders of the bonds of 1861 only *pro tanto*. If the bonds issued and outstanding are the full quota of \$6,000 per mile, only six per cent. can be allowed thereon. This is the limit of incumbrance which should be placed in priority to the bonds of 1858. If less than \$6,000 per mile have been issued, then such abatement must be made of the eight per cent. interest, if any abatement is necessary, as will bring the amount to \$6,000 per mile and six per cent. interest.

§ 1249. *A party holding a first lien should have the right of bidding at the sale.*

3. But the defendants insist that the original decree is substantially correct, in any event, and ought not to be modified, inasmuch as "the relative priority of the two series of bonds" is left open for future decision, after the sale shall be made. It seems to me, however, to be very material to a party holding a first incumbrance on property, not to be deprived of the right of bidding that property up to the amount of his claim. This he cannot do when the property is sold together with other property, or when his right to priority is left in dispute. Cases often occur when a sale of the property out and out, and a subse-

quent adjustment of claims upon the fund, is the only just method which can be pursued. But whenever a specific property on which a separate incumbrance exists can be sold separately, without injury or sacrifice of that or other property, it ought to be thus sold, so as to secure to every incumbrancer, if practicable, the right of protecting his security without involving himself in onerous engagements, or being subjected to onerous conditions. And if a decree is made in plain disregard of this rule, I think it ought to be corrected. A decree in this case will, therefore, be made for correcting the decree complained of, by which it shall be declared that the said bonds and mortgage of 1861 are entitled to priority over the bonds of 1868, and by which the forty miles of road and its appurtenances, between the Trinity river and the city of Houston, as embraced in the mortgage of 1861, shall be sold separately for the purpose of paying, first, the proportionate amount due to the receiver for expenses on the said road yet unpaid, and also a proportionate amount of the costs and expenses of suit; and secondly, the amount of principal and interest due on the bonds of 1861, not to exceed what the full amount of \$6,000 per mile would amount to at six per cent. per annum.

Another matter of complaint made against the decree in the former suit is, that it directs the special master to sell "all the land warrants or scrip received by said company from the state of Texas;" whereas, only one thousand three hundred and twenty sections of said land were included in the two trust deeds of 1858, and none of them were included in the mortgage of that date. And on the other hand, the complainant Campbell alleges that he is the holder of one hundred and eighty land certificates of six hundred and forty acres each, amounting to one hundred and fifteen thousand two hundred acres in all, which he holds as surviving partner of Morris, Campbell & Co., who were the contractors for building said road, and received from the company in all four hundred and seventy-two certificates, or three hundred and two thousand and eighty acres of such land scrip; and received the same in good faith, without any knowledge of their being mortgaged or pledged in any manner, and have parted with all except those now held, to other persons, purchasers thereof in like good faith; and he claims to be protected in the possession and enjoyment of these certificates, and that the other parties to whom certificates were sold by Morris, Campbell & Co. may also be protected. The counsel for the holders of the bonds of 1858, on the other hand, contend that the trust deeds which cover these land grants to the extent of one thousand three hundred and twenty sections (then not in existence, it is true), became a lien on the first one thousand three hundred and twenty sections which were subsequently issued by the company, as soon as they were issued; and if there is any difficulty in finding the balance, the contractors must meet it; hence they demand that the contractors shall surrender all the certificates held by them, or, at all events, that they shall be subject to sale under the decree, until the number of one thousand three hundred and twenty sections has been made good to the use of the trust deeds of 1858.

It is admitted on both sides that, when the trust deeds were given, these land grants were not yet earned by the company; that they existed only in contemplation of law, and depended for actual existence upon compliance by the company with the conditions which, by the laws of Texas, would entitle it to certificates therefor; that when the certificates did issue, until actually located they were mere personal property, and, like any negotiable security, transferable from hand to hand. It also appears that the amount to which the com-

pany would be entitled, when the conditions were complied with, was sixteen sections per mile of their road; that they included in the two trust deeds only twelve sections per mile (which amounted to the one thousand three hundred and twenty sections); and reserved four sections per mile (which was four hundred and forty sections in all), to be employed by them in constructing their road in common with the proceeds which they might derive from the sale of their bonds. This arrangement seems apparent from the evidence and all the acts of the company taken together, and it is unnecessary for me to refer to particular parts of it. It is the conclusion to which I have come from the facts and evidence in the case.

§ 1250. *Purchasers from a corporation of land certificates, without notice of the lien of an existing trust deed, acquire a good title.*

Then, how do the respective claimants stand in relation to each other? The bondholders, as against the company, under the deeds of trust, have a claim to certificates for one thousand three hundred and twenty sections of land; not by absolute grant or assignment, but by the effect of the trust deeds operating by way of estoppel. The trust deeds could not operate as grants of these certificates, for the certificates were not in existence when the deeds were executed. They only operate by way of estoppel. They amount to covenants on the part of the company that the certificates shall be included in the trust deeds when they come into existence. This is the doctrine of equity. To this the courts hold the company, and as against it and its assigns having notice of the contract they treat the certificates as if they had been in existence, and had been embraced in the trust deeds when they were executed. But the courts will not override other equities in coming to this result. If parties purchased the certificates in good faith and without notice of any such estoppel, it would be doing injustice to them to deprive them of the certificates so purchased. In the case before us there was a margin of four sections per mile over and above the amount or number of sections pledged to the bondholders, which the company itself had a perfect right to dispose of. It would be naturally supposed by parties dealing with the company, even if they knew of the existence of the trust deeds, that so long as the company kept within the line of this margin in issuing additional certificates, no interference was made with those to which the trustees under the trust deeds were entitled. If a man sell me fifty bushels from a lot of one hundred bushels of corn, and a third person afterwards, with knowledge of the sale to me, purchase the remainder, and remove his part of the lot, leaving my quantity undisturbed, how can he be liable to me, even though the seller should afterwards fraudulently dispose of my part to other parties? From the evidence in the case, and all the facts and circumstances bearing upon this part of it, without attempting to go into unnecessary details, I am brought to the conclusion that the contractors received their certificates in good faith, and are entitled to be protected in the possession and enjoyment thereof; and the decree should be modified accordingly.

§ 1251. *Payment of taxes.*—A provision in the condition of a defeasance of a mortgage given by a railroad company to secure its bonds, that the mortgage shall be void if the mortgagor well and truly pays the debt and interest "without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever," does not oblige the company to pay an income tax of five per cent. imposed by act of congress upon the interest payable upon the bonds, and which such companies "are authorized to deduct and withhold from the payments on account of any interest or coupons due and payable." The provision has reference only to ordinary taxes imposed upon the company and the property in its possession. *Haight v. Railroad Co.*,* 6 Wall, 15; S. C., 1 Abb., 81.

§ 1252. Bonds giving a lien.— Without a formal mortgage the bonds of a corporation, providing that they shall be a lien upon the property of the company prior to all others, are in substance a mortgage, and may be enforced in equity as against the corporation and its property. *White Water Valley Co. v. Vallette*, 21 How., 414, 422.

§ 1253. A railroad company, authorized to borrow money, issued bonds reciting such authority and pledging its property to secure them. It was held that the bonds constituted an equitable mortgage, and that, though not recorded, the lien existed between the holders of the bonds and the railroad company, and as against subsequent purchasers and creditors with notice. *King v. Tusculumbia R. Co.*, * 7 Penn. L. J., 166.

§ 1254. The property which the railroad company had in its possession on the date of its bonds, and also other property acquired with or received in exchange for it, and the property purchased with the money derived from the sale of the bonds in possession of the railroad company, was held liable to satisfy the bondholders. *Ibid.*

§ 1255. Mortgage by directors at meeting not notified.— A chattel mortgage of corporate property made by the directors at a meeting held without the notice required by the by-laws of the company is not for that reason invalid. *Samuel v. Holladay*, * 1 Woolw., 400.

§ 1256. Statutory mortgage.— A mortgage may be constituted by statute without the execution of any deed of conveyance. *Wilson v. Boyce*, 2 Otto, 320.

§ 1257. A statutory mortgage is construed in the same manner as one executed by deed, as regards the property it embraces. Thus, the state of Missouri having issued bonds in aid of the Cairo & Fulton Railroad Company, under an act which declared that they should "constitute a first lien and mortgage upon the road and property" of the company, it was held that a valid lien was created by the act upon all the lands of the company, including such as did not constitute the road, or any part of it, and were not used in connection with it. *Ibid.*

§ 1258. A statutory mortgage on the property of a railroad company in Georgia was intended as an indemnity to the state to secure it against its indorsement of the bonds of the company, and did not operate to make the state a trustee for bondholders. *Cunningham v. Macon & Brunswick R. Co.*, 3 Woods, 418, 424.

§ 1259. The whole debt may be made to become due upon any default in the payment of interest or of principal. *Wilmer v. Atlanta & Richmond Air Line R. Co.*, 2 Woods, 447 (§§ 1405-1409).

§ 1260. A stipulation in a mortgage, that, on default in payment of interest, the principal shall become due, is not a penalty, but is an agreement which gives the mortgagee a right of entry and sale. *Ruggles v. Southern Minnesota Railroad*, * 17 Int. Rev. Rec., 29.

§ 1261. It is the right of the trustees to avail themselves of this stipulation at their discretion, and it is not for the court to say that they have abused their discretion. *Ibid.*

III. PROPERTY COVERED BY RAILROAD MORTGAGES.

SUMMARY — *Earnings of railroad in mortgagor's possession*, §§ 1262, 1263.

§ 1262. The earnings of a railroad, while it is allowed to remain in the possession of the mortgagor, are not subject to the lien of the mortgage, although in terms the mortgage covers the tolls of the road, if at the same time the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession. *Gilman v. Ill. & Miss. Tel. Co.*, §§ 1264-1267.

§ 1263. But if a mortgage by a railroad company may be made to cover its future earnings and profits, and the company receive them, it may be held to account for them as a trustee for the bondholders. *Pullan v. Cincinnati & Chicago Air-Line Railroad Company*, §§ 1268-1274.

[NOTES.— See §§ 1275, 1276.]

GILMAN v. ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY — COYKENDALL v. SAME.

(1 Otto, 603-617. 1875.)

From U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— These cases have been argued together, and will be decided together. The case at law will be first considered. On the 24th of May, 1872, the telegraph company recovered in the circuit court of the United

States for the district of Iowa, a judgment for the sum of \$23,734.04 and costs. On the 13th of June following execution was issued. On the 17th of that month, the marshal to whom the process was directed served i by attaching as garnishees several persons, one of whom was Coykendall, the plaintiff in error. On the 27th of October, 1873, he filed his answer; and on the 27th of October, 1874, he filed a further answer. By the first answer he admitted that, since he was garnished, he had received for and paid over to the railroad company more than \$37,000. In his second answer he set forth that he was the agent of the railroad company at Des Moines; and that his duties were to sell tickets and receive and ship freight, and to receive the charges upon such freight. For the moneys received both for tickets and freight a large proportion belonged to other companies, but how much he did not know. All the moneys he received were regularly transmitted to the assistant treasurer of the Des Moines company. The proper apportionment of the moneys was made by the officers of that company at Keokuk, and the Des Moines company was accountable to the other companies for what belonged to them. He was not in the employment of any other company or person during the time mentioned, and was not responsible to any other company or person for the moneys which he received, as before stated. The gross amount received by him, between the time he was garnished and the appointment of the receiver who took possession of the road, was \$27,000. The case was submitted to the court and argued by the counsel upon both sides. The next day it was stated to the court by the counsel for the defendant that proof could be adduced of the proportion of the moneys in question which belonged to other companies, and time was asked to procure it. The application was overruled, and the court gave judgment for \$27,000 and costs. The garnishee thereupon excepted to the ruling of the court refusing further time.

§ 1264. *Rulings of the court in a case tried without a jury cannot be reviewed here, unless the trial was according to the act of March 3, 1865.*

The case having been submitted to the court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows no error. It is to be taken that both parties waived a trial by jury, and they are bound accordingly. *Phillips v. Preston*, 5 How., 273; *Campbell v. Boyreau*, 21 id., 224; *Kelsey v. Forsyth*, id., 86. The proceeding not having been according to the act of March 3, 1865, this court has no power to examine any ruling of the court below excepted to during the progress of the trial. *Campbell v. Boyreau*, *supra*; *Guild v. Frontin*, 18 How., 135; *Kearney v. Case*, 12 Wall., 275; *Dickinson v. Planters' Bank*, 16 id., 250.

§ 1265. *The granting of time for the production of further evidence is within the discretion of the court below.*

The only point attempted to be presented by the bill of exceptions was the refusal of the court to give time for the production of further evidence. If this subject was before us in such a shape that we could consider it, it would be a conclusive answer that the matter was one resting in the discretion of the court. Its determination, therefore, could not be reviewed by this tribunal.

This brings us to the examination of the case in equity. The bill was filed to prevent, by injunction, the collection of the moneys upon which the judgment in favor of the telegraph companies was founded. There is no controversy between the parties as to the facts. On the 16th of February, 1857, the railroad company, by its then corporate name, executed a mortgage; and on the 1st of October, 1868, by its corporate name as altered, executed another.

Both were given to secure the payment of its bonds as set forth. A part of the premises described and pledged by both mortgages, besides the road, was its income. In case of default in the payment of interest or principal, the mortgagees were authorized to take possession, and collect and receive the income and earnings of the road, and apply them to the debts secured, and, upon the request of one-third of the bondholders, to sell the mortgaged premises. The conditions of both mortgages having been broken, the mortgagees in the second mortgage filed their bill of foreclosure in the circuit court of Polk county, in the state of Iowa. The mortgagees in the second mortgage — various judgment and lien creditors, among the former the telegraph company — were made defendants. On the 31st of May, 1873, a decree of foreclosure and sale was rendered. It fixed the priorities of the several parties, and held that the judgment of the telegraph company was a lien subject to the mortgage in suit and other specified liens. It ordered a sale of the mortgaged property. The road was still in possession of the company. The decree made no provision for disturbing their possession, and none whatever as to the income of the road between the time of the decree and the time of the sale. The telegraph company proceeded, as we have stated, in disposing of the case at law. On the 20th of June, 1873, the appellants, who are the trustees in the two mortgages, filed this bill. On the 9th of September, 1873, after the sheriff had advertised the mortgaged premises for sale, the decree in the state court was amended by providing for the appointment of "a special receiver of all the income and earnings of the road" between the date of the decree and the time fixed by the sheriff for the sale to be made by him. This was done with a saving of the rights of the telegraph company. The special receiver took possession on the 15th of September, 1873. The sale by the sheriff was made on the 17th of October, 1873. The road was operated by the company up to the time when the receiver took possession. During this period, the fund was received for which judgment was given against Coykendall.

§ 1266. *A decree of foreclosure, silent as to the possession and earnings of the mortgaged property between its date and the date of sale, does not affect such possession or earnings.*

The proceedings in the case at law having been held valid, the telegraph company is entitled to the fund in controversy, unless the appellants have shown a better right to it. The question arises upon the mortgages. The civil law is the springhead of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong vested the fee, subject to be divested by the discharge of the debt at the day *limited* for its payment. If default was then made, the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing, and the mortgage only as an incident and security. In the present state of the law, where there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale. 1 Hill. on Mort., 9, 62; id., 104, 111; *Andrews v. Sutton*, 2 Bland, 665. The remedy last mentioned was resorted to in the state court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court. That court, therefore, had full jurisdiction as to the rights of all the parties touching both instruments. It would have been competent for the

court *in limine*, upon a proper showing, to appoint a receiver, and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee. Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the mean time. It follows that neither, during that period, was in any wise affected by the action of the court. They were as if the decree were not. As regards the point under consideration, the decree may, therefore, be laid out of view. The stipulation renders it unnecessary to consider the amendment to the decree. Without that stipulation, the result would have been the same. It could not affect rights which had attached before it was made. Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession. We may, therefore, lay out of view also both these topics. This leaves nothing to be examined but the effect of the mortgages, irrespective of any other consideration.

§ 1267. *Where, by the terms of a mortgage, it is implied that the company shall retain possession, the company is entitled to the earnings, and the same are liable to its creditors.*

A mortgagor of real estate is not liable for rent while in possession. 2 Kent's Com., 172. He contracts to pay interest and not rent. In *Chinnery v. Black*, 3 Doug., 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said, "Until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profit made." It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things, the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law, or interpose themselves without it. They did neither. In *Galveston Railroad v. Cowdrey*, 11 Wall., 459 (§§ 1297-1304, *infra*), substantially the same question arose as that we are considering. The mortgage there contained provisions touching the income of the road similar to those in the mortgages before us. This court held that, at least until after a regular demand was made, those who received the earnings were not bound to account for them. See, also, *City of Bath v. Miller*, 51 Me., 341; *Noyes v. Rich*, 52 id., 115. Upon both reason and authority, we think the appellants have no right to the fund in controversy.

Decree affirmed. Judgment affirmed. (a)

PULLAN v. CINCINNATI & CHICAGO AIR-LINE RAILROAD COMPANY.

(Circuit Court for Indiana: 5 Bissell, 237-253. 1873.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.— In 1848 the legislature of this state authorized the construction of a railroad from Richmond to Newcastle, a distance of twenty-seven miles. The act was amended in 1851, by authorizing the extension of the railroad in a northwestern direction to a point on the Wabash river, opposite Logansport, and in that way to Lafayette. The act of the legislature, amending the original charter, required that the accounts connected with the running and construction of the road should be kept distinct, and that when the road was completed it should all be united and constitute one entire railway. In 1852, the road having occasion to borrow some money, executed a mortgage or deed of trust to trustees, of whom Mr. Pullan, the plaintiff, is the successor, to secure \$300,000 of bonds which were issued and transferred to various parties, who advanced money upon them. This mortgage described the property as "the present and future to be acquired property of the Newcastle & Richmond Railroad Company, that is to say, the first section from Richmond to Newcastle."

A bill was filed in November, 1864, to foreclose this mortgage,— neither principal nor interest having been paid,— and it is for relief under this bill of foreclosure, and for payment of principal and interest of these bonds, that the case has been so long pending in court, and is now about to be finally disposed of. The Cincinnati & Chicago Air-Line Railroad Company was made a defendant at the time this bill was filed. Between the date of the mortgage in 1852, and the filing of the bill, there had been other mortgages executed upon the whole property between Logansport and Richmond, and under a foreclosure of one of these mortgages in this court the property was sold subject to the mortgage of 1852. The various parties went into possession, and under this decree and sale the Cincinnati & Chicago Air-Line Railroad Company was holding the property at the time this bill was filed. They, of course, were not bound to pay the \$300,000, the debt for which the mortgage of 1852 was given. They had nothing to do with the contract made between the road and these parties (holders of these bonds) other than that they were in possession of the property which was given to secure the payment of these bonds and interest. I think this is all that it is necessary to state before coming to what took place in this court at the May term, 1869, under the bill filed in this cause in 1864. Much had occurred during the progress of the case; many orders had been made by the court; and among others, orders requiring separate accounts to be kept and money to be paid into court for the purpose of protecting these mortgages, which orders do not seem to have been in all respects complied with.

At the May term, 1869, Davis, J., made an interlocutory decree, which is the foundation of all the questions which arise before me at this time. That decree found that the mortgage of 1852 covered the railroad and its revenues between Richmond and Newcastle, and that the road between these two points, "with the bridges, depots and other property thereon, with the tolls and income arising therefrom," were within the terms of the mortgage. And the court found negatively that the mortgage did not extend to any other portion of the road, nor were the income and tolls of any other part of the road mortgaged. It found also, as a necessary corollary from this, that the plaintiff was entitled to receive from the defendant nothing more than the net income of the road from

Newcastle to Richmond. It also found that the rolling stock which the defendant had purchased from Choteau and others, who claimed under the decree and sale under a subsequent mortgage, was in fact equitably owned by the old road, and should be divided ratably between the parties — that is to say, as twenty-seven, the distance between Richmond and Newcastle, is to one hundred and eight, the distance between Richmond and Logansport, or one-fourth of the rolling stock, — and that for one-fourth of the value of the rolling stock at the date of its conversion by the defendant, with interest, the defendant was liable. The first question arises upon this decree.

§ 1268. *Interlocutory orders, made during the progress of the case, are subject to modification.*

The case was referred to a master and instructions given to him as to his report and the principles which should govern his calculation. He has made his report, exceptions have been filed and argued, but the plaintiff has claimed the right to question one of the points found by the court in its interlocutory order of May, 1869, and it is the undoubted right of the plaintiff so to do. Until the case is finally disposed of by the chancellor, any interlocutory order made during the progress of the case is subject to modification. This order made in May, 1869, was only an interlocutory order, and it is therefore within the rule. It is claimed on the part of the plaintiff that the order made at that time by the court, declaring that the mortgage only covered that portion of the railroad between Richmond and Newcastle, was erroneous, for the reason that the statute amending the charter and authorizing the extension of the road to Logansport obviously contemplated that there was to be one entire road; that separate accounts were to be kept, and that when it was completed the road was a whole, and was not therefore separated into distinct parts, and that *ipso facto* (and not by anything which took place afterwards and by which income was earned by the assignees or vendees under a decree of this court) by the passage of the amendments and the directions of the legislature and the taking possession and completion of the road to Logansport, the mortgage expanded and brought within its grasp the whole road from Newcastle to Logansport as well as that from Richmond to Newcastle. An argument has been submitted on that point, the strength of which the court feels and admits. But it would have to be a very clear case — one about which no doubt could be entertained — to warrant the court, in the present aspect of the case, in interfering with the order made at the May term, 1869. If the case is doubtful it is not the duty of the court to modify or change that part of the decree, and on looking at it, I am not satisfied, notwithstanding the arguments which have been used, that that portion of the decree is erroneous, and I do not feel at liberty to interfere with it, but think that it ought to stand as the decree of the court and as binding upon the court now. So that we must proceed on the assumption that the mortgage, or deed of trust, only covers so much of the property as was described by the interlocutory order of the May term, 1869, and consequently we must deny the right of the plaintiff to bring the whole road, that is, the one hundred and eight miles, under the mortgage. This is entirely independent of any question which arises in consequence of the defendants receiving income from the road, which depends upon different principles.

§ 1269. *The net or gross earnings of any particular branch of a railroad may be ascertained with sufficient clearness by a pro rata estimate. (a)*

There are some principles involved in the master's report which are ques-

tioned, and as to which it is the duty of this court to give its opinion. The master, it seems, being instructed by the interlocutory order already referred to, to ascertain the gross earnings of this part of the road from the time the bill was filed, and from its earnings to deduct the expenses, not allowing for permanent improvements which were not required to run the road safely and securely, and being instructed also that a reasonable rent should be allowed for the use of the rolling stock employed in making gross earnings, made a *pro rata* estimate of the earnings and of the expenses of the road in order to reach the result required by the court, viz., the net earnings of the road between Richmond and Newcastle. The objection is made that that principle was erroneous. I am satisfied that it was, under the circumstances, correct, and that no other course could be adopted. I admit that it is a very unsatisfactory mode — that it does not necessarily lead to a true result; but I think it is the only practicable mode by which the master could reach the result aimed at by the court. The reasons for the rule which the master adopted are, I think, satisfactorily stated by him in his report. He says that from the organization of the Newcastle & Richmond Railroad Company, and through all the changes and consolidations, which were numerous, the road from Richmond to Newcastle has been operated and used, and is now operated and used, and the income received and the operating expenses paid as a part of the entire road; that no accounts were made or kept showing separately the income or operating expenses of any particular part, and that the income of this part has been blended with the income of all the other parts of the several lines of road of which it formed a portion, and that the operating expenses have in like manner been paid out of the common fund produced by the use of the various parts. Now, under such circumstances, it is difficult to see how the master could adopt any other rule than he has adopted, admitting that this rule leads not to actual results, but to an approximation merely.

§ 1270. — *the company cannot object to such a computation, when it is through their own fault that the correct figures cannot be obtained.*

Its soundness will be further illustrated by the legislation connected with this railroad. It was obviously intended that the accounts should be kept separate until the road was finally completed to Logansport, so that it should be known precisely how much each part cost, both in construction and in operation. This was a law that stood directly in the path of all these parties, individual and corporate, who were in possession or who came into possession of this railroad. It was a rule for their conduct which was disregarded by them, and I do not think that it is competent for them to complain if the *pro rata* estimate is now adopted for the purpose of ascertaining the net income of the road between Richmond and Newcastle. It is something that grows out of their own fault, with which the mortgagees under the mortgage of 1852 had nothing to do, and for which they cannot justly be held responsible. This disposes of the first, second, third, fourth and eighth exceptions that have been taken to the master's report, and they are overruled, because they all proceed upon the ground that the master erred in adopting that rule for the purpose of ascertaining the net earnings of the road between Richmond and Newcastle. Another objection is, that the earnings of the road should be taken into account from the time that the Cincinnati & Chicago Air-Line Railroad Company went into possession of the road, July 1, 1860.

The interlocutory order of May, 1869, declared that the plaintiff was entitled to the net income of the road for the twenty-seven miles, from the date of the

filing the bill, namely, from November, 1864. It does not appear why that time was fixed on by the court. It may have been on the ground that the court would hold a party in possession for the net income of the road from the time that it should be considered a demand was made for the earnings and income. However that may be, the court at the May term, 1872, modified the order which was originally given to the master, and authorized him to take an account of the earnings of the road from the 1st of July, 1860, leaving the parties to the equities which might arise in reference to that modification of the order, it obviously being the intention of the court to leave the question open for the decision of the court at this time; and that, therefore, is the question which now arises: What is the true construction of the language in the mortgage? "The present and future-to-be-acquired property of the Newcastle & Richmond Railroad Company; that is to say, the first section from Richmond to Newcastle." The property and the future-to-be-acquired property and income of the road were mortgaged. I think that the mortgagees were entitled to the income of the road as soon as it came into existence as property. This question is quite important, because I believe the net earnings, between the time the defendant took possession, on the 1st of July, 1860, up to the time of the beginning of the suit, as found by the master, amount to ninety-five thousand three hundred and forty-four dollars and eight cents (\$95,344.08). It is in relation to the principle which we are now considering that the fifth exception by the defendant is made to the master's report.

§ 1271. *As a general rule the mortgagor is entitled to the rents and profits of the mortgaged property.*

It is claimed that the general rule is — and there is no controverting the position in case of an ordinary mortgage — that the mortgagor, until he is interfered with by the mortgagee, has the right to the earnings and the profits of the mortgaged property; that any income derived from it becomes the property of the mortgagor; that in point of fact, the mortgagor cannot mortgage, and does not mortgage, what is not *in esse* at the time he executes his mortgage.

§ 1272. — *such future rents or profits may be mortgaged, and the mortgagor receiving them is the trustee of the mortgages.*

The rents, profits and income is something that arises in the future. It is claimed that it is not possible for the mortgage to cover what is only to be brought into existence after its execution. There is no disputing this general rule. But the question is, whether parties cannot agree that as soon as property does come into existence in the future, that property shall be seized by virtue of the contract and held in equity for the fulfillment of the obligation of the mortgagor, and I think it can be, and that when the income of this property came into being, that is to say, as soon as it was received, then the mortgage operated upon it by virtue of the contract which was made between the parties; and whoever received the income, received it and held it in trust for the party who was entitled to it. I do not see how this differs from the principle declared by the supreme court of the United States in the case of *Pennock v. Coe*, 23 How., 117 (§§ 1305–1309, *infra*). The question there was whether property which was acquired after the mortgage was executed became the property of the mortgagees as against subsequent creditors, and the court held that it did. That was a case where locomotives and cars were constructed and put on the road after the date of the mortgage, and it seems to me that the principle operates in this case with peculiar force, because these

parties took possession of this property with the knowledge of the contract which was in existence.

It was on the face of the decree under which they claimed. They could no more get rid of it, or of its binding effect in equity, than they could of any other fact set forth in the title under which they held. The decree of this court was the foundation of their title, and is to-day the only one, as far as this court knows, upon which that title depends, and that declares they took the property subject to this mortgage. Then I hold that the parties who have knowledge of this — and they must be presumed to have — as soon as they received the income of this property, held it for the benefit of those who were protected by the mortgage of 1852. And these circumstances furnish an additional reason why it was obligatory upon them thus to discriminate so as to know what the expenses and earnings were upon this particular section of the road. But it is said by the defense that however this may be, the defendant certainly will not be chargeable with any income after it offered to deliver up, in open court, and surrender to the plaintiff, the property of which it was in possession, and the only property, as it insists, that was covered by the mortgage. The answer to this is, that as to the income there was no mortgage upon it, and no trust unless it was earned. If they operated the road and earned income, they could not, of course, avoid the responsibility growing out of these facts. The only answer that they could have made would be that there was no income earned or that they did not use the road.

§ 1273. *Objection to a master's report is incorrect where it appears that the party objecting did not give the master proper assistance.*

It is objected that the percentage of expenses of the gross earnings of the road, as established by the master in his report, is too small; that was fixed at sixty-three and three-tenths per cent., and it is in relation to this that the court has had the most difficulty. I have an impression, I may as well state frankly, that this percentage is not large enough; but I have examined very carefully the report of the master, and the reasons he gives for fixing upon this percentage, and I cannot say that the proof does not warrant it. It is claimed that the master took the gross earnings of the road from the books of the defendant, but did not take the expenses from the same source; and it is insisted, and with some considerable plausibility, that having gone to one source of information for the earnings, and the same source furnishing the expenses, that he should not have taken the account of earnings without also having taken that of expenses. But he says that in the expenses there were included other items than the mere running expenses of the road, which he thought it was his duty alone to consider; that the construction account included in it various other things, all of which went to make up the sum total of the expense account, and as to which he could not discriminate.

I may add that in some instances it is stated by the master that at a particular time, which he gives, the expenses of the road were, in one case, over ninety per cent., and in another eighty-two per cent., and it is claimed that he ought to have taken this during that time to determine the running expenses; but he has given the reason why it was not done, and while I am not entirely satisfied that this percentage is large enough, still I do not see anything in the case that warrants the court in interfering with the report of the master on that ground. I cannot say but what there is evidence in the case that may justify him in his conclusions; and I think, perhaps, there may be some complaint made that all the light that could be thrown on this subject

was not furnished by the defendant, but that the master was left to grope in the labyrinth of accounts without the assistance which might have been rendered. I do not know that this is actually true, but there is something that seems to indicate it. Observations of a somewhat similar character may be made to the objection taken to the account furnished by the master as to the value of the rolling stock which was turned over to the defendant at the time it took possession under Choteau and others. The master states the circumstances connected with this part of his report. He says that the testimony as to their value was conflicting, and that he was obliged to form an opinion somewhat from the value of such articles as established by the market generally. The discrepancy between the statements of Judson and Gest, if they may be considered binding as testimony upon the master, is very great as to the value of this property — one of them making it only \$48,260 and the other \$100,000. The master says that, in view of all the circumstances, he finds that a reasonable price would be \$100,000, and thinks it would be rather less than the actual value. Now the question is whether the court can interfere with the report of the master on the ground that he has committed an error as to the value of this rolling stock. It was competent for the master to believe one of these witnesses rather than the other, and unless there are some circumstances in the case that show the one fixing the lesser value was more entitled to credit than the other, the court cannot interfere with the report of the master on that ground. It is the duty of the party making the exception to satisfy the court that the report is wrong in this particular; otherwise it must stand.

§ 1274. *Eight per cent. of the value is not a reasonable rent for rolling stock, where the owner bears all loss.*

There is one point upon which the court differs from the master, and the exception will be sustained; and that is as to the rule by which the master determined the amount of rent to be paid to the parties who owned the rolling stock which ran over this road, and by means of which the income was obtained. The interlocutory order of May, 1869, instructed the master that a reasonable rent should be allowed for the use of this rolling stock, and the master has fixed the rent at eight per cent., and finds that sum was a reasonable rent for the use of the rolling stock employed in making the earnings over twenty-seven miles of the road. The question is, whether, all things considered, that is a sound rule. I hardly think it is. It is right that the master should be heard in explanation of his finding upon this point, and he says that the rolling stock employed was maintained and kept in repair by expending money and labor, treated and charged as part of the operating expenses of the road, and therefore in fixing the amount of rent he did not take into consideration the wear and tear, but the value of the rolling stock as forming so much capital invested and employed in making the earnings, and he has apportioned the value according to the length of the road; and, upon the capital thus ascertained, he has calculated it at eight per cent. as a reasonable rent. Now I think the circumstances of the case do not warrant that. It seems to me that that is too low a per cent. for the use of the rolling stock of the defendants. This was an important element in the earnings of the road, and it seems to me that the master has hardly had a just appreciation of the part this rolling stock bore in obtaining these earnings. Eight per cent. on that kind of property, considering how subject it is to loss and deterioration in many ways, seems hardly enough, and I think that the facts scarcely warranted the master in finding so low a percentage; and that exception will be sustained by the court.

Some criticism has been made upon the manner in which the master obtained the results upon his *pro rata* rule. It is insisted on the part of the defense that he has made his denominators too low in every instance. For example, the master took the length of the road from Richmond to Logansport, one hundred and eight miles, to obtain a *pro rata* estimate for twenty-seven miles; then he took the length of the road from Richmond to Valparaiso, one hundred and seventy miles, to make a *pro rata* estimate; and then for Chicago, two hundred and sixteen miles; and then for the whole length of the road, about five hundred and eighty miles. I am rather inclined to think there is something in this criticism on the part of the defense; and, therefore, in referring back the case to the master, I shall ask him to reconsider his *pro rata* estimate upon these points and see whether he has been precisely correct. I am not certain as to this, and therefore I shall not make an absolute ruling upon that point.

There is only one remaining question, which, although it is not absolutely necessary now to discuss or decide, still, as it was presented in the argument, and may have some influence upon the action of the parties, I may as well state what is the opinion of the court. That is, as to the effect of any finding of the court against the defendant for the indebtedness which is due for the income upon its property, I mean the Cincinnati & Chicago Air-Line Railroad Company. It is claimed that although the mortgage may not cover any other property than that between Richmond and Newcastle, as it included the income and after-acquired property of the road, and the defendant was in possession, subject to the equities protected by the mortgage, that its property is bound equitably for any decree that may be rendered against it. And I do not know why this principle, to some extent at least, may not be a sound one. They, as the operators of the road from Richmond to Logansport, received the income on this particular part; as receivers of the income of this part they may be bound to respond for that to the mortgagees under the mortgage of 1852. As the court has already said, they held it in trust for whomsoever are entitled to it; and having so received and held it, there may be, perhaps, an equitable lien upon their property to respond for the amount. But I do not decide this point, and it may remain open for future consideration. I may say, in conclusion, that the master appears to have devoted himself with great industry and fidelity to the investigation of the several points submitted to him by the court, and the manner in which he has discharged his duty, considering the many difficulties and embarrassments attending its performance, is very creditable to him. And the court, in the examination of the various questions referred to in this opinion, has derived great assistance from the arguments of the counsel on both sides.

§ 1275. After-acquired property — Wood for engines.— Where a mortgage by a railroad company covers after-acquired property, wood collected by a railroad company in its sheds and at its stations, for the use of its engines, is included in the mortgage. It is a necessary element of the road and indispensable to the use and enjoyment of the thing conveyed. It cannot be levied upon by virtue of an execution issued against the railroad company. *Dunham v. Earl*, * 16 Leg. Int., 45.

§ 1276. Railroad company entitled to earnings until mortgagee takes possession.— Until a mortgagee takes possession, either in person or by receiver, the mortgagor is entitled to the income derived from the property. Especially is this true in case of a mortgage of property the income of which is derived by working or operating the property. Drafts made by the mortgagor on income, and assigned to a creditor before possession is taken by the mortgagee or a receiver, cannot be subjected by the receiver to the payment of the mortgage debt. *Young v. Northern Ill. Coal & Iron Co.*, * 9 Biss., 800.

IV. AFTER-ACQUIRED PROPERTY OF RAILROAD COMPANIES.

SUMMARY—*After-acquired property not limited to such as it may have purchased by means of that loan, § 1277.—After-acquired lands not for the use of the road, § 1278.—After-acquired municipal bonds, § 1279.*

§ 1277. A mortgage by a railroad company of all its present and future to be acquired property includes all that the company has at the time of foreclosure, and is not limited to such as might be purchased with the money obtained from the mortgage loan. *Shaw v. Bill*, §§ 1280-1283.

§ 1278. A general mortgage by a railroad company does not pass after-acquired land which has not been acquired or used for the purpose of operating the road. Such land is not an accretion to the property unless it is essential to its use, or actually used in connection with it. To include subsequently acquired lands in such a mortgage the particular property must be indicated with a reasonable degree of certainty, as lands which might be subscribed to it for stock, or be granted to it by the government, or purchased for its use in connection with its road. *Calhoun v. Memphis & Paducah R. Co.*, §§ 1284-1286.

§ 1279. A mortgage by a railroad company of its present and future to be acquired property, specifically described, does not include, under the term "property," municipal bonds issued in aid of the road, which are not described. *Smith v. McCullough*, § 1287.

[NOTES.—See §§ 1288-1292.]

SHAW v. BILL.

(5 Otto, 10-16. 1877.)

APPEAL from U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—In 1849 the New Albany & Salem Railroad Company was incorporated and issued bonds in five successive series, mortgaging all its property to secure them, and appointing Bill as successor in case of the death of the trustee. In August, 1857, a bill was filed to foreclose the mortgages. By consent in 1858 a decree was entered which extinguished all the liens of the bondholders except those of the first and second mortgages, the subsequent bonds being converted into stock of the company. Before this, by interlocutory decree, a loan of \$200,000 was authorized, which the trustee was directed to pay out of the first earnings of the road. In August, 1868, the bondholders of the first and second mortgages demanded that the trustee should foreclose the mortgages, whereupon he filed a bill in a state court for that purpose, and under it the property was sold in 1869, the purchaser organizing in a new company called the Louisville, New Albany & Chicago Railway Company. This company held possession of the road until, at the instance of Shaw, it was placed in the hands of a receiver. Shaw was the holder of fourth mortgage bonds and stock created by the decree of 1858. His petition was filed in the old suit in the United States circuit court, which he insisted had not been ended by the decree of 1858, and that the federal court having still jurisdiction of the subject-matter the proceedings in the state court were void. This view was sustained by the circuit court and Bill filed a supplemental bill. There was a final decree of foreclosure from which Shaw and others appealed.

§ 1280. *It is not improper for a solicitor to appear for a company against a single creditor and afterwards for the trustee against the company.*

Opinion by MR. JUSTICE FIELD.

It seems from the record, that, when the petition of Shaw for the appointment of a receiver was presented to the court, Mr. Hendricks, with others, appeared as special counsel for the company and moved its dismissal. Subsequently Mr. Hendricks appeared as counsel for the trustee in the proceedings

on the supplemental bill for the foreclosure of the mortgages, and on his motion the default of the company was entered. This second appearance of counsel against the company is regarded by the appellant as exhibiting "an anomaly in chancery practice" so great as to vitiate the decree. We do not perceive any anomaly or irregularity or impropriety in the conduct of the counsel. He might very well have appeared for the company to defeat a petition of a single creditor asking for the appointment of a receiver of its property, and yet subsequently have appeared for the trustee to foreclose its mortgages. There was nothing in the duties required on the motion which in any way conflicted with the duties required in the subsequent proceedings. There is not even a colorable pretext for calling in question the propriety of the action of counsel.

§ 1281. *A service of subpoena is not necessary on a supplemental bill, except as to new parties.*

The fact that process of subpoena was not issued upon the supplemental bill is of no consequence. Such process is only necessary where new parties are brought in. The supplemental bill is a mere adjunct to the original bill, and, where the parties have already been served, no further subpoena for them is required. In this case the company was ruled to answer; and the new parties appeared by counsel and both demurred and answered. The fact that leave was granted upon motion of counsel to issue a subpoena against the company some months after its default had been entered does not alter the case. Nothing appears to have been done upon the leave, and it was probably asked inadvertently.

§ 1282. *Demand of payment of bonds at the place where payable is not necessary. (a)*

The position that the appellants' demurrer to the supplemental bill should have been sustained, because it did not aver a demand of payment at the place where the bonds were payable, is without merit. No such ground is stated in the demurrer, which is special; and, had it been, it would have been unavailing. The insolvency of the company and its want of funds at the place designated appear from the allegations of the bill; and, where such is the fact, no demand at the place is required. The law does not exact in such a case the performance of a fruitless act.

§ 1283. *A mortgage covering all property "in future to be acquired" includes all that the mortgagor has at the time of foreclosure.*

The objection that the decree covers property not embraced or intended to be embraced by the mortgages is equally untenable. The terms of the mortgages are as broad and comprehensive as could be used. They embrace all existing property of the company except such surplus lands as were not required for the roadway, depots and stations, and other uses of the road, and all its future property, both such as might be purchased with the proceeds of the bonds issued and such as might be acquired by other means. The language used is, "all the following, present and in future to be acquired property of the parties of the first part," pertaining to the road; "that is to say, their road made and to be made, including the right of way and land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein or procured therefor, inclusive of the iron rails purchased or to be purchased or paid for with the above-described bonds, or the money obtained therefor, and the machinery purchased with the same; bridges, via-

ducts, culverts, fences, depot grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, and all other personal property, right thereto or interest therein pertaining as aforesaid, together with the tolls, rents or income to be had or levied therefrom, and all franchises, rights and privileges of the said parties of the first part of, in, to or concerning the same;" with a proviso that the surplus lands mentioned might be sold.

The reference made in this description to the property which might be afterwards purchased with the bonds issued does not operate as a limitation of the lien of the mortgage to such future-acquired property, but only to remove any doubt that might otherwise possibly arise whether the property thus purchased would also go to increase the security offered. We do not deem it of any moment whether the rolling stock and machinery in use by the company at the date of the decree were acquired with the proceeds of the bonds or with the subsequent earnings of the company. A mortgage by a railroad company which covers, in the terms of the two mortgages in suit, its engines, cars and machinery, carries not only the cars, engines and machinery in existence at the date of the mortgage, but such as take their place or are subsequently added to them by the company, and are in existence at the time of the foreclosure. This kind of property is necessarily undergoing constant wear and consequent destruction; and the mortgages in suit, so far as that property is concerned, would have been of little value if their lien did not extend to such as took its place or was added to it by the company. *Pennock v. Coe*, 23 How., 117 (§§ 1305-1309, *infra*); *Philadelphia, Wilmington & Baltimore R. Co. v. Woelper*, 64 Penn. St., 366; *Phillips v. Winslow*, 18 B. Mon. (Ky.), 431. We perceive no error in the rulings of the court below.

Decree affirmed.

CALHOUN v. MEMPHIS & PADUCAH RAILROAD COMPANY.

(Circuit Court for Tennessee: 2 Flippin, 442-449. 1879.)

STATEMENT OF FACTS.—The defendant railroad company executed a mortgage on "all the railroad of said company, . . . and the lands, real estate, rails, . . . whether then owned and possessed or thereafter to be acquired by it; . . . and all other corporate property, real and personal, of said railroad company, . . . or thereafter to be acquired," etc. After the execution of this mortgage the defendant acquired a tract of forty-four acres of land, which was surveyed and laid off into town lots and offered as such for sale. Fisher and others, judgment creditors, levied their executions upon these lands on the ground that they were not included in the mortgage.

§ 1284. *A general railroad mortgage does not pass after-acquired lands unless used in connection with the road.*

Opinion by HAMMOND, J.

It is insisted by the petitioners that the land in dispute is not within the description of the property conveyed, or if it can be so held, then that the mortgage is inoperative because this land is not more particularly described, and was not then owned or in expectancy. However carefully we analyze the words and sentences used in describing the property conveyed, much may be said on either side, and there is no very clear indication either way as to the actual intention of the parties in relation to land situated as this is and acquired as this was. It is not unusual for railroad companies to own lands not at all connected with the narrow strip occupied by the roadway and its appurte-

nances and not unusual to include such lands in the mortgages. Neither can it be denied that under a properly constructed instrument, lands of that character to be subsequently acquired may be included with the other property conveyed. But all mortgages of the kind which have fallen under my observation make some provision for utilizing the outside lands by their sale and the application of the proceeds to the purposes of the trust generally to the construction or betterment of the road itself. The entire absence of any such provision in this mortgage, more than any other circumstance, inclines me to the belief that, as a matter of fact, lands such as these were not in the contemplation of the parties. Besides, as to other property already included, there is no ambiguity whatever, and it is only when we are called upon to say whether *this land* was conveyed by the instrument, that it becomes perplexing in its uncertainty of description; yet, the expression "all other, the corporate property, real and personal, of said railroad company, whether heretofore acquired and now held, or owned, or hereafter to be acquired by the said railroad company," and, perhaps, other phrases in the description, are broad enough in terms to cover this land. It is doubtful if the words, "belonging or appertaining to the said *railroad*," as used in connection with this phrase, were intended to limit the general description to lands to be used in the railway, and appurtenant, as for depots, warehouses, structures, etc., because these had been already abundantly described with the description of the railway itself. The word "railroad," as used here, may mean *railroad company*, as it frequently does. Ordinarily, this general description would be controlled by the subsequent enumeration contained in the words "all depots, warehouses and structures." *Pullan v. Cincinnati & C. R. Co.*, 4 Biss., 35, 43 (§§ 1203-11, *supra*); 3 Wash. Real Prop., 400, 431. But when this rule of construction is relied on, it will be generally found that the particulars are introduced with a *videlicet*, or some such manifestation of the intention to restrain the general description. *Bouv. Dict. words*, "Videlicet," "Scilicet;" and this *ejusdem generis* rule of construction always yields to the intention to be gathered from the context and general scope of the whole instrument. *Williams v. Williams*, 10 Yerg., 76; *Edmonds v. Edmonds*, 1 Tenn. Ch., 163. Here the particulars are introduced by the word "including," which does not indicate a restrictive intention, but rather the contrary.

These particulars having been already more particularly described, may have been inserted out of abundant caution, and not for the purpose of confining the mortgage to the railway and its superstructure. The same uncertainty prevails if we consider the other terms of this description, supposed to include this land. But, notwithstanding this, the general description is broader than in *Dinsmore v. R. & M. R. Co.*, 12 Wis., 649, or that in *Seymour v. C. & N. F. R. Co.*, 25 Barb., 284, and the case falls within the principle of these cases, and the case of *Shamokin Valley R. Co. v. Livermore*, 47 Penn. St., 465, all excluding lands situated like this, under mortgages very similar to the one under consideration. *Walsh v. Barton*, 24 Ohio St., 28; *Parrish v. Wheeler*, 22 N. Y., 494.

§ 1285. *The doctrine of accretion.*

A mortgage by a railroad company does not, by implication, cover property not essential to its business. 1 Jones' Mort., 156. In this case, while all other property is described with marvelous detail, this, if intended to be conveyed, is only described by doubtful general terms. It does not seem, from other provisions and from the whole instrument, to have been within the scope of the contract the parties were making. This point would be sufficient to decide the case, but inasmuch as it may be doubted, I have considered it on the assump-

tion that the intention of the parties was to convey all lands not immediately connected with the railway and appurtenant to it, then owned and subsequently to be acquired. Railroad mortgages have, on grounds of public policy, by a sort of *eminent domain*, somewhat trespassed upon some of the best assured doctrines of the common law; but the courts have not unconditionally surrendered to them all the principles which govern in determining the rights of property as between ordinary individuals. On the doctrine of accretion, it has been held that, without particular mention of the property afterwards acquired, a mortgage by a railroad company will pass, under a general description, property subsequently acquired which is essential to its use, and may be fairly taken as a part and parcel of the thing which we call a railroad. 1 Jones' Mort., §§ 152, 161. But as to its other property, not regarded as accretions to the road itself, these mortgages are governed by the same rules as in other cases. The broad doctrine stated in *Mitchell v. Winslow*, 2 Story, 630, has come to be taken as quite an accurate statement of the principle, that after-acquired property may be the subject of a sale or mortgage; but, in its application, the courts have established that the general principle not only has exceptions, but in all cases must conform to the rules governing all contracts. It is said that, in relation to the sale of things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an *agreement to sell* — of an executory contract. Things not yet existing, which may be sold, are those which are said to have a potential existence — that is, things which are the natural product or expected increase of something already belonging to the owner. But he can only make a valid agreement to sell — not an actual sale — where the subject of the contract is something to be afterwards acquired. *Wyatt v. Watkins*, 1 Tenn. Leg. Rep., 148, 150; *Benjamin on Sales*, § 78; 2 Story's Eq., 1040, 1231; 1 Jones' Mort., § 149; *Everman v. Robb*, 52 Miss., 654; *Phelps v. Murray*, 2 Tenn. Ch., 746; *Looker v. Peckwell*, 38 N. J. L., 253; *Merrill v. Noyes*, 56 Me., 458; *Phila. W. & B. R. Co. v. Woelper*, 64 Penn. St., 356; *Ellett v. Butt*, 1 Woods, 214 (§§ 1736–38, *infra*); *Beall v. White*, 94 U. S., 382.

§ 1286. *To include subsequently acquired lands in a general mortgage, they must be described with a reasonable certainty.*

In the application of this principle to railroad mortgages, it will be found that the courts sometimes refer them to one of these classes, and sometimes to the other, as the property is regarded as personal or real property. 1 Jones' Mort., § 154, and cases cited; *Pennock v. Coe*, 23 How., 117 (§§ 1305–1309, *infra*); *Whitewater Valley Co. v. Vallette*, 21 How., 414, 422; *Dunham v. Railway Co.*, 1 Wall., 254, 267, 268 (§§ 1557–58, *infra*); *Shaw v. Bill*, 95 U. S., 10 (§§ 1280–83, *supra*); *Pullan v. C. & C. R. Co.*, 4 Biss., 35 (§§ 1203–11, *supra*); *S. C.*, 5 Biss., 237 and notes (§§ 1268–74, *supra*); *Phelps v. Murray*, 2 Tenn. Ch., 753. It is said in this last case that a contract relating to realty was always enforceable in equity, and therefore a conveyance of realty, not the present property of the vendor, is good in equity. And all these cases show that there never was any difficulty in treating a contract to convey real estate to be subsequently acquired, as a mortgage of it, in all cases where the object was to secure a debt. We have already seen that after-acquired lands, not used in connection with the railroad, cannot pass under a general mortgage of the road itself, as a part of it, on the principle of accessions to it; and hence it follows that, as to this kind of property, the contract must be treated as an

agreement to mortgage; and under the rule that a court of equity will treat that as done which is agreed to be done, it constitutes a lien upon the land specifically mentioned. It was held in *Wilson v. Boyce*, 92 U. S., 320, that a statute creating a lien upon "the road and property of the company" took effect to include lands disconnected with the road. It was said that a deed "of all my estate," or of "all my lands wherever situated," passed title. 1 Jones' Mort., § 65; *Wilmington R. Co. v. Reid*, 13 Wall., 264, 269 (CONST., §§ 2303, 2304). As to property already acquired, this description could be made certain by extraneous evidence, but it would be impossible by such a description, in conveying subsequently acquired lands, to designate them; and as against creditors the description must be reasonably certain, or it does not operate as notice. 1 Jones' Mort., §§ 66, 528, and cases cited; *Seymour v. C. & N. F. R. Co.*, *supra*; *Dinsmore v. R. & M. R. Co.*, *supra*; *Shamokin Valley R. Co. v. Livermore*, *supra*. The principle of *Wilson v. Boyce* cannot be applied to lands not already owned at the time the deed was made, without wholly breaking down the rules of law which require the mortgagee to give notice by the mortgage of the property claimed under it. No case that I have found gives any support to the doctrine that a grantor may convey by that description alone "all the lands he may subsequently acquire," and thereby pass every parcel of land which may afterwards become his own. Parties may, as a security for their debt, mortgage unsurveyed lands by an agreement to purchase them, when not yet acquired, as in *Wright v. Shumway*, 1 Biss., 23 (§§ 435-439, *supra*), and other cases. And no doubt a railroad company might, by contract, agree that the mortgage should cover all lands which should be subscribed to it for stock, or to be granted to it by the government in aid of its construction, or the like description; but every such contract, if not designating by metes and bounds the lands to be acquired, should indicate with reasonable certainty the particular property, so that all persons would know what was intended to be conveyed. And I think, in such cases, the power to mortgage would be limited to such lands as the company, at the date of the instrument, had an expectation of obtaining, or to such lands as could be designated in the agreement itself, as those upon which it was to operate.

The result is that the prayer of the petitioners must be granted, and their judgment liens held paramount to the mortgage.

SMITH v. McCULLOUGH.

(14 Otto, 25-30. 1881.)

APPEAL from U. S. Circuit Court, Western District of Missouri.

STATEMENT OF FACTS.—A mortgage was executed April 1, 1872, by the Burlington & Southwestern Railway Company to secure the payment of certain bonds issued by the corporation. A decree of foreclosure was passed at the instance of the mortgagee, the Farmers' Loan and Trust Company, and the receiver, Smith filed his petition against McCullough and others, claiming certain Sullivan county bonds to the amount of \$40,000, issued in aid of the railroad company to aid in or secure the building of a branch road. These bonds were the last instalment of \$200,000 which was to be issued. The last instalments of these bonds had been attached by creditors of the railroad company, who had summoned McCullough as garnishee and obtained judgment and an order of sale of the bonds before Smith filed his petition.

Opinion by MR. JUSTICE HARLAN.

Waiving any inquiry as to whether such property as that in question could have been conveyed by mortgage in any other way than by estoppel against the mortgagor, we will consider whether the bonds issued by Sullivan county are embraced or were intended to be embraced by the mortgage to the Farmers' Loan and Trust Company. That question is within a very narrow compass. It must be solved so as to give effect to the intention of the parties, to be collected as well from the words of the instrument as from the circumstances attending its execution.

§ 1287. *A mortgage by a railroad corporation of its then and thereafter to be acquired property, specifically described, does not pass municipal bonds not described.*

The contention of the appellant is that the bonds in question are embraced by the following language describing the premises and property conveyed: "All the present and in future to be acquired property of or in any manner pertaining to the Linneus Branch of the Burlington & Southwestern Railway Company, and all the right, title and interest and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises, *that is to say*, all the branch railroad, including the premises leased as aforesaid of the Lexington, Lake & Gulf Railroad Company now made and to be constructed, extending from the main line of said Burlington & Southwestern Railway at or near Unionville in the county of Putnam in the state of Missouri, by way of, etc., including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber and materials and property purchased or to be purchased or otherwise acquired for the construction and maintenance of said branch railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock, now owned or hereafter purchased by said party of the first part for and on account of said branch railroad, all the revenue and income of said Linneus Branch, and all the rights, privileges and franchises relating thereto and property acquired by virtue thereof, now in possession or hereafter to be acquired, including machine-shops, tools, implements and personal property used therein or along the line of said branch railroad, together with all the property of every kind acquired by said party of the first part by virtue of said lease of said Lexington, Lake & Gulf Railroad," etc.

It is quite true, as argued by learned counsel for appellant, that the word "property" is sufficiently broad and comprehensive to include every kind of possession or right. In its literal acceptance it might include such rights, whether legal or equitable, absolute or contingent, as the railway company acquired under or by virtue of the subscription made by Sullivan county to the bonds placed in the hands of McCullough. But we are all of opinion that such a construction of the mortgage is not imperatively demanded by the terms employed in describing the property mortgaged, nor would it, we think, be consistent with the intention of the parties. Had the draughtsman of the instrument stopped in his description of the mortgaged property with the general words, "all the present and in future to be acquired property of or in any manner pertaining to the Linneus Branch, . . . and all the right, title and interest . . . therein," there would be more force in the position taken by the appellant. But the rules established for the interpretation of written instruments will not justify us in detaching these general words from those of

an explanatory character which immediately follow in the same sentence. The subsequent phrase, "that is to say," followed by a detailed description of the different kinds of property which are embraced by the general words quoted, indicates that the mortgage was not intended to embrace every conceivable possession and right belonging to the railway company, but only the road and its adjuncts and appurtenances. It specifies different kinds of property, some of which would enter into the construction of the branch road, and some of which would necessarily be employed in its maintenance after completion. The "rights, privileges and franchises" mortgaged were, it seems to us, only such as had direct connection with the management and operation of the road after it was constructed and put in use as a public highway. There was no purpose, we think, to pass to the mortgagee any interest whatever in municipal subscriptions which had been previously obtained and accepted by the company for the purpose of raising money to build the road. The bonds which Sullivan county placed in the hands of McCullough for delivery to the company as the work progressed were certainly more valuable and could have been more readily utilized for purposes of construction than a like number of bonds issued by the railway company. We ought not to presume from the general language used, that the railway company intended to cripple itself in the use of salable municipal securities in order to place upon the market its own bonds of less value. Our conclusion is that the mortgage was not intended to deprive the mortgagor of the privilege of using, in any way it desired, bonds or other securities to which it had an absolute or contingent right, and which it had obtained for the purpose of being used in building and equipping the road.

What has been said renders it unnecessary to consider the claim of the appellant, based upon the alleged arrangement with the county court, further than to say that his action in that regard was outside of his functions as receiver. Notwithstanding the broad terms of the order appointing him, we are satisfied that the court had no purpose to appoint him receiver of any property except that covered by the mortgage. He was given express authority to borrow the sum of \$200,000 upon receiver's certificates of indebtedness, to be expended under the directions of the court, or of a special master, in building, completing and equipping the unfinished portion of the Linneus Branch. But he obtained no authority from the court appointing him to contract for municipal aid in the construction by him, as receiver, of the unfinished portion of the branch road. His action in that regard was never approved or ratified by the court from which he derived his authority. He can, therefore, take nothing by his unauthorized contract with the county court.

But there is another view of some force upon this branch of the case. The original contract of subscription by the county prescribes, as one of the conditions precedent to the delivery of the bonds, that the work of construction shall have been paid for. The arrangement which the receiver made with the county was, by its terms, subject to the terms and conditions of that contract. It is not, therefore, at all clear that the equities of the case are with the receiver as against the judgment creditors whose debts were for the construction of the road. Nor, in view of the construction which we have placed upon the mortgage, is it at all essential, on this appeal, to examine into the regularity or validity, as to the receiver, of the proceedings in the state courts. If, as we have ruled, the mortgage did not cover the bonds in question, it is of no interest to the receiver, in this case and upon the issues made by him, to inquire

whether the state courts transcended their jurisdiction by subjecting the bonds in the hands of McCullough to the satisfaction of the judgment creditors of the railway company. In one of the printed briefs before us some argument is made to show that the county of Sullivan has been injuriously affected by the decree below, but inasmuch as the county has not appealed therefrom we need not consider any suggestion made in its behalf.

Decree affirmed.

§ 1238. *After-acquired line of road.*—Where a railroad company has the power to purchase, and does purchase, a line of road lying within its chartered limits, the road so purchased becomes subject to existing mortgages of road completed and to be completed. But such mortgages cannot prejudice the priorities due to mortgages of the purchased road previously executed. *Branch v. Atlantic & Gulf R. Co.*, 3 Woods, 481, 487.

§ 1289. *After-acquired land grant.*—Where a railroad company which, upon completing its road according to certain conditions, would become entitled to receive sixteen sections of land of six hundred and forty acres each for each mile of road, included in a mortgage only twelve sections per mile, amounting to thirteen hundred and twenty sections, reserving four sections per mile, or four hundred and forty sections in all, to be used in constructing their road, and afterwards transferred to a contractor four hundred and seventy-two sections, who received the certificates in good faith, without any knowledge of their being mortgaged or pledged in any manner, it was held that he acquired a good title to these sections, free from the incumbrance of the mortgage. *Campbell v. Texas & New Orleans R. Co.*, 2 Woods, 263 (§§ 1245-1250).

§ 1290. *After-acquired lease of another road.*—A mortgage by a railroad company embracing all property which it may subsequently acquire includes a lease which it afterwards takes of another railroad. Upon the subsequent bankruptcy of the corporation, its assignees in bankruptcy cannot maintain a title to the leased road as against the mortgage trustees. *Barnard v. Norwich & Worcester R. Co.*, * 14 N. B. R., 469.

§ 1291. *After-acquired land subject to vendor's lien.*—A mortgage of a railroad in terms covering after-acquired property attaches to land subsequently conveyed to the company; but it attaches subject to the vendor's lien for unpaid purchase money due for the land. As to such after-acquired property the mortgagee is not a purchaser for value. *Loomis v. Dav- enport, etc., R. Co.*, 3 McC., 489, 495.

§ 1292. *A mortgagee of future property is not a purchaser.* The lien of his mortgage attaches to such property subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. Thus, a mortgage of all the property of a railroad company then in its possession, or which might thereafter be acquired, does not attach to cars afterwards purchased with a stipulation that the title should remain in the seller until they should be paid for. The seller, upon a breach of this stipulation, may, as against the mortgagee, reclaim them; and he may do this although a receiver is in possession, for his possession adds nothing to the previously existing title of the mortgagee. *Fosdick v. Schall*, 9 Otto, 285 (§§ 1547-1549); *Fosdick v. Car Co.*, * 9 Otto, 256; *Myer v. Car Co.*, 12 Otto, 1 (§§ 1550-1553).

V. LEGAL NATURE OF ROLLING STOCK OF RAILROADS.

SUMMARY—*Mortgage covers after-acquired rolling stock*, § 1293.—*Subject to existing liens upon the rolling stock*, § 1294.—*Rolling stock appurtenant to particular divisions of a road*, § 1295.—*Mortgage of rolling stock need not be recorded as a chattel mortgage*, § 1296.

§ 1293. *A mortgage of a railroad afterwards to be built, and of the rolling stock and other property appurtenant to such road, attaches to the road and the rolling stock as they are built and acquired.* Such a mortgage is a lien superior to that of a subsequent mortgage, made after the road has been completed and equipped; and in like manner superior to a judgment lien which has afterwards attached to such property. *Galveston Railroad v. Cowdrey*, §§ 1297-1304; *Pennock v. Coe*, §§ 1305-1309.

§ 1294. *A mortgage of future rolling stock attaches to it subject to the liens existing upon it when it is acquired.* *United States v. New Orleans Railroad*, §§ 1310-1314.

§ 1295. *The rolling stock of a railroad operated in separate divisions may become fixtures of and appurtenant to particular divisions and pass by separate mortgages of such divisions. But whether this is the case is a question of fact and intention.* *Minnesota Co. v. St. Paul Co.*, §§ 1315-1319.

§ 1296. A mortgage by a railroad company of its road and its rolling stock and other property appertaining to it, need not be recorded, so far as concerns the rolling stock, as a chattel mortgage. *Farmers' Loan and Trust Co. v. St. Jo. & Denver City R. Co.*, §§ 1320, 1321.

[NOTES.— See §§ 1322-1326.]

GALVESTON RAILROAD v. COWDREY.

(11 Wallace, 459-483. 1870.)

APPEAL from U. S. Circuit Court, Eastern District of Texas.

STATEMENT OF FACTS.—The Galveston Railroad Company made four successive mortgages to secure the like number of issues of bonds, except that the last was to secure a loan of money to one Pulsford, the loan being based also upon certain bonds of the third issue and other securities. The bill was filed to foreclose the mortgages. Other facts appear in the opinion of the court.

Opinion by MR. JUSTICE BRADLEY.

The first objection made by the defendants to the decree is that the mortgages under which the complainants claim are not valid for want of capacity in the railroad company to make them. It is admitted that the charter authorizes the company to mortgage certain real estate, which it was authorized to acquire for the purpose of aiding in the construction or maintenance of the road. But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and track of the railroad. But we think it is general, and applies to any real estate which the company might acquire in any way. This construction is aided by the other powers conferred by the charter, as that of borrowing money on bond or note, and of doing all acts necessary and proper for or incident to the fulfillment of their obligations. And it is expressly declared that all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under seal of the company, and in pursuance of a vote of the directors, shall be valid and binding. If it were necessary to look into the charter for express power to borrow money and mortgage its property to secure the payment thereof, we think the power is found therein.

§ 1297. *Under the law of Texas, a railroad company has power to mortgage its road-bed, franchise and other property.*

But the defendants contend that, if the power to mortgage mere real and personal estate be conceded, still there is no power to mortgage, or in any way to assign the railroad as such, or the franchise of operating it and taking tolls, or any other franchise, much less that of exercising corporate powers; and hence the decree is erroneous in authorizing a sale of these rights and franchises under the mortgages. Without examining how far the operative effect of a mortgage executed by a railroad company upon its road, works and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have. By the act of December 19, 1857 (Paschal's Dig., art. 4912), section 4912, it is expressly provided that: "The road-bed, track, franchise and chartered rights and privileges of any railroad company in this state shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same, but . . . shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust or any other power, the purchaser or pur-

chasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter or by virtue of the general laws of this state; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporations under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent as if they were the original corporations of said company."

The following section, 4913, enacts that: "Whenever a sale of the road-bed, track, franchise and chartered rights and privileges of any railroad company is made by virtue of any deed of trust or power, the same shall be made at the time and place mentioned in the deed of trust or power, and in accordance with the provisions of the same as to notice and in other respects; and if the same be not specified, such sale shall be made as hereinafter provided for sales under execution or order of sale."

§ 1298. *Under the laws of Texas the property of a railroad — track, franchise, etc.— may be sold under execution.*

The following section, 4914, gives the like effect to sales under execution issued upon a judgment. Indeed, it is by virtue of the latter section that the defendants claim to be the present owners of the road and its franchises. This law is not prospective, but general in its operation. It is a remedial law for the benefit of creditors, and should be liberally construed. It should especially be applied to a case in which, by the very terms of the trust deed, all the franchises and rights of the company are expressly embraced therein. It cannot be claimed, as is done by the defendants, that a sale under one mortgage or judgment, by virtue of this law, nullifies and destroys all prior mortgages. Such a doctrine would work the greatest injustice, and would open the door to the grossest frauds. A sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises can no more be deemed incompatible than successive sales of the same property; and we all know that a sale of land under a judgment does not, in the slightest manner, affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter.

§ 1299. *The fact that mortgages of a Texas railroad company were executed in New York is not a good defense against bona fide holders of the bonds.*

It is next objected that the mortgages were not properly executed, because the meetings of the directors by which the mortgages were authorized to be executed were held in the city of New York. It is not denied that the mortgages were executed in good faith under the corporate seal, and signed by the president and countersigned by the treasurer of the company, and duly recorded in the proper offices of registry in the state of Texas. Supposing the complainants to be *bona fide* holders of the bonds held by them, the question raised by this objection amounts to this: Can a corporation repudiate a mortgage, given to secure its bonds held by *bona fide* holders, on the ground that its directors authorized its execution by a resolution passed outside of the limits of the state, the mortgage being, in other respects, executed and recorded in due form of law? Can it take all the benefit of the transaction, get off its bonds on the business community, and then repudiate its mortgage for such a cause? We have not been referred to any case like this. It would seem, at first blush, to be a very hard rule, if such a rule exists. No doubt it may be true, in many cases, that the extraterritorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports,

383, where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory, and may sue and be sued therein. It may hold land in another territory so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when that action is the basis of negotiations by which third parties have *bona fide* parted with their money and the company has received the benefits of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities. Must a person purchasing railroad bonds in Wall street or Walnut street first send to Illinois, California or Texas to see whether the meeting of the directors which authorized the mortgage given to secure the bonds was held in a proper place? Whoever may, under supposable circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it. And, if the company are estopped, then those who purchase the property of the company at an execution sale must be estopped. It has frequently been held that such a purchaser takes only the right, title and interest which the debtor had, subject to the equities which existed against the property in his hands when the judgment was recovered.

But it is objected that the complainants are not *bona fide* holders of the bonds in their possession; that many of the bonds were issued improvidently, and against stipulations contained in the mortgages, to the effect that they should only be issued to retire the previous issue of bonds. If this were true with regard to some of the bonds, it is not pretended to be true with regard to all of them; and the question, what particular bonds were wrongfully issued, if a material question, is properly examinable in the master's office, where all bonds are to be presented and passed upon, if not already done. And the decree will stand only for the benefit of such bonds as appear to be entitled to its benefit; and this benefit will not be confined to the complainants' bonds, but will be extended to all bonds that may be presented by other holders. But it does not appear, so far as we have been able to scrutinize the evidence, that the complainants are not *bona fide* holders of their bonds. They have been examined, and have produced their bonds, and have told how they procured them, namely, by purchase, and what they gave for them; and they allege that they purchased them in good faith in the open market, supposing them to be valid obligations of the company, and being told that they were. If such is the fact, and no proof to the contrary occurs to us, we do not see why the complainants must not be held to be *bona fide* holders for value of the said bonds.

§ 1300. *One or more of a class of creditors may sue on their own behalf and on behalf of other creditors.*

The next objection we shall notice is, that the complainants have no right to sue for themselves and in behalf of the several classes of bondholders under the different mortgages, because the interests of these classes are antagonistic to each other. They are no more antagonistic to each other than the several bondholders of the same class are. It is the interest of each bondholder to

have as few prior claims to his, and as few participants with him as possible. Every co-bondholder is, in one sense, an antagonist. But the objection is entirely without foundation. The complainants do, in fact, hold bonds of the three different classes, and they have a perfect right to state that fact in their bill, and to pray relief suitable to the fact, and no possible harm or inconvenience can arise in their suing in behalf of themselves and all other bondholders in each class according to their several priorities. If any class of bondholders wish to contest the precedency of a prior mortgage, they have a perfect right to intervene in the suit and file a cross-bill setting up the matter of objection. All bondholders, including the complainants themselves, have to establish their claims in the case before it is finally closed, and before a distribution of the assets can be made. And any bondholder proving his claim may contest the claim of any other bondholder. It has even been held that a mortgagee may sue on behalf of himself and all other creditors, notwithstanding he claims a right to prior satisfaction out of the mortgaged property. See Story's Eq. Pl., §§ 101, 158. And Judge Story says that, on principle, it is not easy to see why it might not be sufficient, in a suit by incumbrancers, to file the bill on behalf of all the creditors and incumbrancers; thus making them all, in a sense, parties to the extent of asserting their own rights, or of enabling them to contest the matter before a master. He says that this seems to be the true doctrine inculcated by the more recent authorities. See Story's Eq. Pl., § 158; Eq. Jur., § 549. But the case before us is much stronger than this. The complainants *must* set out their own claims under the different mortgages, and it would be impossible to make all the bondholders of either class parties, for they could not be discovered; and the rights of all are protected by the opportunity given to all to contest the claim of any. We consider the bill as properly conceived, and the objection as untenable.

§ 1301. *A decree in a creditor's suit is not conclusive of a debt.*

In connection with this objection it is proper to notice an objection to the original decree, that it undertook to declare and find the amount of bonds outstanding and due under each mortgage before the bonds had been regularly produced and proved. That decree, of course, is not to be regarded as final and conclusive on this point. The remarks of Vice-Chancellor Wigram, in *Whitaker v. Wright*, 2 Hare, 310, are germane to this subject: "With respect to the form of a decree in a creditor's suit," says he, "the court does not treat the decree as conclusive of the debt. It is clear that it is not so treated for all purposes, for any other creditor may challenge the debt, and it is equally clear that in practice the executor himself is allowed to impeach it. If, in a case where the plaintiff sues in behalf of himself and all other creditors, and the defendants, who represent the estate, do not admit assets, it is objected at the hearing that the debt is not well proved, the court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plaintiff to go into the master's office, and a new case may be made in the master's office, and new evidence may be there tendered." See Story's Eq. Jur., § 549, note. In this case, it is true, no reference to a master was made in the first decree for taking the proof of the various bonds that might be produced; but the final decree directed that to ascertain the proportion and amount of the several series of bonds and coupons outstanding, all holders thereof claiming participation in the distribution of proceeds of any sale of the property should present their

bonds and coupons to the court, to be deposited in some bank to be designated, there to remain subject to further order, and to such directions as the court may make to ascertain their genuineness, and to classify them. This has not yet been done, all proceedings being stayed by the appeal. But the action of the court, as far as it has gone, is substantially correct. It only remains to complete the proceeding in accordance with the proper practice applicable to the case.

On the part of Robert Pulsford it is objected that the decree does not give him a priority on that portion of the road which was laid with his iron. He contends that he is entitled to this, first, because when the mortgages of the complainants were executed it was not in existence, and could not have been conveyed thereby, and can only be embraced therein on a principle of equitable estoppel, which is rebutted when it comes in conflict with a superior equity; secondly, because his capital applied to the road conserved it, and rendered it capable of being operated, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, he is entitled to priority. The counsel for Pulsford has furnished us with a very ingenious and learned argument on these points; but we cannot yield to their force.

§ 1302. *A railroad corporation can mortgage its future railroad in borrowing the money which shall call it into existence.*

As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second and third deeds of trust, or mortgages, given by the Galveston Railroad Company to the trustees, estops the company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule. The precise case arose in New Jersey thirty years ago. The Morris Canal Company mortgaged its canal, appurtenances and chartered rights to secure a loan. When the mortgage was given, one section of the canal, that between Newark and Jersey City, although authorized, was not constructed. It was constructed afterwards. Two other mortgages were given upon that part of the canal, one of which was held by the state of Indiana. A bill of foreclosure was filed on the first mortgage, and after argument by very able counsel, Chancellor Pennington held that the first mortgage took priority. The objection was raised that the company did not own any of the land on which the contested portion was constructed when the mortgage was given. "Can it be possible," said he, "that if on the line of the route at any place it should turn out that a deed was obtained for a piece of land since the execution of the mortgage, that such part of the canal is not embraced

within it?" 3 Green Ch., 402. Mr. Pulsford, as holder of the fourth mortgage, is an assignee of the railroad company, claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel.

§ 1303. *The last creditor is not entitled to priority of payment because his money conserved the property.*

As to the other point, giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason. We do not understand that it is a part of the general law of Texas. By an act of the congress of Texas, passed 20th January, 1840, the common law was made the rule of decision, where not inconsistent with the constitution and acts of congress. By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain states a lien is created by statute in favor of mechanics, called the mechanic's lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien does not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained. Some other minor points have been made by the defendants which it is not necessary for us to examine in detail. Our conclusion is that the decree, so far as it is in favor of the complainants, must be affirmed.

§ 1304. *Until demand made a mortgage of tolls, income, etc., does not take effect so as to entitle the mortgagees to an account.*

The complainants have also appealed from the decree because it fails to award them the tolls, income and profits of the railroad during the time it was operated by the present defendants, and to make the defendants accountable therefor. The complainants claim that nearly all the rolling stock and property, including the junction railroad, claimed by the defendants as their property, were really produced by the earnings of the railroad fraudulently appropriated to themselves by the defendants. This claim raises the question whether a mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagees. In this case it does not appear that the complainants or their trustees made any demand for the tolls and income until they filed the present bill. The bill itself does not contain any allegation of such a demand. Now what is the language of the deeds of trust? They convey, it is true, with the other premises, the tolls, income, issues and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time for the space of three months be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds, the trustees shall take possession of the railroad and other property, and, through the agency of the persons they may appoint, shall collect and receive the tolls, incomes and profits of the railroad and mortgaged property for the purpose of the security

before declared, and may sell the road upon giving due notice, etc. It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect. At all events until a regular demand were made for the payment of the tolls and income we do not think, under the language of the deed, that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of said tolls and income.

We are, therefore, of opinion that this part of the decree ought also to be affirmed. The result is that the entire decree of the circuit court is affirmed.

PENNOCK v. COE.

(28 Howard, 117-182. 1859.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States for the northern district of Ohio.

The bill was filed in the court below by Coe, mortgagee of the road of the railroad company, in trust, for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company by Pennock and Hart, two of the defendants.

The facts of the case are these: The Cleveland, Zanesville & Cincinnati Railroad Co., created a body politic and corporate by the laws of Ohio, to make a railroad between certain termini in that state, in pursuance of authority conferred by law, issued bonds to the amount of \$500,000, payable ten years from date, with interest at the rate of seven per cent., payable semi-annually, on the 1st day of April and October in each year, and, to secure the payment of the same, executed a mortgage of the railroad and its equipments to the complainant, in trust for the bondholders, the description of which is in the words following: "All the present and future to be acquired property of the parties of the first part; that is to say, their road, made or to be made, including the right of way, and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein, or procured therefor, with the above-described bonds, or the money obtained therefor, bridges, viaducts, culverts, fences, depots, grounds and buildings thereon, engines, tenders, cars, tools, machinery, materials, contracts, and all other personal property, right thereto or interest therein, together with the tolls, rents or income to be had or levied therefrom, and all franchises, rights and privileges of the parties of the first part, in, to or concerning the same." At the time of the issuing of these bonds, and the execution of the mortgage, the railroad was in the course of construction, but only a small portion of it finished. It was constructed and equipped almost entirely by means of the funds raised from these bonds, together with a second issue to the amount of \$700,000. The road cost upwards of \$1,500,000. The stock subscribed and paid in amounted only to some \$369,000.

The mortgage securing the payment of the second issue bears date the 1st of November, 1854, and was made to one George Mygatt, in trust for the bondholders, and the property described in and covered by it is the same as that described in the first mortgage. The road was finished to Millersburg, its present terminus south, in May, 1854, and the whole of the rolling stock was placed on it previous to the date of the second mortgage. This stock was pur-

chased and placed on the road from time to time, as the locomotives and cars were needed in the progress of its construction. The mortgage to the complainant contained a covenant on the part of the company that the money borrowed for the construction and equipment of the road should be faithfully applied to that object, and that the work should be carried on with due diligence until the same should be finished. In case of default in the payment of the principal or interest of the bonds, the trustee was empowered to enter upon and take possession of the road, or, at the election of a moiety of the bondholders, to sell the same at public auction, and apply the proceeds to the payment of the bonds. The defendants Pennock and Hart, being the holders of sixteen of the bonds issued under the second mortgage, recovered a judgment on the same, May, 1856, against the railroad company, issued execution, and levied on a portion of the rolling stock of the road, and caused the same to be advertised for sale. This bill was filed to enjoin the sale, and a decree was rendered perpetually enjoining it in the court below, which is now before us on appeal.

§ 1305. *A mortgage of present existing and future-acquired property is valid and will attach to the future-acquired property on its coming into existence.*

The first two grounds of objection taken to this decree may be considered together. They are: 1, that the mortgage to the trustee of the 1st April, 1852, is void or inoperative, as respects the locomotives and cars which were levied on under the execution of the defendants, inasmuch as they were not in existence at the date of it, but were constructed and placed on the road afterwards, being subsequently-acquired property of the company. And, 2, that the mortgage is void, on the ground of uncertainty as to the property described or attempted to be described therein and conveyed to the mortgagee. The description begins by conveying "all the following present and future-acquired property of the said parties of the first part;" and, after specifying the road and the several parts of it, together with the rolling stock, there is added, "and all other personal property, right thereto and interest therein." This clause, probably, from the connection in which it is found, was intended to refer to property appurtenant to the road, and employed in its operation, and which had not been enumerated; and, if so, the better opinion, perhaps, is, that it would be bound by the mortgage even as against judgment creditors. But it is unimportant to express any opinion upon the question, as the property in this case (the locomotives and cars) levied on are articles specifically enumerated; and the only uncertainty existing in respect to them arises out of their non-existence at the date of the mortgage. An uncertainty of this character need not be separately examined, as it will be resolved by a consideration of the first question, which is, whether or not the after-acquired rolling stock of the company placed upon the road attaches, in equity, to the mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company?

If we are at liberty to determine this question by the terms and clear intent of the agreement of the parties, it will be found a very plain one. The company have agreed with the bondholders (for the mortgagee represents them) that if they will advance their money to build the road and equip it, the road and equipments thus constructed, and as fast as constructed, shall be pledged as a security for the loan. This is the simple contract, when stripped of form and verbiage; and, in order to carry out this intent most effectually, and with as

little hazard as possible to the lender, the company specially stipulate that the money thus borrowed shall be faithfully applied in the construction and equipment of the road. And in further fulfillment of the intent, the company agree that, in case of default in the payment of principal or interest, the bondholders may enter upon and take possession of the road and run it themselves, by their agents, applying the net proceeds to the payment of the debt. The bondholders have fulfilled their part of the agreement — they have advanced the money on the faith of the security; the company have also fulfilled theirs — they have made the road and equipped it; it has been partially in operation since January, 1852, and in operation upon the whole line since May, 1854. The road, therefore, as described in the mortgage, from Hudson to Millersburg, and which was in the course of construction at the date of the instrument, has been finished, and the rolling stock, locomotives, tenders and cars, also described in it, and which were to be afterwards acquired, have been brought into existence and placed upon it — all in conformity with the agreement of the parties; and the question is, whether there is any rule of law or principle of equity that denies effect to such an agreement.

The main argument urged against it is founded upon the maxim that “a person cannot grant a thing which he has not:” *ille non habet, non dat*; and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity, for equity no more than law can deny it. The thing itself is an impossibility. It may at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, real or personal, *in presenti*, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity. But the principle has no application to the case before us. The mortgage here does not undertake to grant, *in presenti*, the property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired. Portions of the road had been acquired and finished and were in operation when the mortgage was given, upon which it is conceded it took effect; other portions were acquired afterwards, and especially the iron and other fixtures, besides the greater part of the rolling stock.

The terms of the grant or conveyance are: “all present and future to be acquired property of the parties of the first part” — that is to say, “their road, made or to be made, and all rails and other materials, etc., including iron rails and equipments, procured or to be procured,” etc. We have no occasion, therefore, of calling in question, much less denying, the soundness of the maxim so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is, not whether a person can grant *in presenti* property not belonging to him and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement, founded on a good and valuable consideration; and this when no rule of law is infringed or rights of a third party prejudiced. The locomotives and cars were all placed upon the road as early as February, 1854, when, at the furthest, the mortgage attached to those in question, according to its terms, if at all, and the judgment of the defendants was not recovered till May, 1856.

§ 1306. *A contract by a railroad mortgagor of future-acquired property, to devote the funds received to equipping the road, will be specifically enforced.*

We think it very clear, if the company, after having received the money upon the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely, the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed and enforced a specific performance. One of the covenants was that the money should be faithfully applied to the building and equipment of the road; or if, after the road was put in operation, the company had undertaken to divert the rolling stock from the use of the road, a like interposition might have been invoked, and this in order to protect the security of the bondholders. And if a court of equity would thus have compelled a specific performance of the contract, we may certainly with confidence conclude that it would sanction the voluntary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence. The case of *Langton v. Horton*, 1 Hare Ch., 549, supports this view. The mortgage security in that case was the assignment of the ship *Foxhound*, then on her voyage to the South Seas, together with all and singular her masts, etc., "*and all oil and head matter, and other cargo, which might be caught or brought home on the said ship, on and from her then present voyage.*" The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was filed to have the mortgage declared a good and valid security for the moneys advanced, and that the complainants be entitled to the benefit of the security, in preference to the judgment creditor.

The vice-chancellor, in giving his opinion, observed: "Is it true that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract?" And in answer to the question, he said: "It is impossible to doubt, for some purposes at least, that by contract an interest in a thing not in existence at the time of the contract, may, in equity, become the property of the purchaser for value." And, after reviewing the cases in the books, he concludes: "I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point that *Bixnie*, the contracting party, would be bound by the assignment to the plaintiffs." There are many cases in this country confirming this doctrine, and which have led to the practice extensively of giving this sort of security, especially in railroad and other similar great and important enterprises of the day. 2 Seld., 179; 3 Green Ch., 377; 32 N. H., 484; 25 Barb., 286; *id.*, 284; 18 B. Mon., 431; *Redfield on R'ys*, 590, and note; 2 Story, 630; *Tapfield v. Hillman*, 7 Jur., 771. In the case of *Tapfield v. Hillman*, Tindall, Ch. J., seems inclined to the opinion that, even at law, a mortgage security of future acquisitions might have effect given to it, if the terms indicated an intent to comprehend them. The counsel for the appellee referred to the case of *Chapman v. Weimer*, 4 Ohio St., 481, as denying effect to a mortgage upon after-acquired property. But that was a case at law; and even there the court held that the mortgage attached after the property was acquired, from the time the right was asserted by the mortgagees.

§ 1307. *A sale under judgment on second mortgage bonds will be enjoined at suit of holder of first mortgage bonds.*

In conclusion upon this point, we are satisfied that the mortgage attached to the future acquisitions, as described in it, from the time they came into existence. As to the claim of the judgment creditors, there are several answers to

it. In the first place, the mortgage being a valid and effective security for the bondholders of prior date, they present the superior equity to have the property in question applied to the discharge of the bonds. It is true, if the property covered by the mortgage constituted a fund more than sufficient to pay their demands, the court might compel the prior incumbrancer to satisfy the execution, or, on a refusal, the mortgage having become forfeited, compel a foreclosure and satisfaction of the bond debt, so as to enable the judgment creditor to reach the surplus. Or the court might, upon any unreasonable resistance of the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it. But no such ground has been presented, or could be sustained upon the facts before us. On the contrary, it cannot be denied but that the whole of the property mortgaged is insufficient to satisfy the bondholders under the first mortgage, much less when those under the second are included. To permit any interference, therefore, on the part of the judgment creditors, with a view to the satisfaction of their debt, consistent with the superior equity of the bondholders, would work only inconvenience and harm to the latter, without any benefit to the former. 3 Hare Ch., 416; 9 Ga., 377; Redfield on R'ys, 506; 5 Ohio, 92.

§ 1308. *A holder of part of the bonds secured has no right to appropriate the security to his sole benefit.*

In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue, and secured, in common with all the bonds of that issue, upon this property, by virtue of the second mortgage. These bondholders have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, in equity, a distribution is made among the holders *pro rata*. The payment of the bonds of the second issue is also postponed until satisfaction of the issue comprehended within the first mortgage, as the second was taken with a full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution would not only disturb the *pro rata* distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien. As the judgment creditors can have no interest in the management or disposition of the property, except as bondholders, on account of the deficiency of the fund, it is unimportant to inquire whether or not the court was right in refusing a receiver, or to direct a sale of the road with a view to a distribution of the proceeds. For aught that appears, the road has been managed, under its present directors, with prudence and fidelity, and to the satisfaction of the bondholders, the parties exclusively interested.

§ 1309. *Power under charter to construct a road.*

Another objection taken to the validity of the mortgage is, the want of power under the charter to construct the road from Hudson to Millersburg, and consequently to borrow money and pledge the road for this purpose. There is certainly some obscurity in the statutes creating this corporation as to the extent of the line of its road; but we agree with the court below, that, upon a reasonable interpretation of them, the power is to be found in their charter. They were authorized to construct the road from some convenient point on the Cleveland & Pittsburg road, in Hudson, Summit county, through Cuyahoga

Falls and Akron, to Wooster, or some point on the Ohio & Pennsylvania railroad, between Massillon and Wooster, and to connect with said Ohio & Pennsylvania road, and *any other railroad running in the direction of Columbus*. It was clearly not limited, in its southern terminus, to its connection with the Ohio & Pennsylvania road, for there is added, "and any other railroad running in the direction of Columbus." The extension of the road to the Ohio Central road at Zanesville, or at some other point on this road, comes fairly within the description.

We have not referred particularly to the authority of the company, under the statute laws of Ohio, to borrow money and pledge the road for the security of the payment, as no such question is presented in the brief or was made on the argument. Indeed, the authority seems to be full and explicit. Decree below affirmed. (a)

UNITED STATES v. NEW ORLEANS RAILROAD.

(12 Wallace, 362-365. 1870.)

APPEAL from U. S. Circuit Court, District of Kentucky.

STATEMENT OF FACTS.—The mortgages in this case were executed in 1858 and 1860, and purported to cover all the property of the company, and after-acquired property. The suit was brought by the United States as holder of first and second mortgage bonds, the trustee and several individual bondholders being joined as parties. After decree, and while the execution was in the hands of the marshal, it was discovered that certain property had been sold by the United States to the company in 1866, and that a bond was taken wherein it was stipulated that the United States retained a lien on the property so sold to secure the purchase money. The bond was not recorded and none of the parties interested, except the trustee, knew of its contents. The other property was sold by the marshal and did not realize enough to pay the bonds. On a question submitted the court found that as to the property sold to the company in 1866 the United States had an equity superior to that of the bondholders under the mortgages. From this decree an appeal was taken.

§ 1310. *Jurisdiction of a court of equity in a suit for foreclosure of a mortgage.*

Opinion by MR. JUSTICE BRADLEY.

The appellants contend, first, that the court had no authority to make the decision; that the proceeding was wholly irregular, without proper pleadings, and *coram non judice*. This objection hardly comes with a good grace from the appellants, who all joined in submitting the question to the court. But the jurisdiction was undoubted. A court of equity, in a suit for the foreclosure of a mortgage, clearly has cognizance of all questions relating to priority of lien on the property in litigation as between the parties to the suit and those whom they lawfully represent. The mode in which the jurisdiction shall be exercised is not so much a matter of substance as of form. Ordinarily a reference to a master before the final decree would be the formal method to pursue, but where, from oversight or other cause, this has been omitted, the parties may certainly agree (as was done here) to submit the matter to the court upon a statement of facts, after the decree.

§ 1311. *A mortgage covering after-acquired property only attaches itself to such property in the condition in which it comes into the mortgagor's hands.*

The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages being prior in date to the bond given for the purchase money of these locomotives and cars, and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice.

§ 1312. — *and such mortgage does not displace a mortgage or lien upon such property existing at the time it was so acquired.*

A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors.

§ 1313. — *nor does such mortgage displace a mortgage or lien given by the mortgagor for the purchase money of such after-acquired property.*

Had the property sold by the government to the railroad company been rails, as in the case of the Galveston Railroad v. Cowdrey (11 Wall., 459; §§ 1297-1804, *supra*), or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto.

§ 1314. — *but where the after-acquired property becomes affixed to and a part of the principal thing, the general mortgage displaces such lien or mortgage for purchase money.*

In the case before us, the United States, at the time of making the sale, reserved a lien on the property, and imposed a condition of non-alienation until the price should be paid. Taken all together the transaction amounts to a transfer *sub modo*, and the lien must be regarded as attaching to the property itself, and as paramount to any other liens arising from the prior act of the company.

Decree affirmed.

MINNESOTA COMPANY v. ST. PAUL COMPANY.

(2 Wallace, 609-645. 1864.)

STATEMENT OF FACTS.—The La Crosse & Milwaukee Railroad Company, in building their road from Milwaukee westward, had divided it into two divisions, the eastern, from Milwaukee to Portage City, and the western, from

Portage City to La Crosse. In 1854 they gave a mortgage on the eastern division and rolling stock to Palmer. In 1856 they gave a mortgage on the western division and rolling stock to Bronson, Soutter and Knapp, commonly called the Land Grant Mortgage. In 1858 they gave a third mortgage on the whole road to Barnes, under which mortgage the road was sold, subject to the prior mortgages, the purchasers forming the Milwaukee & Minnesota Company, called for brevity the Minnesota Company.

Afterwards, foreclosure suits were brought in the same court, the United States district court for the district of Wisconsin, having circuit court powers, by the mortgagees of both the western and eastern divisions, and a master appointed to ascertain the proportion of rolling stock belonging to each division. The master found that forty box cars, described by their numbers, belonged to the western and the remainder of the rolling stock to the eastern division. The court, after disposing of exceptions taken by both divisions to the master's report, ordered sale of the western division, and the marshal advertised and sold not only the road-bed and the forty box cars, but all the balance of the rolling stock, subject, however, to the lien of the mortgage on the eastern division. This sale, however, was confirmed. The purchasers, Pratt and White, organized the Milwaukee & St. Paul Company, called for brevity the St. Paul Company, and the road having been for some time in the hands of a receiver, the court, on the petition of the St. Paul Company, ordered the receiver to turn over the western division and the whole of the rolling stock to said company. This suit was now brought by the Minnesota Company, who still owned the equity of redemption in the eastern division, not yet sold; their claim being that the decree in the foreclosure suit of the western division had not authorized the sale of all the rolling stock, but only of the forty box cars; that they held the equity of redemption in the remainder of the rolling stock, and that the earnings of the road in the hands of the receiver should be applied to the payment of the eastern division mortgage in proportion to the earnings of that division.

Opinion by MR. JUSTICE MILLER.

The first question raised by the demurrer relates to jurisdiction. For the purposes of this question we are to take the facts set up by the bill [his Honor had stated the main ones] and demurred to, as true, and consider whether they make a case for the jurisdiction of the circuit court of the district of Wisconsin which has become successor of the district court in that district. The present suit grows immediately out of and is a necessity which arises from the suit by Bronson, Soutter and Knapp to foreclose the Land Grant mortgage; under the decree in which suit the western division of the La Crosse & Milwaukee road was sold, and also all the rolling stock of the company belonging to both divisions to the Milwaukee & St. Paul Railway Company. The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it. The road and rolling stock which are the subject-matter of this controversy were placed in the hands of a receiver in the progress of that suit; and he was in possession of the rolling stock when, by an order of the district court, made June 12, 1863, in that suit, and a similar order of the same date in another suit, it was all delivered to the Milwaukee & St. Paul Railway Company.

§ 1315. *Federal court has jurisdiction of suits with a receiver of such court.*

At the last term of this court (*Bronson v. La Crosse R. Co.*, 1 Wall., 405), we decided that by the act creating the circuit court for the district of Wisconsin the district court lost its power to make such orders and that they were void. The consequence of this ruling is, that, in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of the receiver of the circuit court, nothing can be plainer than that any litigation for its possession must take place in that court without regard to the citizenship of the parties. *Freeman v. Howe*, 24 How., 460. If it has been taken illegally from the custody of the receiver it is equally clear that the court has not lost thereby the jurisdiction over the property, or the right to determine where it shall go, so far as that right is involved in that suit. This is the very object of this bill, and it is rendered all the more necessary by that which the court has done, as well as that which it has failed to do. In the case of *Randall v. Howard*, 2 Black, 585 (§§ 1075-76, *supra*), these principles are fully stated as applicable to a proceeding in a state court, and are given as reasons why the federal court would not interfere; although the parties had the right, so far as citizenship could give it, to litigate in the courts of the United States.

§ 1316. *Bill in equity to ascertain true construction of decree is supplemental.*

It is objected that the present bill is called a supplemental bill, and is brought by a defendant in the original suit, which is said to be a violation of the rules of equity pleading; and that the subject-matter, and the new parties made by the bill, are not such as can properly be brought before the court by that class of bills. But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, far instance, would hesitate to say, that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law. The case before us is analogous. An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected and to carry into effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court and subject to its order.

§ 1317. *Purchaser at sale under decree becomes quoad hoc a party to the suit and subject to the jurisdiction of the court.*

It is objected that Pratt and White and the Milwaukee & St. Paul Railway Company were not parties to that suit, and cannot, therefore, be compelled to yield their right to litigate with a citizen of Wisconsin in the courts of that state. Pratt and White are mere nominal parties, who were the agents and attorneys of the corporators composing the Milwaukee & St. Paul Railway Company, and purchased the property at the marshal's sale for them. They and the company may both be considered as purchasers at that sale; and it is in

their character of purchasers, and on account of the possession which they obtained on petition of the company, and the rights they claim under that purchase, that they are now brought before the court. If the court has jurisdiction of the matters growing out of that sale and order of possession, as we have already shown that it has, then it has jurisdiction to that extent of these parties, without regard to their citizenship. It would, indeed, be very strange if these parties can come into court by a petition and get possession of that which was the subject of litigation, and then when the wrong they have done by that proceeding is to be corrected they shall be permitted to escape by denying that they were parties to the suit. In the case of *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall., 655, this matter was fully discussed, and it was there held that a purchaser or bidder at a master's sale subjected himself *quoad hoc* to the jurisdiction of the court, and became so far a party to the suit by the mere act of making a bid that he could appeal from any subsequent order of the court affecting his interest. *De la Plaine v. Lawrence*, 10 Paige, 602; *Calvert on Parties to Suits in Equity*, pp. 51, 58, and note to p. 61. The objection to the jurisdiction must therefore be overruled.

§ 1318. *Rolling stock of railroad may become appurtenant to a particular division of road.*

We next proceed to inquire whether the bill makes a case calling for relief. This involves the consideration of the mortgage of complainants in the original suit, and of several orders and decrees of the district court, all of which are the subject of conflicting constructions by the parties and their counsel.

In reference to the road-bed which is covered by these various mortgages, there is no diversity of opinion, but in reference to the rolling stock, it is contended by appellees that these several mortgages were successive liens on all the rolling stock of the company, and by appellant that they are liens only on the rolling stock belonging to, or in some way identified with, that part of the road included in each mortgage respectively. At first blush it would seem that in a road used continuously as one road, there could be no such definite relation between any particular division of the road and any particular portion of the stock. But as it was competent for the company which owned all the road and all the stock to assign certain stock to one division, and certain other stock to the other division, when the roads were divided for the purpose of making mortgages, we cannot assume as a fact that there was no such allotment of the rolling stock; but must look to the language of the mortgages themselves to see if any such intention is expressed. If it is not, then obviously the other view prevails, and the mortgages are successive liens on the whole stock. The language in the descriptive part of the Palmer mortgage, and that in the corresponding part of the mortgage on the western division, when considered in reference to the rolling stock alone, may not be free from doubt as to its construction. But when we consider it in reference to the clear purpose of the parties to make the mortgages distinct, and different as to everything else conveyed by them, we conclude that it was intended that the rolling stock covered by each mortgage was that which was properly appurtenant to each particular division of the road.

It is not so important that we be right in this, however, as we are satisfied that the district court in the foreclosure suit decided this question; and as that decision is in full force and unreversed, it must conclude the parties to the present suit, all of whom claim under the decree of the court. The complainants in the original foreclosure suit made defendants of all the judgment cred-

itors of the company who had liens subsequent to themselves, and made the Milwaukee & Minnesota Company defendant, who held under the subsequent mortgage to Barnes, with a view to cut off their equity of redemption; but they did not make defendants of Bronson and Soutter, who held a subsequent mortgage on the eastern division, and a subsequent lien on the rolling stock, which complainants would also desire to extinguish, if they had believed it covered the same rolling stock which theirs did. By omitting these mortgagees they show their own construction that their mortgage, and that of Bronson and Soutter, did not cover the same stock, which could only be because it was appurtenant to the eastern division.

About the time that foreclosure suit was commenced, a suit was instituted in the same court to foreclose the second or Bronson and Soutter mortgage on the eastern division; but the holders of the Palmer mortgage were not made defendants to either suit. The two suits progressed *pari passu* to a final decree; but while the western division went to sale, an appeal stayed proceedings in the eastern division case, and no sale has yet been made under that decree. Very shortly after these suits were commenced the court made an order of reference in each of them to masters in chancery, who were the same masters in both cases. These references were for the purpose of ascertaining the amounts due on the bonds, the amounts due certain judgment creditors, and the amount of rolling stock on the whole road, and the amount included in each mortgage. The language of the order of reference on this latter point in the original suit in this case is as follows: "And it is further ordered that said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by this mortgage, also in the first and second mortgages respectively."

The reference in the other case is in language almost identical. Now it is argued that the object of this order was to ascertain and settle the priorities between these different mortgages. No such inference can be made from its language, for it says nothing about priorities in date, or superiority of lien. There was no occasion or reason for ascertaining those priorities in that suit, for the respective parties were not before the court, and could not be bound by its decree. It would not even bind complainants, because there would be no mutuality in the estoppel. It is an impeachment of the legal attainments of the court and of the counsel to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and, if passed upon by the court, could affect nobody's interest in the slightest degree. But the language of the order clearly implies a different thing. The object is to ascertain what is covered by one mortgage to the exclusion of the other; an object which had manifest pertinency to the duty which the court was called upon to discharge. The judge who made these orders delivered an opinion at the trial, in which he decides that the rolling stock of a railroad is a fixture; and if we suppose him to have considered that which was mortgaged to Palmer and to Bronson and Soutter as a fixture on the eastern division, and that which was mortgaged to Bronson, Soutter and Knapp as a fixture on the western division, we have a clear idea of what he wished to ascertain, in view of the decrees he was to make in the two suits.

We have next the report of the masters on this subject, which is as follows: "We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, \$569,635.78, and an additional amount of

\$53,600 has been purchased since the filing of the bill of complaint, making the whole amount \$623,235.78. And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to \$31,979.64, and numbered 330, etc. [giving the numbers], are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause, the said cars having been purchased, and by the proceeds of a portion of the bonds to which this mortgage is collateral; and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to G. C. Bronson and J. T. Soutter, and bearing date on the 17th day of August, A. D. 1857."

In the foreclosure suit of the eastern division, these same masters reported on the same day: "We have ascertained, and do further report, that of said rolling stock, forty box cars, amounting, at cost price thereof, to \$31,979.64, and numbered 330, etc., are covered by and included in the mortgage of Bronson, Soutter and Knapp, and no other;" and then adds, that the remaining rolling stock is covered by the mortgage to Palmer, and to Bronson and Soutter; that is, the mortgage on the eastern division.

It is impossible in examining these reports to doubt that the commissioners understood that they were directed to ascertain what rolling stock was covered by each mortgage, in order that only such might be sold under the decree in that case, and that they reported that, of all the rolling stock on the road, forty box cars alone were subject to the mortgage in the present case, and that all the other stock was subject to the mortgage in the other suit. At all events, they were directed to ascertain what was subject to the mortgage in this suit, and they reported the forty box cars and did not report any more. This much is beyond dispute from the language of the report in this case. Counsel for complainant excepted to this report. His fourth exception is that, instead of certifying as they did, the masters should have reported, "That all the rolling stock on said road was covered by and included in the mortgage given to said complainants, and described in their bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens."

This exception was overruled by the court, and the report of the masters confirmed so far as this branch of the subject is concerned. We regard this as a judicial decision that complainant's mortgage did not cover the rolling stock, which was covered by the previous mortgage to Palmer, and that it only covered the forty box cars and such proportion of the rolling stock purchased by the receiver as the net earnings of the western division bears to the net earnings of the eastern division. This order, modifying and confirming the report of the masters, settled the rights of the parties, and by that decision they must stand until it is reversed on appeal or set aside by some direct proceeding for that purpose.

The final decree ordering the sale proceeds upon the same view of the rights of the parties. After ordering a sale of the property mortgaged, and copying the language given in the mortgage as descriptive of what was mortgaged, the decree adds: "With forty box cars, etc., and such portion or share of the rolling stock purchased and procured by the receiver, costing \$147,942.63, as the net revenues of the portion of the road covered by this mortgage bears to the balance or other end of the road, since the appointment of the receiver. The remaining rolling stock is subject to a prior mortgage." That is to say, having

decided that what is covered by the other two mortgages is not covered by this, it is not subject to sale in this suit. The marshal, however, who was directed to make the sale instead of a master commissioner, did sell all the rolling stock, and that sale was confirmed by the order of the district court of May 5, 1863.

§ 1319. *A sale by marshal, unauthorized by decree, is not rendered valid by subsequent confirmation.*

It is too clear for argument that a sale by the marshal, unauthorized by the decree, is without any validity. Does the order of the court confirming the sale make it valid? Upon principle, the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nullity, and we doubt if a court can make it valid by a mere general order of confirmation. If, however, an issue had been made, by exceptions or other proper pleading, as to the question whether any particular piece of property had been included in the *decree or order of sale*, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. There is every reason, on the contrary, to believe that the court had no suspicion that the marshal had sold more than the decree authorized.

On the 7th day of May, two days after the order of confirmation, the Milwaukee & St. Paul Railway Company presented their petition for the discharge of the receiver, and for possession of the property which they had purchased. The court thereupon made an order "that the receiver deliver over to said Milwaukee & St. Paul Railway Company the said road and appurtenances between Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*" The only rolling stock specially described in the decree was the forty box cars and the proportion of stock purchased by the receiver. The fact that this was ordered to be delivered to the purchasers, and no more, is almost conclusive of two things: first, that the judge understood his decree and previous rulings as we have interpreted them; and second, that he had no idea that he had confirmed a sale of all the rolling stock on the road, to the purchasers at the sale. It is true that over a month later he ordered the eastern division of the road and the remainder of the rolling stock into the possession of the same company. But this was done to enable them to run the whole road as a through route, on the principle of public policy, and that it was better for all parties concerned. This he declared in an opinion delivered at the time, and it is substantially indicated in the orders themselves. In the light of these facts, we cannot give to the order of confirmation in this case the effect of making valid the marshal's sale, however the rule might be on that subject in other cases. But we do not mean to intimate that in any case a sale by a marshal, or master in chancery, can be valid, when there is no decree to support it. Cases in this court (*Shriver v. Lynn*, 2 How., 43; *Gray v. Brignardello*, 1 Wall., 627) would seem to decide that it cannot. The order of June 12, 1863, delivering possession of this property to the Milwaukee & St. Paul Railway Company, has been declared by this court to be void for want of jurisdiction, and has been set aside by the court which made it. It therefore affords no support to defendants in this claim to the rolling stock in dispute.

We have thus examined with care and patience the mortgage, and the various orders and decrees of the district court, on which the claim of the Milwaukee & St. Paul Railway Company to the ownership of this property depends.

There is in all of them some want of clearness and precision, including the mortgage itself. Before the court ordered the sale, it should have made clear all these ambiguities. It evidently attempted to do so, and, we think, if it has not in all cases effected that purpose fully, it has furnished the criteria by which it can be done. And, although the language of its orders is not always free from doubt, we have been able to satisfy ourselves of the court's intentions. The title of appellant is clear on the record, unless it has been divested by these proceedings. We think that they do not confer title to the rolling stock on the Milwaukee & St. Paul Railway Company, nor divest the appellant, except as to the forty box cars, and the proportion of the stock purchased by the receiver, which the net earnings of the western division bore to the net earnings of the eastern division, and that they also decide that the mortgage under which they claim did not include any more.

Order of the circuit court sustaining the demurrer to complainants' bill, and the decree of the court dismissing it, reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Dissenting opinion by MR. JUSTICE NELSON, JUSTICES CLIFFORD and FIELD concurring.

The complainants in this bill, who set up a right to the equity of redemption in the Bronson and Soutter mortgage, insist that the whole of the rolling stock on the old La Crosse & Milwaukee road, with a trifling exception, is subject to the lien of this mortgage on the eastern division, the foreclosure of which is pending; and that a proper allowance of rent for the use of it on the western division should be made, and the avails applied to the interest due on the mortgage; and further, that the question involved was litigated and so decided in the foreclosure suit on the mortgage of the western division.

We have looked into the position of the counsel for the complainants, and have come to the conclusion that it is not maintained. For aught that appears, all the rolling stock of the old company was purchased by it for the use and benefit of the whole of the road, out of the common funds of the company, and a lien was given upon it in each and all of the mortgages of that company on the two divisions, the eastern and western, and also upon it in the mortgage of the whole road to the complainants. These liens would take effect as matters of law according to priority. Any other disposition of them would be unjust and in violation of good faith to the bondholders, for the security of the payment of whose bonds the mortgages were given. The district court, however, seems to have entertained the idea that any of the rolling stock purchased by the proceeds of the bonds of a particular mortgage should be exclusively subject to the lien of that mortgage, and made a reference for this purpose; and on the coming in of the report, acting upon this idea, decided that some forty box cars purchased by the proceeds of the bonds of the first mortgage on the western division should be sold and the proceeds applied exclusively to this mortgage, and that all the rest of the rolling stock on the road (meaning the whole road), when the receiver was appointed, was covered by the first mortgage of the road from Milwaukee to Portage (meaning the Palmer mortgage), and all purchased since the appointment of the receiver be applied to this first mortgage, and the mortgage in the bill of foreclosure, in the proportion therein mentioned.

The decree of foreclosure, after describing the property to be sold, and particularly the forty box cars and the share of the stock purchased since the

appointment of the receiver, adds: "The remaining rolling stock is subject to prior mortgages." In the report of the sale by the marshal he states that he sold of the rolling stock the forty box cars, and the share of the stock purchased since the receiver was appointed, free and clear of all incumbrances; but the remainder of the rolling stock was sold, subject to the lien of mortgages prior in date to the mortgage under which the sale was made. This report of the sale by the marshal was excepted to, but after argument the exceptions were overruled and the sale confirmed, and although the complainants here were party defendants in that suit of foreclosure, no appeal was taken from the decree of confirmation. *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall., 653-7. We are of opinion, therefore, that the question as to the ownership or the liens upon the rolling stock in question were not adjudicated by the court below in the foreclosure suit on the mortgage upon the western division, and that the question is open for this court to determine.

We agree that the rolling stock upon this road covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words, is in technical language a fixture to the road, so far as in its nature and use it can be called a fixture. But it is a fixture extending over the entire track of the road from Milwaukee to La Crosse. It is not a fixture upon any particular division or portion, but attaches to every part and portion. It was purchased, as we have before said, for aught that appears, by the common funds of the old La Crosse & Milwaukee Company, and which were derived from its various resources — subscriptions of stock, sale of bonds secured by mortgages, earnings of the road after a part or the whole line was fitted for the running of the cars; and the mortgages or other incumbrances on the road made by the old company, whether on a portion or on the whole line, take effect according to the priority of lien. These liens, so far as respects the rolling or moving stock, attach to them a right to have the cars run upon the road, upon its entire line, as the value of the lien depends upon this use of the property. The lien was acquired in contemplation of this use, for without it a mortgagee or lienholder of the commonest observation must have seen the security would be next to worthless. The great value of the road and rolling stock, as a security, consists in the use and operation of the same as a railroad line in the carriage of passengers and freight; it is the combined use maintained and enforced that enables the lien creditor to realize the security contemplated when the credit was given.

Our conclusion, therefore, is, that the mortgagees of the eastern line have by virtue of the liens of their mortgages such an interest in the rolling stock as to entitle them to the appropriate use of it in running the road for the carriage of passengers and freight; and that the Milwaukee & St. Paul Company, by reason of their title under the mortgage foreclosed on the western division, acquired the same right; and also that the complainants, by virtue of their title under the mortgage foreclosed, acquired a similar right, and that neither has acquired an exclusive right or title to any portion of the rolling stock. We say nothing as to the persons or parties who may be entitled to liens on their property, as these questions are not before us; nor the evidence that would enable us to determine the same, nor could they be determined under this bill. Our conclusion is that the decree below should be affirmed.

FARMERS' LOAN & TRUST COMPANY v. ST. JOSEPH & DENVER CITY RAILROAD COMPANY.

(Circuit Court for Kansas: 3 Dillon, 412, 413. 1875.)

STATEMENT OF FACTS.— Bill to foreclose. The plaintiffs were trustees in a railway mortgage. The mortgage covered the rolling stock and other property appertaining to the railroad. It was duly recorded as a real estate mortgage, but not as a chattel mortgage, as the latter, to be valid, are required to be by the Kansas laws. The question was whether the above mortgage was valid as against certain judgment creditors who levied on the rolling stock.

§ 1320. *A mortgage of a railroad with its rolling stock need not be recorded as a chattel mortgage.*

Opinion by MILLER, J.

After having taken time to consider the question involved in this case, my judgment is that it was not necessary, as to the rolling stock, to record the instrument as a chattel mortgage. As to this it is sufficient, even as to creditors, that the mortgage was duly registered as a mortgage of real estate.

§ 1321. *Rolling stock a part of the road.*

In my opinion rolling stock and other property, strictly and properly appurtenant to the road, is part of the road and covered by the mortgage in question, which in terms embraces rolling stock. The cases are conflicting upon the point as to the *nature of rolling stock*, but considering the peculiar character of a railroad, the true principle is the one above stated. Under the provisions of this mortgage a different principle would apply to fuel or other property personal in its nature, and which is used, or is such as is commonly used, for other than railway purposes. Such property would be subject to the levy and not be held by the mortgage. Judgment accordingly.

DILLON, J., concurs.

§ 1322. *After-acquired rolling stock.*— A mortgage of a railroad in operation, including its entire property, future receipts, and property subsequently to be acquired, in equity creates a mortgage on the property subsequently acquired; and, therefore, where rolling stock of the road subsequently acquired was levied upon, a sale under the execution was perpetually enjoined. *Coe v. Pennock*, * 6 Am. L. Reg., 27.

§ 1323. *Chattel mortgage statutes do not apply.*— Statutory provisions in regard to chattel mortgages do not embrace mortgages by a railroad corporation, in connection with its real estate and franchises, of its personal property used and appropriated for railroad purposes. *Hammock v. Loan & Trust Co.*, 15 Otto, 77 (§§ 1322-23).

§ 1324. *Rolling stock of separate divisions.*— Where rolling stock was purchased by a railroad company and placed and used on the entire line of road, embracing two separate divisions, covered by separate mortgages, as well as by a mortgage of the whole line of road, and no division of the rolling stock was ever made between the two divisions, it was held that the mortgages operated upon all the rolling stock in the order of their dates, and that a mortgage of one of the divisions, being the oldest, had priority of lien upon the entire rolling stock of the road. *Minnesota Co. v. St. Paul Co.*, * 6 Wall., 742.

§ 1325. *In Illinois, rolling stock subject to execution.*— A mortgage or deed of trust given by a railroad company to secure its bonds includes all present and after-acquired property, whether real or personal, and is superior to a judgment lien which afterwards attaches to such property. *Scott v. Clinton & Springfield R. Co.*, 6 Biss., 529, 534.

§ 1326. A provision of the constitution of Illinois, that rolling stock and all other movable property belonging to a railroad company shall be liable to execution in the same manner as the personal property of individuals, does not change the rule that a mortgage made by a railroad company of all its after-acquired property includes rolling stock, if given before the rights of execution creditors attach. *Ibid.*

VI. MORTGAGE BONDS AND COUPONS.

[See BONDS, B, Vol., IV.]

SUMMARY—*Numbering bonds does not affect standing in case of overissue, § 1327.—Priority of first mortgage bonds not issued when second mortgage is made, §§ 1328, 1329.—Coupons paid by bankers, not by the railroad company, § 1330.—Guaranty of municipal bonds, § 1331.*

§ 1327. The numbering of bonds does not ordinarily give the holders of the lower numbers any preference over the holders of the higher, when there has been an overissue of bonds beyond the amount provided for by the mortgage. All *bona fide* holders for value stand upon the same footing. *Stanton v. Alabama & Chattanooga R. Co.*, §§ 1332-1336.

§ 1328. A first mortgage of a railroad as against a second mortgage of the same property protects such bonds of the corporation purporting to be second, by such first mortgage, as have been actually issued and are held for value at the time the second mortgage is made. Such bonds held in pledge for debts of the company at the time of making the second mortgage are protected. *Claffin v. Railroad Co.*, §§ 1337-1340.

§ 1329. Bonds in the hands of the company, or which it afterwards takes up, are protected as against a second mortgage unless this mortgage in terms limits the lien of the prior mortgage to bonds actually out at the time, and provides against reissues. *Ibid.*

§ 1330. When a railroad corporation which had previously paid its coupons at its own office directed the holders to take the coupons to a banking house, where they would receive payment, and the holders there received the amounts due on the coupons and left them in the possession of the bankers, they might properly presume that the company was not paying the coupons. On the contrary there is a fair presumption that, when the holders delivered the possession of the coupons, they assented to a transfer of ownership. *Duncan v. Mobile & Ohio R. Co.*, §§ 1341-1347.

§ 1331. A railroad having express authority of law both to issue its own bonds to raise means to construct and operate its road and to receive the bonds of cities and counties as subscription to its stock may also guaranty such city and county bonds for the accomplishment of the same end; and the fact of such guaranty being determined, stockholders cannot deny its validity. *Railroad Co. v. Howard*, §§ 1348-1354.

[NOTES.—See §§ 1355-1362.]

STANTON v. ALABAMA & CHATTANOOGA RAILROAD COMPANY.

(Circuit Court for Alabama: 2 Woods, 523-531. 1875.)

STATEMENT OF FACTS.—The bill in this case was filed to foreclose a mortgage made by the railroad company to secure its first mortgage bonds. The mortgage covered the entire road, which extended from Chattanooga, Tennessee, to Meridian, Mississippi. The company was a corporation of Alabama, and was recognized by legislation in the states of Tennessee, Georgia and Mississippi. The statute of Alabama provided that whenever any railroad company should finish and equip twenty miles of road, the governor should indorse its first mortgage bonds, at the rate of \$16,000 for each mile of road. The bonds secured by the mortgage purported to be issued and indorsed under the above law, and each purported to be one of a series of numbered bonds so issued. The property was sold pursuant to the decree of sale, and bid off by the trustees for the benefit of the bondholders. It appeared that the length of the road justified the issue of four thousand seven hundred and twenty bonds of \$1,000 each, at the rate of \$16,000 per mile, and that bonds to the number of five hundred had been issued in excess of this amount, each indorsed by the governor. The question is whether the holders of the bonds issued in excess of the amount authorized are entitled to share in the title to the property bought by the trustees.

Opinion by Woods, J.

It is conceded that the petitioners are holders of the high numbered bonds for value and without actual notice of any infirmity attaching to them. These bonds are commercial paper, and as such are binding upon the railroad company when in the hands of a *bona fide* holder for value. Commissioners of Knox County v. Aspinwall, 21 How., 539; Woods v. Lawrence County, 1 Black, 886; Mercer County v. Hackett, 1 Wall., 95; Gelpcke v. Dubuque, id., 175; Van Hostrup v. Madison City, id., 291; Meyer v. City of Muscatine, id., 384; Murray v. Lardner, 2 id., 110. (a) By the same authorities they are equitably binding upon the state by reason of its indorsement. Neither the railroad company nor the state enter into this controversy. The contention is between bondholders; the parties who hold bonds bearing numbers less than 4721 insisting that their bonds only are secured by the mortgage, and what they style the overissue or high numbered bonds are not secured. The claim of the holders of bonds bearing numbers below 4721 is based on two grounds: first, because the petitioners holding the high numbered bonds were put on notice of the fact that their bonds were not secured by the mortgage; and second, because by the very terms of the mortgage these bonds are not secured by it; that mortgage declares what bonds it is intended to secure, and these bonds are not among them.

§ 1332. *The holder of railroad bonds is charged with notice of what appears on his bonds or on the mortgage securing them.*

1. Were the holders of the overissue or high numbered bonds put on notice of the fact that the bonds they held were in excess of what the terms of the mortgage deed authorized? The power of the railroad company to issue bonds was unlimited. It could issue as many as it chose. The bonds are therefore binding upon the railroad company. Were the holders of the bonds put upon sufficient notice of the facts that bonds held by them were not secured by the mortgage? The holders of the bonds were bound to take notice of what was contained in or indorsed upon their bonds; they were bound to take notice of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage. Royal British Bank v. Turquand, 6 Ell. & Bl., 327. Upon a reference to this mortgage deed, the purchaser of bonds would have learned that the mortgage was only intended to secure bonds at the rate of \$16,000 per mile. He was, therefore, bound to reasonable diligence to find out whether his bonds were secured by the mortgage deed or not. By a perusal of the laws of the state referred to in the mortgage, and also upon the face of the bond, he would have learned that the governor of the state of Alabama was authorized to indorse the bonds of the railroad to the amount of \$16,000 per mile of completed railroad; that the oath of the president and chief engineer of the railroad company as to the number of miles of completed railroad was required to be filed with the governor as the evidence of the fact that so many miles had been completed, and that he was authorized to act on that evidence in making his indorsement. By a reference to the bonds they would have seen that the governor had indorsed them and recited in his indorsement that he had done so in pursuance of law; they would have seen that the face of the bond recited that it was one of a series of numbered bonds, issued in accordance with the laws of the state above recited, secured by the indorsement of the governor, made in pursuance of the same laws, and was a

(a) These cases are in full under Bonds. The sections of the cases, in the order in which the cases are cited above, are as follows: §§ 1418-18; 908-1008; 1400-12; 1367-70; 1190-97; 921-925; 1240-42.

first lien upon the railroad and other property of the railroad company; and they would have seen that the bonds bore the indorsement of the trustees named in the mortgage deed, to the effect that they were the bonds described in and secured by the said mortgage.

§ 1333. *If bonds and mortgage of a railroad company satisfy inquiry the holder is not bound to look further.*

So it would seem that the very bonds and mortgage which put the purchasers upon inquiry lulled and satisfied inquiry. They had the right to presume that the governor had not violated his duty; that before he indorsed the bonds, he had on file the oath of the president and chief engineer of the railroad company, that a sufficient number of miles of railroad had been completed to authorize the indorsement. Besides this, they had the statement of the president and treasurer of the railroad company on the face of the bond, and of the trustees for all the bondholders upon the back of the bond, that the bonds were secured by the mortgage. To require the purchaser to go behind the indorsement of the governor, sustained, as they had the right to presume, by the oath of the president and chief engineer of the railroad company, and the statement of the railroad company itself, made by its president and treasurer, and of the trustees who were appointed to act for all the bondholders, would be to require every purchaser of a bond actually to measure the road for himself to ascertain its length. While, therefore, the mortgage put the purchaser upon inquiry as to the length of the road, the mortgage itself, and the bonds, with their statements and indorsements, answered the inquiry in such a way as to satisfy the most cautious and wary.

§ 1334. *There is no presumption that a bond of a particular number was sold first or last.*

But suppose the purchaser of bonds had ascertained the length of the road for himself by actual measurement, how would that help him to know whether his bonds were outside or inside the terms of the mortgage? The bonds all bear the same date, and fall due on the same day. Bond number one has, therefore, no advantage over any other bond, and no presumptions are to be indulged in its favor. There is no presumption of law that it was issued first or sold first. On the contrary, the presumption is that all were sold at the same time. Practically, we know that where a large number of bonds are put upon the market, the high numbered bonds are just as likely to be sold first as the low numbered bonds. So that if the purchaser should, before purchasing, ascertain for himself the precise length of the road, he would have no means of ascertaining whether his bonds were overissue bonds or not. The holders of the five hundred bonds highest in number would have precisely the same ground to say that the first five hundred are overissues as the holders of the five hundred have to say this of the last five hundred. I conclude, therefore, that while it is true that the mortgage limits the number of bonds to be secured thereby, and the holder of bonds might be required to take notice of that limitation, there was nothing to put him upon notice that the limit thus fixed had been exceeded; on the contrary, that all the presumptions and all the evidence was that it had not; nor if he had ascertained that the limit had been exceeded, was he bound to conclude from the fact that his bonds bore the highest numbers, that they were the overissue bonds, rather than others.

§ 1335. *Railroad bonds are numbered for convenience of identification, not to indicate preferences and priorities.*

But second, it is claimed that the mortgage was executed to secure sixteen

bonds of \$1,000 each to the mile, and no more, and that no larger number of bonds can be secured by it than its terms authorize; that when the officers of the railroad company had issued sixteen bonds to the mile, they had no power to issue a greater number to be secured by that mortgage, and the overissue is not secured. But the difficulty recurs that there is no way of ascertaining which are the overissue bonds. The law presumes they were all issued at one and the same time, and the purchaser has the right to act on that presumption. The bonds are numbered, not for the purpose of giving one number any advantage over another, but as a matter of convenience in their registration and identification.

§ 1336. *Where, from the unfaithfulness of trustees, there is an overissue of bonds, the rule that equality is equity is applied.*

The case is this: A mortgage is made to trustees to secure a given number of bonds, and, as a matter of security to the bondholders, the trustees are required to place their certificate upon the bond to the effect that it is described in and secured by the mortgage. The common trustees of all the bondholders are unfaithful, and certify to a larger number of bonds than were intended to be secured by the mortgage. The result is that all must suffer from the unfaithfulness of the trustees. But no part of the bondholders can say that the loss shall fall exclusively on others. It is a case for the application of the rule that equality is equity. A second mortgage bondholder would have the right to insist that the first mortgage should only secure bonds to the extent of \$16,000 per mile. But no first mortgage bondholder has the right to say that he shall be paid in full to the exclusion of others whose bonds purport to be secured by the same mortgage, and whose equities are equal to his.

The views expressed are illustrated by a fact in this case. The length of the railroad constructed is, in fact, only two hundred and ninety miles; five miles of the line between Chattanooga and Meridian is not the property of this road, but is leased from the Nashville & Chattanooga Railroad. So that, according to the mortgage, the company should have issued and the governor indorsed only four thousand six hundred and forty bonds; yet it issued four thousand seven hundred and twenty as for the entire line between Chattanooga and Meridian. There is, therefore, among the four thousand seven hundred and twenty bonds an overissue of eighty bonds. Now I ask what eighty bonds of the four thousand seven hundred and twenty are to be excluded from the benefit of the mortgage? There is no rule by which any can be excluded. They must all share *pro rata* in the proceeds of the mortgage property. As the proceeds of the property sold are not sufficient to pay more than one-fourth of the first mortgage bonds, no second mortgage bondholder is injured by allowing the overissue bonds to share in the proceeds, and no first mortgage bondholder can exclude any other from sharing in the proceeds. The result is that the prayer of petitioners must be granted.

CLAFLIN v. RAILROAD COMPANY.

(Circuit Court for South Carolina: 4 Hughes, 12-40; 8 Federal Reporter, 118-140. 1880.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is a suit in equity by holders of bonds of the South Carolina Railroad Company, secured by what is known as the second mortgage, to foreclose that mortgage subject to the lien of prior incumbrances. It naturally divides itself into six parts, which, for convenience, will be consid-

ered separately. They are: 1. The first mortgage. 2. The second mortgage. 3. The syndicate. 4. The sales of parts of the mortgaged property. 5. The attachments in Georgia. 6. The wharf property.

I. As to the first mortgage: The original name of the South Carolina Railroad Company was the Louisville, Cincinnati & Charleston Railroad Company. In that name, and under the authority of an act of the general assembly of South Carolina, passed December 12, 1837, the company issued bonds, payable part in London and part in Charleston, to the amount of £450,000, which fell due January 1, 1866. The payment of these bonds, principal and interest, was guarantied by the state, and secured by a statutory mortgage to the state on all the property and funds of the company in South Carolina. The name of the company was changed in 1843, and thereafter it was known as the South Carolina Railroad Company. In 1865 it became apparent that these bonds could not be met at maturity. Accordingly the general assembly of the state, on the 21st of December, 1865, passed another act, petitioned for by the company, authorizing the issue of other sterling bonds for the principal and interest of the first, and to be substituted for them. As the substitution was made the new bonds were to be guarantied by the state, and this guaranty was to have the effect of continuing the original statutory mortgage in force the same as if no change had been made. Some exchanges were effected under this authority, but on the whole the scheme was a failure.

In addition to the bonds thus put out, the company was in debt for other bonds, issued in 1849, amounting in all to \$175,000, which were to fall due, some on the 1st of January and some on the 1st of October, 1868. Under these circumstances, after negotiation with the bondholders, it was "deemed advisable, for the better securing of the said debts, that all the said bonds should be delivered up and canceled, and new bonds issued in substitution thereof; the payment of said bonds to be secured by a mortgage to trustees of the estate, real and personal, of the . . . company, including therein all the real and personal property . . . situate within the limits of the state of Georgia, and not included in the statutory mortgage created by the act of 1837." Thereupon the company "resolved to execute its bonds, payable in London, for an amount not exceeding in the aggregate the sum of £543,500, . . . to be dated on the 1st day of January, A. D. 1868, and to be payable to bearer, with interest thereon at the rate of five per cent. per annum, payable semi-annually, . . . on the presentation of the proper coupons at the office of Messrs. Dent, Palmer & Company, in the city of London, . . . which said bonds shall be substituted for the sterling bonds now outstanding and payable in London." The company also "resolved to execute certain other bonds, not exceeding in the aggregate the sum of £76,500, . . . to be dated on the 1st day of January, A. D. 1868, and to be payable to bearer, with interest at the rate of five per cent. per annum, payable semi-annually, . . . on the presentation of the proper coupons at the office of the . . . Company, in the city of Charleston, . . . which said bonds shall be substituted for the sterling bonds . . . payable in Charleston." It was also "resolved to substitute for the bonds issued in the year 1849, and payable in currency of the United States, . . . or to apply to the satisfaction of said bonds, upon such terms as may be agreed upon, the sterling bonds to be issued as hereinbefore provided for, so as to retire all the said bonds now payable in currency of the United States." "To secure the true and punctual payment of the said bonds, . . . the . . . Company . . . resolved to pledge and mortgage to the 'trustees named' all

the real estate, wherever situate, which is now owned or may hereafter be acquired by the said company, and all the rolling stock and other personal property used or necessary in the operating of said railway." In accordance with this scheme bonds, with a mortgage to secure them, to the full amount of £620,000, were executed by the company and certified by the mortgage trustees. Provision was made in the mortgage for a substitution of bonds, "payable in lawful money of the United States, with interest not exceeding seven per cent. per annum," for the new sterling bonds provided for, "upon terms to be agreed upon by and between said company and the bondholders desiring such substitution;" but the pound sterling, on all payments of sterling bonds, or the interest thereon made in Charleston, was "to be estimated at \$1.44½."

All the old issues of bonds have been taken up by exchange or otherwise and canceled, except:

1. Guaranteed Louisville, Cincinnati & Charleston sterling bonds.....	\$16,050
2. Guaranteed South Carolina sterling bonds.....	\$8,000
3. Bonds of 1849, Nos. 191, 192, 193.....	\$1,500
4. Guaranteed South Carolina sterling bonds, pledged to E. L. Trenholm in 1870....	\$5,400
5. One other bond of same character (No. 463).....	\$600
Against this the receiver now holds bonds originally put into the hands of the London agents for exchange, and which have not been used for that purpose.....	\$24,450
Currency bonds in the possession of and owned by the company when this suit was begun	\$2,000

It is conceded that there are now outstanding in the hands of *bona fide* holders and entitled to the benefit of the mortgage security —

Sterling bonds	\$309,550
Currency bonds.....	\$1,114,000

The same is true of items 1, 2 and 3 in the statement above showing the unredeemed bonds of the old issues.

It is also conceded that £620,000 was more than the old debt. If all the old bonds had been out when the new were issued, their aggregate, principal and interest, would not have reached this sum. They were not, however, all out. Some had been taken up by the company before that time; and it is apparent from the evidence that an issue of the whole amount of £620,000 would leave a surplus of \$400,000 and more, after fully providing for what were left. All the bonds of the new issue are now out except such as are held by the receiver. No questions are raised as to any save the following:

1. Amount pledged to several creditors of the company as security for moneys loaned, outstanding in the hands of the pledgees, October 1, 1872, when the second mortgage was made	\$114,000
2. Amount pledged to C. H. Manson as security, January 19, 1877.....	\$20,000
3. Amount pledged to B. F. Moise, agent, January 15, 1874.....	\$4,500
4. Amount of sterling bonds pledged to George W. Williams as security, May 14, 1874.....	\$18,000
5. Amount of loose coupons cut from bonds pledged George W. Williams, and past due when the bonds were sold under the pledge....	\$3,675
6. Nine guaranteed South Carolina railroad bonds, of £600 each, issued under the act of 1865, and pledged to F. L. Trenholm as security for money loaned, April 2, 1870.....	\$5,400
7. One bond of same character, being No. 463, pledged to the syndicate.....	\$600

The date of the second mortgage is October 1, 1872.

§ 1337. *What debts of a corporation are protected by a first mortgage, as against a second mortgage.*

Upon this state of facts several questions are raised which will now be considered. And first, it is insisted that the company could not issue under this

mortgage any bonds not actually used in taking up or retiring the old ones. The argument is, that the mortgage is in legal effect a contract between the company and the bondholders, by which it was agreed that no bonds were to have the benefit of the security thus created except such as were substantially "substituted" for the earlier issues. I am unable to discover any such contract. The mortgage purports to be made to secure bonds of certain descriptions, not exceeding in the aggregate £620,000. It recites other bond indebtedness secured by prior liens, and that the new bonds were to be substituted for the old. This may, and I think does, confine the lien of the new mortgage to an amount which, added to the prior specified incumbrances, shall not exceed the limit fixed, but that is all. Every bondholder can insist that the entire issue shall not exceed this sum, and every subsequent incumbrancer that the lien of the bondholders shall be correspondingly restricted.

That this was the understanding of the company no one can doubt. As early as January, 1871, the treasurer, in a report to the stockholders, took occasion to refer to the surplus of these bonds, which he estimated at \$450,000, and to say that if they could be disposed of at their value the finances of the company would be greatly relieved. At this time, one, at least, of the trustees named in the mortgage was a director in the company, and soon afterwards the issue of the surplus bonds, as collateral or otherwise, was commenced without objection from any one. As between the railroad company and *bona fide* holders of bonds certified in due form by the trustees and purporting to be issued under the mortgage, there can be no doubt as to the lien. The company is estopped from denying that the bonds it has actually put out are what they purport to be. None of the first mortgage bondholders complain. So far as appears, they are satisfied with the security they have got. The second mortgage covered only the equity of redemption which the company then had in the mortgaged property. Whatever bound the company then as to the extent of the mortgage lien, within its limit of £620,000, bound the second mortgage bondholders. It follows that to the extent the bonds were actually out, and in the hands of *bona fide* holders, when the second mortgage was executed, there can be no question as to their priority.

§ 1338. — *bonds held in pledge are protected.*

It is next claimed that the first mortgage bonds which are held in pledge as security for the notes of the company have no priority over the second mortgage. So far as this objection relates to the bonds held by the defendants Middleton, DeSaussure, Andrew Simonds, Rose and Drayton, pledged and in the hands of the present holders before October 1, 1872, it is disposed of by what has already been said. They were all actually issued under the mortgage and accepted as such. This the company will not be permitted to deny; neither can the second mortgagees. No one has ever supposed that a taker of negotiable paper, as collateral security for a debt contracted at the time, was not a holder for value. It follows that, to the extent necessary to secure the debts due these defendants respectively, the lien of the bonds they severally hold is good. The same is true also, I think, of the bonds held by the defendant Manson. The master has reported that these bonds were pledged after the second mortgage went into effect, and to secure a debt contracted at the time of the pledge. To this part of the report an exception has been filed. In my view this question is unimportant; but having looked into the evidence I am satisfied the exception is well taken. The bonds were out on pledge when the second mortgage was made, and the evidence leaves no doubt in my mind

that the present debt in the hands of this defendant is, in legal effect, a continuation of the old one with the original pledge transferred. This exception to the report will, therefore, be sustained, and the pledge classed among those outstanding October 1, 1872. As to the bonds for £18,000 pledged to the defendant George W. Williams, it is conceded they were not and never had been out of the control of the company when the second mortgage was made. They were executed and certified in proper form as bonds secured by the mortgage, and on the 9th of July, 1868, sent with others to the company's agents in London to be exchanged for old sterling bonds payable there. During the year 1874, when it was found they would not be needed to take up the old bonds, the company gave them in pledge to Williams, by whom they are now held, his note having been renewed from time to time until the commencement of this suit.

Soon after the report of the treasurer, in 1871, which has already been alluded to, the use of the surplus bonds as collateral was begun; and it is safe to say that between that time and the date of the second mortgage, all except those in the hands of the London agents had been put out in that way. None had ever been actually canceled, but all were kept on hand to be used as wanted. The second mortgage trustees might have required all on hand, when the second mortgage was made, to be retired, and the lien of the first mortgage confined to those already out. This, however, they did not see fit to do, and consequently the rights of those they represent depend on the effect to be given the instrument they took; and in this, as it seems to me, the intention of the company to keep the first mortgage on foot as a standing and continuing security to the full extent of the originally authorized issue is clearly manifested. The language is "that the mortgage herein above granted shall be and continue at all times subject to the lien of the mortgage executed by the South Carolina Railroad Company to Henry Gourdin, H. P. Walker and James M. Calder, and to all renewals or extensions of said mortgage or of the bonds secured thereby, to the full amount of the principal of said bonds." This, I think, means not only the principal of bonds then out, but of all that might thereafter lawfully be put out under the mortgage as well. The use which the company had been making, and which it was no doubt expected would be continued, of the surplus bonds remaining after providing for the old issues, must have been in the minds of all. One of the trustees under the second mortgage was at the time director of the company, and the idea of actually canceling any of the old lien in favor of the new seems never to have been suggested by any one.

§ 1339. *Bonds authorized by a first mortgage, not issued before the execution of a second mortgage, may be issued afterwards.*

The question is thus distinctly presented whether bonds then in the hands of the company, or which afterwards got there, could be issued or reissued so as to carry with them a lien under the first mortgage as against the second. This, as it seems to me, is a question of intention to be gathered from the language of the instrument considered with reference to the surrounding circumstances and the subject-matter of the contract. I am aware that ordinarily a debt once paid is extinguished, and that as a mortgage is but an incident of the debt it secures, if there is no debt there can be no mortgage. But here the point of the inquiry is whether the parties intended to apply this rule in all its strictness to the prior mortgage about which they were contracting. Certain it is that before the mortgage can be canceled the debt it purports to secure

must be shown never to have been created, or, if created, extinguished within the reading of the contract for security expressed in the mortgage. As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds become due. The contract with the individual bondholder is no more than that he shall have his due proportion of the security the mortgage on its face implies.

Railroad bonds are a kind of public funds. They are put on the market and dealt in as such. They are treated as current until past-due or actually retired. The mortgages provide for the security of the particular bonds they describe, and the company puts the bonds out from time to time as occasion requires. When a dealer finds such bonds not yet due in the hands of the company with the proper certificate of the mortgage trustee upon them, it has, I think, always been understood in the commercial world that he might buy in good faith with safety. The security has been considered a continuing one, and the bonds negotiable by the company so as to carry the mortgage security until they have become commercially dishonored, or something else has been done to deprive the company of its power of putting them out. In my opinion, a subsequent mortgage is not sufficient for this purpose, unless it in terms limits the lien of the prior mortgage to bonds actually out, and provides against reissues. As it would be within the power of the second mortgage to require that all bonds not out should be destroyed, so as to prevent their getting on the market, it may be doubtful whether, as against a *bona fide* holder, the limitation contained in the second mortgage would be of any avail, unless the bonds themselves had been actually canceled, or carry on their face the evidence of an extinguishment of their lien. It is so easy for one taking a subsequent lien to protect both himself and the public against loss in this particular, that, if he fails to do so, he should be treated as guilty of a commercial wrong, and made to suffer accordingly.

Take this case as an illustration. The first mortgage provides for an issue of £620,000. In point of fact the full amount was executed, properly certified, and left with the company to be put out as wanted. According to the construction I have already given the mortgage, the most one purchasing from the company need do before the making of the second mortgage was to inquire whether there was a surplus to be sold after taking up the bonds for which this issue was to be substituted. The second mortgagees voluntarily permitted the first mortgage to stand as it was. In this the second mortgage bondholders are represented and bound by their trustees. Whatever the company could do with the first bonds before it might do after, so far as any express limitations in the second mortgage were concerned. The lien of the first to its full amount was recognized, and nothing was said or done showing directly any intention to limit the power of the company under it. Suppose, instead of a mortgage to secure bonds, it had been, under full legislative authority for that purpose, to secure a certain amount and description of notes, like bank notes, to be put in circulation as money. Would any one insist that, if a subsequent mortgage should be given on the same property, which was in terms subject to the lien of the first, the company would in this way be prevented from keeping its old notes in circulation and taking them in and paying them out as before? Clearly not, I think. And why? Because the nature of the paper secured was such as to preclude such an idea. The notes were put out for circulation. They were to be used as money. When in the possession of the company they were for the time

being inoperative, but as soon as they were out their attributes as notes secured by the mortgage were all restored. Such would have been the evident intention of the parties, and such, I am sure, is the effect the courts would give to what had been done.

Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company their lien under the mortgage was suspended, but the moment they were out in the usual course of business it again took effect as of the time the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed.

§ 1340. *Bonds authorized to be issued by a corporation and pledged collaterally by the corporation are protected as against a second mortgage.*

As Mr. Williams took the bonds direct from the company at a time when he was himself a director, he is charged with notice of the facts. His lien, therefore, would not be good as against the second mortgage if the company had not the power to use them as it did and transfer a corresponding interest in the mortgage — as I think it had that power. The bonds were not due and had not, commercially speaking, been retired or extinguished. It follows that to the extent necessary to secure the note for which they are held, they are entitled to the benefit of the lien created by the terms of the mortgage. The two hundred and ten loose coupons held by Mr. Williams as collateral were cut from bonds pledged to him December 4, 1872. The original loan made at that date was continued by various renewals until 1878, when the bonds, with the matured coupons cut off, were sold and the proceeds applied to the payment of the debt. A part of the debt still remains unsatisfied and the coupons cut off are unpaid. I see no reason why they may not be enforced as valid claims under the mortgage. What I have said in respect to the other pledges is equally applicable to this. The same is true of the bonds held by the defendant Moise. There is no dispute as to the debt he holds or the fact of the pledge in good faith before this suit was begun and before the bonds were due.

The next questions presented are those connected with the guarantied South Carolina railroad bonds issued under the act of 1865, ten in number and £6,000 in all. Nine of £600 each are held by the syndicate as collateral to a note of the company to E. L. Trenholm, and the other is also held by the same parties under the general arrangement which will be considered hereafter. The facts are these: In 1866 the company had in some way got to be the owner of a considerable amount of the old Louisville, Cincinnati & Charleston bonds. For these were substituted an equivalent amount of bonds guarantied by the state under the act of 1865. All the substituted bonds were afterwards put out by the company so as to transfer the absolute ownership except the nine pledged to Trenholm. These were given to him in 1870 as collateral to a loan or loans then made. The original note given for the loan was renewed from time to time, Trenholm still retaining the pledge until it was purchased by the syndicate by whom the note and collaterals are now held.

I have no doubt that bonds guarantied by the state under the act of 1865, and actually substituted for a like amount of the issue under the act of 1837, bound the state and the company so as to carry with them the statutory lien

whether issued in lieu of bonds before owned by the company or not. When the company got the guaranty it could do with the new bonds what it pleased. If actually exchanged for bonds of 1838, and the old bonds taken up and canceled, they could be negotiated if they had the guaranty of the state on them so as to carry the statutory lien which the guaranty brought into operation. The first mortgage did not of itself vacate that lien. When a first mortgage bond was actually put out in place of the old one, the lien under the mortgage was substituted for that of the statute. Since the aggregate of the statutory and first mortgage liens cannot exceed £620,000 of principal debt, it is of no consequence to the second mortgagees whether the bonds ahead rank as one or the other of the acknowledged prior securities. The company was under no obligations to take up the old bonds and put out the new. So long as there were no more out in the aggregate than the second mortgage contemplated, there could be no ground of complaint. It has been suggested that the first mortgage was not to be used until the holders of the four-fifths of the old bonds had signified their assent to the scheme of substitution, and that this assent was not secured until 1871. If that be so, then these bonds were used with Trenholm before they could be properly exchanged. But, however that may be, I am satisfied that the pledge could lawfully be made at the time it was, and that when made it transferred as part of the pledge the lien which pertained to the bonds put out. This made Trenholm a holder for value, and his *bona fide* title protects all who claim under him, whether they be innocent or not. This is an elementary principle in commercial law. These bonds, therefore, to the extent they are required to pay the Trenholm debt, are to all intents and purposes part of the prior lien subject to which the second mortgage is taken, and to which it is asked the sale may be made.

As to guarantied bond No. 463, issued under the act of 1865, it was bought by the company in the market before due as an investment. It is clear from the evidence that the company never intended by this purchase to retire it from under the mortgage, but to keep it alive for future use if occasion might require. It was pledged to the syndicate under the agreement which will be considered further on. It was out, in fact, when this pledge was made; the title of the syndicate is good under the principles which I have just stated. As there is a claim of an overissue, however, and it seems to be conceded that the other securities, if sustained, will be more than sufficient to satisfy any balance that may be due that association, I think the injunction against the negotiation of this bond should be continued in force until such time as it shall be found whether there has been an overissue, or at least until it shall be found that the other securities will not pay the debt.

As to the alleged overissue, it is sufficient to say that the case is not now in a condition to enable me to determine that fact. I have already shown that the mortgage is valid to the extent of £620,000. The bonds now out on hypothecation by the company are understood to be more than sufficient to pay the debts for which they are held. In legal effect the amount thus issued is no more than is required for the purposes of the security. The receiver has now in his hands \$2,000. Those bonds may now be retired and canceled. It will be sufficient for all the purposes of this case to order a sale subject to a prior lien in this behalf not exceeding £620,000 as the principal sum. The difference between that amount and the actual bonds outstanding will not be sufficient to materially affect the sale, and it will be time enough to consider what shall be done with any excess of issue there may be when it becomes

necessary to enforce the earlier liens. This, I believe, disposes of all the questions presented under this branch of the case except as to the coupons taken up in 1877, and January, 1878, by the syndicate. These will be considered hereafter.

II. As to the second mortgage: At a meeting of the directors of the company, May 21, 1872, the following resolutions were adopted: "*Resolved*, As the sense of this board, that some measure of relief for the large and oppressive floating obligations of the company, incurred for valuable improvements, and for acquiring controlling interests in important connecting railroads in danger of passing into unfriendly hands, has become expedient; and further, that some means of providing for the annually recurring bond maturities should be devised; therefore, be it

"*Resolved*, That a second mortgage be authorized to be created upon the properties of the company to the extent of three millions of dollars (\$3,000,000); that bonds to that amount under said mortgage be executed to run thirty years, bearing seven per cent. interest, payable in semi-annual coupons, 1st April and 1st October, in the city of New York; and *whereas*, it is a duty we owe to the stockholders in putting a final mortgage upon their property to take every necessary precaution to secure to them the utmost value of the bonds to be issued under the said mortgage, and thereby to accomplish the end proposed, namely, the relief of the company's finances; therefore,

"*Resolved*, That the president be authorized to sell the said second mortgage bonds at not less than eighty per cent.; *provided, nevertheless*, that he shall take payment for the same in the following manner, viz.: one-third in cash and two-thirds in the unsecured bonds of the company at not less than eighty per cent., when these terms of payment shall be tendered."

At the same meeting it was voted that the privilege of making payment for second mortgage bonds by one-third in cash and two-thirds in non-secured bonds should extend for one year from the date when the bonds should be prepared for sale, and that the proceeds of the bonds should be applied exclusively to the extinguishment of the floating debt and of the unsecured bonds. The floating debt at this time amounted to something more than \$1,000,000, and the unsecured bonds to two millions. In accordance with these resolutions, a mortgage, and bonds of \$500 each, amounting to \$3,000,000, were executed — the mortgage recited the substance of the resolution of the directors, and especially that the proceeds of the bonds "were to be applied exclusively to the extinguishment of the floating debt and the retirement of said unsecured bonds." Of the new bonds it is conceded that two thousand two hundred and sixty-nine, amounting to \$1,134,500, were regularly issued, and are entitled to the full benefit of the mortgage security. Twenty-three, equal to \$11,500, are now in the hands of the receiver, subject to the orders of the court, and can, at any time, be canceled and retired. The rest are disputed, principally on the ground that, instead of being used to *extinguish* the floating debt and *retire* the unsecured bonds, they were pledged to the floating debt holders as collateral security, whereby the debt was perpetuated rather than got out of the way. For this reason, it is contended that the bonds so held are not entitled to an equal lien under the mortgage with those issued so as to bring about an actual extinguishment of old debts.

This makes it necessary to determine what bonds the mortgage really does secure. The controversy is between the bondholders, as to the extent of their respective rights, and, for the purposes of this part of the case, it may be ad-

mitted that if bonds in the hands of first takers, or their assignees with notice, were not regularly issued, their right to the benefits of the mortgage may be disputed by the other parties interested in the security. The mortgage is not to the unsecured bondholders, or floating debt holders, or to trustees for their security. It was made to secure bonds, the proceeds of which were to be applied to extinguish the one class of debts and retire the other. The mode in which this was to be done is not provided for. All that is left to the discretion of the company or its officers. No creditor can demand the bonds upon such terms as he may dictate. He must submit to what the company requires, or get no advantage from what has been done. His specific rights under the mortgage all depend on the bargain he makes with the company in that behalf. He may, if the company consents, exchange his claims for bonds, dollar for dollar, or less, or more; but until some arrangement has been made by which a bond secured by the mortgage becomes in some way connected with the unsecured bonds he owns, or the part of the floating debt he holds, he remains just where he was before the mortgage was made.

The original plan was to dispose of the bonds to be paid for in part by unsecured bonds and part cash. In this way, unsecured bonds would be actually retired by the transaction, and money obtained which could be used to pay the floating debt. At first the sales were at eighty per cent., but afterwards at seventy-five. The original time limited for taking advantage of this offer was one year, but this was extended. This plan was only partially successful. About \$670,000 of the unsecured bonds are now out, and but little money was actually realized with which to take up the floating debt. In the then financial condition of the country it seems to have been impossible to dispose of the second mortgage bonds on favorable terms, and to gain time the expedient was resorted to of extending the debt, and pledging the bonds as collateral. In this way it seems to have been supposed that temporary relief could be obtained until the bonds could be sold or converted at more satisfactory rates. In effect, the company said to the creditor: "Your debt is due; we have not been able to sell our bonds, and therefore cannot pay now, but if you will give us time, we will secure you with the bonds. If before the debt matures again we can sell the bonds, you shall have the proceeds; but if we cannot, you will have the security, which you can sell and get your money." It is impossible to say that this is not an application of the bonds, having for its object the extinguishment of the particular debt to which they were attached. If before the debt was due the company had itself sold the bonds, and with the proceeds paid what it owed, the application, it is conceded, would have been in exact accordance with the provisions of the mortgage, and this whether the bonds were disposed of at a greater or less price. I am unable to see any difference, so far as the mortgage is concerned, whether the sale is made by the creditor under the authority of the company, or by the company itself. In either case the proceeds of the bonds are applied to the extinguishment of the debt. As much may not have been accomplished as was hoped for, but the application that has been made is completely within the scope of the mortgage.

Another class of cases reported to the master shows even more pointedly the propriety of this construction. The unsecured bonds were from time to time falling due. Some of the holders were not willing, and perhaps not pecuniarily able, to accept the terms of exchange that were offered, but they were willing to surrender the obligations they held and take a note of the company for the amount due, payable at a future date, with second mortgage bonds

as collateral. Some of these propositions were accepted, and the notes with bonds pledged are now out. The old bonds have been retired by the use of the new. There was no actual exchange of bonds, but the new bonds were put in the way of being applied to pay for the old ones. All this, as it seems to me, is within the scope of the mortgage. It may not have been judicious management, but it was within the discretion of the company. The only contract with the individual bondholders is, that the mortgage security shall not be diverted from its designated uses. That bonds sold under a pledge to secure an old debt carry with them the mortgage, cannot, as I think, admit of a doubt. That being so, it is difficult to see how the pledgee, before sale, can be in a worse condition than a purchaser.

Coming now to the consideration of the particular cases, I find that they may properly be divided into four classes: 1. Debts actually owing at date of second mortgage, October 1, 1872. 2. Notes for unsecured bonds, actually taken up and retired. 3. Debts bearing date after October 1, 1872. 4. Debts contracted with the purchase of certain securities of the Greenville & Columbia Railroad.

As to the first and second classes, nothing need be added to what I have already said. They include all the cases embraced in Schedules 7 and 8 of the Master's Report. As to the third class, which includes the cases found in Schedule 8, while they are apparently debts contracted after the second mortgage, I think they are in reality only a continuation of those which existed before. The floating debt seems to have been for a long time a continuing thing. The amount now owing is substantially what it was when the mortgage was made. The creditors have changed, but not the debt. One note has been paid, directly or indirectly, by putting out a new one. It may not be possible, in all cases, to tell whether a debt to one was paid directly with money borrowed from another, but it is certain that, from a fund made up in part from new borrowings, old loans have been canceled. The object of the mortgage was to extinguish the existing debt. This is not done by simply changing the creditors. It may be true that the plan adopted by the company has, in fact, perpetuated the debt instead of extinguishing it, but it is clear that extinguishment was contemplated by what was done. If, in the end, the debt has been canceled by the use of the bonds in this way, there can be no doubt that the lien of the bonds would be good. I cannot believe that the pledgee loses his rights, simply because the plan has proved a failure.

As to the fourth class, the evidence shows that, before the execution of the mortgage, the South Carolina Railroad Company had, by the use of its unsecured bonds or otherwise, become the owner of a controlling interest in the stock of the Greenville & Columbia Railroad Company. The restrictions under which the mortgage was created represent that the large and oppressive debt of the company was incurred, in part, "for acquiring controlling interests in important connecting railroads, in danger of passing into unfriendly hands." The Greenville & Columbia road was an important feeder to the South Carolina Company. It owed a large debt to the Commercial Warehouse Company of New York, for which valuable collaterals were pledged; and, besides, there was danger that if the debt was not paid, the company would be put into bankruptcy. It was believed that such a result would be disastrous to the interests of the South Carolina Company. For this reason, the South Carolina Company seems to have treated the debt of the Greenville & Columbia Company as its own, and given its own notes to the Warehouse Company, secured by second mortgage bonds as collateral. This, I think, is fairly within the

scope of the mortgage. While, nominally, the debts of the two companies were distinct, the South Carolina Company was as deeply interested in saving the Greenville Company from bankruptcy as that company could be itself. As the new bonds were made to take care of the debt incurred in buying the stock of this company, I cannot but think their lien should be sustained.

In addition to this it appears that these bonds were first put out under this pledge February 19, 1873 — only a few months after the second mortgage. From that day until the commencement of this suit no complaint has been heard from any one. During all this time, one of the mortgage trustees was a director of the company. Many of the bonds have been sold under the pledge, and it is now too late to complain of their use or dispute their lien. In all matters affecting their security the bondholders are charged with the knowledge of their trustees. For the purpose of protecting their interests under the mortgage the trustees are their agents. Without pursuing this branch of the case further, it is sufficient to say that I am of the opinion that the holders of all bonds now out on pledge by the company are entitled to their proportionate share of the security of the mortgage, to the extent that may be necessary to pay the debts for which they are respectively held, and that all bonds sold under pledges carry their lien with them to the purchaser.

The only question in this part of the case which remains to be considered is as to the rights of the outstanding unsecured bondholders under the second mortgage. It is insisted in their behalf that the mortgage "was a contract between the corporation and its creditors, and constituted a complete and executed trust for the creditors of the company then holding its open and unsecured bonds and its floating debt, for the retirement and extinguishment of which the bonds secured by said deed were to be exclusively applied." From what I have already said it must be apparent that I cannot agree to this position. Whatever else the mortgage may be, it is not certainly an assignment for the benefit of these two classes of creditors. Neither, as I have before stated, was it intended in any manner for their security so long as they held their unsecured bonds or floating debt unaffected by any contract they may make with the company with reference to it. They can only get what they especially bargain for. Neither can they compel the company to make any particular arrangement in their behalf. The company was at liberty to make its own terms. The terms it once offered, the owners of the bonds now outstanding declined to accept. The bonds have since been used. To the extent of the rights under the mortgage they carry to the present holders the security that has been appropriated. It is now too late for others to come in for what is left, if there should be anything. They must be content to remain, as they always have been, unsecured creditors of the company.

III. As to the syndicate: All the questions connected with this part of the case have been disposed of by what has already been said, except those connected with the coupons of the first and second mortgage bonds taken up in New York and Charleston, and the attachment proceedings in Georgia. In respect to the coupons, the first inquiry is, whether they were bought by the syndicate or paid by the company with money advanced for that purpose by the syndicate. In the early part of 1877 the finances of the company were found by the directors to be again in an embarrassed condition. In some cases interest on the bonded debt had not been paid promptly at maturity, and there was danger of a general suspension unless relief could be obtained. The credit of the company was impaired and the available collaterals mostly in use.

Under these circumstances, certain of the wealthy and influential directors of the company associated themselves together for the purpose of giving the necessary help. This association is known in the pleadings as the "syndicate." They agreed with the company to use their personal credit either by loans, guaranties or indorsements, to an amount not exceeding \$200,000, in arranging for maturing coupons, interest or bills payable, and such other necessary debts as might mature up to and including January 1, 1878. In consideration of this the company pledged as security all the collaterals it could control and assigned the current future income as it accrued. In respect to the coupons the provision was as follows:

"And it is further understood and agreed that all coupons of the bonds of the South Carolina Railroad Company which may mature up to and including the 1st day of January, 1878, shall be purchased by such certain members of the board of directors hereinbefore set forth, or any one or more of them who may make advances for that purpose; and that upon their said purchase, the said coupons shall be held, kept and retained by such certain members of the board of directors as may purchase the same, as security for the amounts advanced for such purchase, and the coupons so purchased shall remain in the hands of such certain members of the board of directors, or their agent, who shall be entitled to all the rights, liens and priorities which may appertain to the same, and to the remedies which can or may be maintained and enforced thereon against the said South Carolina Railroad Company."

In respect to this part of the agreement, as reduced to writing and executed by the president in behalf of the company, it is insisted that it does not follow the instructions of the directors as contained in their resolutions conferring authority on the president in that behalf, and is not, therefore, binding on the company. While the original resolution may not have contemplated precisely such a contract as this, the evidence shows that the agreement as drafted was presented to the finance committee of the board and approved. After that it was executed. The company does not object, but on the contrary insists that it be carried into effect. Under these circumstances, the present complainants are in no condition to insist that the agreement as signed is not actually binding on the company.

That as between the company and the syndicate the coupons were bought, not paid, I think is clear. The argument to the contrary is based upon a misconception of the evidence contained in the books of the syndicate. These books have been treated by the counsel for the complainants as though they had been kept between the company and the syndicate; whereas they are in fact the books of the treasurer of the syndicate, in which are kept all the accounts of that association. The transactions are all entered as with cash — one side of the journal showing receipts and the other disbursements. Thus the first entry on the journal shows a demand loan made by the syndicate from the People's National Bank, consisting of the check of that bank on the Bank of New York for \$20,000, and premium thereon \$50, in all \$20,050. On the other side it appears that this check was sent to National City Bank of New York to purchase coupons due April 1. The railroad company was in no way connected with this transaction. The money was borrowed by the syndicate on its own obligations and sent to the City Bank, not for the credit of the company, but to buy the coupons. Next in order on the journal is a charge of certain notes or bills payable, made by the syndicate to raise money on. The company had nothing to do with these other notes, and was in no

manner whatever bound for their payment. On the other side of the account is found the amount paid for the discount of these notes. In this way is shown the proceeds of the notes made available for the use of the syndicate. On the other side of the journal is then shown the use made of the fund thus obtained. Among other things, the demand loan at the People's National Bank is taken up, and \$20,000 loaned the company. For this loan to the company the bills receivable account shows that the note of the company was taken — with the rest coupons were bought. These coupons were held by the treasurer of the syndicate as his vouchers for the note to that extent of the funds in his hands, and were charged in the coupon account of the syndicate. The company had nothing to do with this, and no charge is made against it on the books for any such use of this money. The same will be found true of all the other entries. When money was advanced to this company, a corresponding entry is, as a rule, found in the bills receivable account. Thus, when preparations were made for taking up the sterling coupons, payable in London, the money was advanced to the company and remitted to the agents in London. For these amounts the notes of the company were given to the syndicate. In this way the money was provided to *pay* the London coupons — not to buy them. Those coupons, when taken up, were extinguished, and no claim is made for them. They do not and never have appeared in the coupon account of the syndicate. The vouchers held for that advance were the notes of the company. It is not claimed that any coupons were bought except in New York and Charleston.

The books are in reality between the syndicate and its treasurer, and show in what way he has disposed of the funds in his hands. He is in effect charged with certain amounts of money, and his books show how it has been disbursed. On settlement he produces, as his vouchers, interest and expenses paid, coupons bought, and bills receivable belonging to the syndicate, consisting of the notes of the company taken up from others, or given for money advanced. It is an error to suppose that all the money charged to him was got from the company, or that all he paid out was either advanced to or charged in account against the company.

The next question is whether, as between the bondholders and the syndicate, the coupons were bought or paid. I shall not undertake to recapitulate the evidence on this point, but content myself with saying that the evidence, as I think, brings the case clearly within the rule laid down by the supreme court in *Ketchum v. Duncan*, 96 U. S., 659. Certainly there can be no claim of bad faith on the part of the syndicate. In Charleston full as much notice was given that the coupons were bought as was shown in the *Ketchum* case, and while there was no such notice in New York; the payments were made in a somewhat unusual way, and no one took the trouble to inquire why. I cannot but think that but for a misinterpretation of the books of the syndicate, this defense would not have been made. The arrangement with the syndicate was in every respect fair and honorable. All the members of the association were directors and members of the finance committee of the board. They were to be paid nothing for their services or the risks they assumed. So far as appears, they were in no condition to be personally benefited by what was done, and in all the mass of testimony not a word is to be found reflecting on their integrity in the matter. There is nothing whatever in the case to show that the transaction was anything else than a laudable effort on the part of the directors to tide the company over what was supposed to be but a temporary embarrass-

ment brought about by an unexpected falling off of business, with the hope that upon a revival of business a disastrous failure might be avoided. The bondholders have lost nothing. The money they got when they gave up their coupons is certainly worth as much as their security under the mortgage would be to them now.

But it is still further contended that if the coupons were in fact bought, they have since been paid. This might be true if, as has been assumed, the coupons were charged in general account against the company, and the payments made from time to time by the company applied to the satisfaction of the several items of charge in the order of their entry; but, as I have already shown, the transaction between the parties never took that form. The syndicate bought the coupons, and has never charged them in account against the company. They were originally taken and are still held as coupons. When money was advanced the company, a note was taken, or something equivalent done. No general charge in account was made. As moneys were paid by the company, they were credited at large, without any specific application. In this way, at the end of the year, when the contract expired, a large amount stood in open credit to the company. The parties then met and made their adjustments. The credit at large was all exhausted by its application to other purposes than taking up the coupons. This the parties were at liberty to do. From the books it is apparent that the application was actually made and carried into full effect long before this suit was begun. The coupons have never been taken up by the company or canceled, and there is no rule of law which requires that any moneys which have been paid by the company to the syndicate should be applied to their satisfaction, as against what has been done by the parties. The evidence leaves no doubt on my mind as to what the parties have done.

I see nothing in the reports of the directors to the stockholders to estop the syndicate. It is true that all the members of the syndicate were directors, and no doubt cognizant of what the report contained. No one could have been deceived by the accounts as stated. Evidently they were intended to show the results of the business of the year. At once the stockholders referred the report to a committee, which reported on the 10th of April that the syndicate had raised the money to take care of the interest, and were "protected by holding the coupons so taken up." Before the meeting was held to which this report was made, the default had occurred in the payment of interest on the second mortgage, by reason of which this suit was brought.

I think, therefore, that the syndicate cannot be required to refund the money paid by the receiver under a former order in this cause, to take up their first mortgage coupons, and that they are entitled to the benefit of the mortgage security applicable to those of the second mortgage, which they hold. If these coupons are not paid in full from the proceeds of the mortgage security, the balance will become part of the general debt against the company, for which the other collaterals were pledged under the original agreement. The assignment of the income of the road was vacated by the receivership, under which the possession was taken for the benefit of the second mortgagees. The question of the attachment by the syndicate in Georgia need not be considered, as it was conceded on the argument that, if the pledges which the syndicate held were sustained, the attachment need not be enforced.

IV. As to the sales of parts of the mortgaged property: So far as the trustees of the mortgages have sold the property and invested the proceeds, the securities they hold in lieu of the property are subject to the order of the court, and may

be dealt with as the circumstances require. If, as is stated, a part of other securities consist of first mortgage bonds, it is proper that they should be delivered up and canceled. Such an investment is equivalent to a substitution of the bond for the property, and an extinguishment of the mortgage lien to that extent.

In the present condition of the case, no decree can be rendered against the trustees for moneys in their hands, or which have been misappropriated. They have never been called on to answer, and there are no allegations whatever against them. It will be time enough to consider their liability when proceedings in that behalf shall have been instituted in some appropriate form. As to property sold and conveyed by the trustees of both mortgages, the lien of the mortgages is gone, and the title of the purchasers good. In respect to purchasers who have no conveyances from the trustees, the case is in no condition for a decree under the present pleadings, and, with the present parties, all that can be done is to order a sale of the property not actually secured by the second mortgage trustees, leaving the parties to such remedies as they may have.

V. As to the attachment by the People's Savings Bank in Georgia: After the great length to which this opinion has already been extended, I am not inclined to consider this question in detail. The conclusion I have reached is, that the lien of the attachment is superior to that of the mortgage in Georgia. The first record of the mortgage in that state was not good as against attaching creditors, and it is not pretended that this bank was not at liberty to pursue such remedies as the law gave for the collection of debts. As the amount is comparatively small, and it is better to have the property sold free of such a lien, I think an order should be made directing the receiver to pay any balance that may remain due after the funds reached by the process of garnishment, and not actually paid over to the receiver, have been applied, as far as they will go, to the satisfaction of the judgment that has been rendered in this action in the Georgia court.

VI. As to the wharf property in Charleston which is subject to the lien of certain special mortgages: There is no dispute about the priority of the lien of the special mortgages on this property, or as to the amount which is due. The decree should order a sale subject to these liens, and providing that the purchaser should not, by his purchase, become personally bound for the payment of any balance of the debt that may remain after the mortgaged property is exhausted, if he should not desire to pay off the incumbrances and keep the property.

At the close of the argument it was suggested that a reference ought to be made to determine what property was covered by the lien of the second mortgage. There is nothing in the case as it now stands to enable me to determine as to the necessity for such an order, or whether, if made at all, it should be before a sale. That question is therefore left open, to be settled when the details of the decree shall come up for consideration. A decree may be prepared in accordance with this opinion. The complainants are entitled to a sale of the mortgaged property, subject to the ascertained prior incumbrances; but until such a decree is prepared the injunctions heretofore issued in this cause shall remain in force.

DUNCAN v. MOBILE & OHIO RAILROAD COMPANY.

(Circuit Court for Alabama: 3 Woods, 567-582. 1877.)

STATEMENT OF FACTS.—There were several cases consolidated, all having reference to the affairs of the Mobile & Ohio Railroad Company. The principal question involved in the case as heard was, whether the coupons due in May and November, 1874, and taken up by Duncan, Sherman & Co., were purchased by them or paid by the company. That firm was the financial agent of the corporation, and Duncan, the head of the firm, was president of the corporation. The coupons were presented for payment at the proper place, and the holders were referred to the bank or agency of the firm for their money. The facts on this point appear sufficiently in the opinion of the court.

Opinion by BRADLEY, J.

In the case of the Mobile & Ohio Railroad Company, in which the various suits were consolidated, we have given the subject discussed a good deal of consideration, and have prepared the following opinion: The consolidation of these cases by agreement of the parties has relieved us from the necessity of deciding between the conflicting claims of the two sets of trustees. Both being before the court, as well as the parties beneficially interested, we can make a decree by which a sale of the mortgaged property will be valid and confer a good title. We are also relieved from making any adjudication in reference to the claim of priority of the Tennessee substitution bonds, which, by like agreement of the parties, is submitted to the consideration of another court.

The only question of importance remaining in the causes as now consolidated is, whether the interest coupons which became due in May and November, 1874, on the first mortgage bonds, are valid and outstanding securities, entitled to payment out of the proceeds of the mortgaged premises *pari passu* with the bonds from which they were severed, or even prior to said bonds, or whether they are to be deemed to have been paid and satisfied. The holder of these coupons (they not having been canceled) contends that they were purchased from the original holders thereof, and were not paid, and that by virtue of such purchase he is entitled to the full benefit of the mortgage security, and even to priority of payment over the coupons subsequently maturing, and over the principal of the bonds; and if not entitled as purchaser, that he is at least entitled to be subrogated to the rights of the original holders, as if the coupons had never been paid. The coupons in question were regularly presented for payment at the proper places appointed for that purpose, at or soon after the time when they became due; but the money due thereon was not received by the parties holding the same in the usual manner, at the place of presentment; but, after being examined, they were inclosed in a sealed envelope and indorsed with a memorandum of the number and amount, and returned to the holder or his agent, with directions to present them at some neighboring banking house, where they would get the money. It is claimed that they were not paid by the railroad company, but that Duncan, Sherman & Co. advanced the money on them with intent to hold them as subsisting securities, and that the holders consented thus to dispose of them. Parties contesting the validity of the coupons as an outstanding claim insist that they were in fact paid by the company or with funds procured by it for the purchase, and that the holders did not consent to a sale of them, and that Duncan, Sherman & Co., at all events, are estopped from setting up a claim to them as purchasers.

The right of the contestants to appear and oppose the claim of the present holders of these coupons is questioned. It is said that, having come before the master and proved their own bonds without making objection to the coupons which were also presented and proved before the master, they are now precluded from raising objections to them. The statement is not precisely accurate. One of the contestant bondholders at least did present objections before the master (which objections were adopted and presented by the complainants as trustees of the mortgage), and others have since been permitted to appear as defendants in the cause and file an answer, which they have done, raising the very issue. In addition to this, the trustees of the second mortgage filed an answer disputing the validity of the coupons. We think, therefore, that the issue has been distinctly and properly raised.

§ 1341. *In equity opposition to a claim of one creditor inures to the benefit of all.*

In the administration by a court of equity of a common fund subjected to the equal benefit of many creditors, if one creditor objects to the claim of another creditor and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all. It questions the right to participate in the common fund. If the other creditors, not opposing the claim, expressly waive all objections to it as to themselves, and consent that it shall participate, such waiver and consent can only affect the proportion of the fund to which they would be entitled if the disputed claim were excluded. It comes in for a portion of their share by equal participation with themselves. This proposition is so obvious that it needs no argument to support it.

§ 1342. *The effect of a waiver of objections.*

Waiver of objections to a claim is no proof of its validity except as against those who make the waiver. The waiver filed in this case, therefore, cannot have the effect of proof that the coupons in question were purchased by Duncan, Sherman & Co., except by way of estoppel as against those who filed it. The questions raised by the contestants, therefore, are properly raised, and must be met; and in considering these questions, it is necessary to inquire into the precise position which Duncan, Sherman & Co. occupied towards the company. It appears from the evidence that they had for some time previous to May, 1874, been the general financial agents of the Mobile & Ohio Railroad Company, and were interested in its capital stock and its various classes of securities, to wit: First mortgage bonds, second mortgage and other bonds, and also in its floating debt. They made the arrangements for the current funds necessary to meet its various liabilities from time to time; and, in short, may be said to have carried the concern for a considerable period. Wm. B. Duncan, the head of the firm, was for several years a director of the company, and in April, 1874, he became its president, and was invested with the most plenary control of all its financial affairs. By resolutions of the directors, adopted in April, 1874, after Mr. Duncan was elected president, he, as such, was invested with full discretion over the available securities held and owned by the company, in consolidated bonds, convertible bonds, first and second mortgage bonds and stock, and was authorized to sell or hypothecate the same; and the net earnings of the company were pledged for repayment of advances made by him for the purpose of meeting the May interest; and the consolidated bonds were pledged as a security for the floating debt. The truth is, the whole financial operations of the company were under the control and passed through

the hands of Duncan, Sherman & Co., both in 1873 and 1874, and up to the time of its open suspension in May, 1875.

The resources which thus came into their hands were derived from the earnings of the road, the disposable securities and stock of the company, and the temporary loans that were made from time to time. It appears from the annual report of the company for the year 1874 (the year in question) that its net earnings for that year were \$708,000, and the sales of bonds (mostly convertible) amounted to \$94,000, making a total of \$802,000. The contestants, in this case, contend that these sums were sufficient to have kept down and paid the interest of the first mortgage bonds and most of the other outstanding bonds of the company. This is true. The annual interest of the first mortgage bonds (including the Tennessee substitution bonds) was about \$730,000, and of all the bonds together, about \$880,000. But there was a large floating debt, which, at the close of 1873, amounted, according to the annual report for that year, to the sum of \$1,451,147.77, of which Duncan, Sherman & Co. held about \$191,000. They had, during the year, loaned to the company, on its notes, \$150,000, which had not been reimbursed, and the balance due them on general account at the close of the year was over \$41,000. This loan was made to enable the company to keep up the payment of its interest and to meet its current obligations. The floating debt was kept along by renewals and by pledging various securities of the company as collateral. During the year 1874 it was reduced about \$282,000, and as a part of this reduction Duncan, Sherman & Co. reduced their own debt \$174,000, bringing it down to about \$17,000. That is, they reimbursed themselves their temporary loan, with interest, amounting to \$160,000, and \$14,000 on their general account.

The contestants complain that this reduction ought not to have been made, especially so much of it as applied to the debt due to Duncan, Sherman & Co. They say that by the resolution of April, 1874, the earnings of the road were pledged for the May interest (which is the interest represented by one-half of the coupons in question), and that at all events this interest should have been paid. They also insist that the same considerations apply to the November interest. They contend that this was a specific appropriation of these funds, and that Duncan, Sherman & Co., occupying the fiduciary relations towards the company which they did, were bound in equity to carry it out, and had no right to assume the role of purchasers of those coupons. This position will presently be considered.

Besides reducing the principal of the floating debt as before mentioned, the sum of \$118,346 was absorbed in paying interest thereon, for the purpose of extending it and preventing the sacrifice of collaterals; the sum of \$139,296 was used to pay overdue coupons of the previous year, and \$128,000 to pay interest on convertible and other bonds; besides which, some of the assets were uncollected, amounting, in excess of what was realized from those of 1873, to \$47,726, and the sum of \$45,000 was paid on the Oktibbeha branch. These items together amount to \$478,368, and with the amount paid on the principal of the floating debt, made an aggregate of \$763,000. Various other claims in judgment, and otherwise, absorbed the balance. It is not pretended that any portion of the bonded interest accruing in 1874 (except as above stated) was paid by the company, unless the payment hereafter mentioned is to be regarded in that light. The only resources which the company had were actually disposed of as above stated.

In this state of affairs it was evident that the company was in a failing con-

dition. Its net income from the road (which was its only real resource) was insufficient to pay the interest on its funded debt, to say nothing of the floating debt. The great mass of its property was primarily liable to its first mortgage bondholders. If subjected to an indiscriminate scramble of judgment creditors, the rolling stock and outside property would be sacrificed and scattered, and the whole security would be ruined. What was to be done? The first mortgage bonds were not due, and if the earnings were applied to the payment of the interest accruing on them, the bondholders could not take possession of the property, nor bring a suit for foreclosure. At the same time, other creditors were clamorous for every cent which could be realized. Duncan, Sherman & Co. conceived the idea of purchasing the coupons with their own funds, or funds provided by them for the purpose, perhaps in the hope of preserving the credit of the company until a change for the better should enable it to avoid ultimate bankruptcy. It is evident, moreover, that this would place it in their power, if the resources of the company should continue inadequate to redeem the coupons, to take proceedings for administering on the property for the protection of the bondholders, and of putting the company into a course of liquidation.

The mode of carrying out the plan of purchasing the coupons was this: Funds were furnished or provided for by Duncan, Sherman & Co., in some bank near the usual place of payment, for the purpose of taking up the coupons on their account. When presented for payment by the holders, the course pursued is stated by the master in his report, as follows: "As to the mode and manner the evidence is very complete. For instance, the coupon holders who presented them for payment at the company's office in Mobile were handed back their coupons after they had been verified or counted by the treasurer or his assistant, and placed in envelopes indorsed with memoranda of the number and amounts, and the holders were told to take them to the Bank of Mobile, where they would be paid. On presentation at said bank to the teller, the coupons were retained by the bank officer and the bank's checks or money were given for them. The mode and manner of payment in London and New York was not the usual mode. In London the coupons for May, 1874, were taken up on instructions from Duncan, Sherman & Co. by the Union Bank, and for November by the Credit Foncier. In New York, the evidence is that they were not paid in the usual manner, and that the holders were informed that they were being purchased, and held uncanceled.

"Evidence was adduced to show that a portion of the original owners did not know that the company was not paying. It appears that some did not know, and did not inquire. Others did and were fully informed. Payment was not made at the treasurer's counter as usual. It appears that all who inquired were informed of the nature of the payment. There was evidence to show that a written notice was posted up in view of the treasurer's office. The evidence is full that the purchasing agencies and the officers of the company fully understood the transaction. Evidence offered to show that the matter was kept secret, failed."

The master further finds as follows: "The proof is full as to the intent of Duncan, Sherman & Co., and their agents—the Bank of Mobile, Credit Foncier, etc., with the assent of the company, not to pay or satisfy said coupons so as to extinguish them; but, on the contrary, their plainly expressed intention was that they should be purchased and remain uncanceled, with all the rights that

purchasers would have. Their taking up the coupons without extinguishment was with the consent of the company, by the express agreement with its officers that they were to be purchased with all lien rights as existing mortgage security, preserved and held until the company could pay them." These findings of fact have been excepted to by the contestants, but after a careful examination of the evidence, we think they are substantially correct.

§ 1343. *Financial agents of a corporation may buy up its liabilities, but are bound to the utmost good faith.*

Now, upon this state of facts several questions arise: *First.* Were Duncan, Sherman & Co. precluded from purchasing the coupons by the relation in which they stood to the company? We do not see that this can be successfully maintained. As financial agents of the company, and general managers of its pecuniary concerns (Wm. Butler Duncan being the chief executive officer), it is undoubtedly true that they were bound to preserve entire good faith. Had they been furnished by the company with the requisite means to pay the coupons, it would have been acting in bad faith towards it to have purchased the coupons in this manner, without the company's consent; and, under such circumstances, even to have purchased them with its consent, and kept them on foot, for the purpose of getting possession of the company's property, would have been a fraud upon other parties interested in that property. But the requisite funds were not furnished by the company. Money enough was furnished, it is true, to have paid these particular coupons, by leaving everything else unpaid. But the company was overwhelmed with floating debt, and creditors were pressing to be paid. Securities to a large amount had to be pledged as collateral to prevent instant prosecution, and debts had to be extended by payment of interest to prevent the sacrifice of the securities. Duncan, Sherman & Co. cannot justly be condemned for paying these pressing obligations as far as the money in their hands would go. Immediate bankruptcy would have resulted from a contrary course. It is true, the resolution of April pledged the earnings of the road for the advances obtained by the president for the purpose of meeting the May interest; but this pledge was only made for his security, and did not prevent him from paying other debts with such earnings if he found it expedient, and for the company's interest to do so. And even if the company could have insisted on such an appropriation, it did not, but assented to his purchasing the coupons instead of paying them.

As to Duncan, Sherman & Co. paying their own temporary loan to the company, it does not appear but that they had claims of the highest equity to be paid. They had made this loan to enable the company to pay its interest. It was a confidential debt for a loan made to relieve the company from its pressing embarrassments.

Secondly. Was the transaction, as it actually occurred, a purchase of the coupons? It is insisted by the claimant that his possession of the coupons uncanceled is *prima facie* evidence of his title to them, with all the rights of a purchaser. So it would be if the evidence did not disclose the exact nature of the transaction. Whilst he has possession we know how he got that possession, or, rather, we know how Duncan, Sherman & Co. got it, and it is conceded that the present holder, having obtained them after maturity, is affected by the consequences that attach to the transaction. If they were paid, he cannot hold them as unpaid. He has the same title to them which Duncan, Sherman & Co. acquired, and no greater.

§ 1344. *What constitutes a purchase and what a payment of coupons.*

Then was it a purchase? We are clearly of opinion that there was no purchase, unless there was an intent on the part of the original holder to sell. This is almost a self-evident proposition. And where, as in this case, a sale, as compared with payment, is prejudicial to the holders' interest by continuing the burden of the coupons upon the common security, and lessening its value in reference to the balance of the debt, the intent to sell should be clearly proved. Such an intent may be inferred, however, when the holder has actual notice that purchase, and not payment, is being made, and when, having such notice, he consents to take his money. So the same result will follow if the holder acquiesces in the transaction, on being subsequently informed that payment was not made by the debtor company, but was made by a third party intending to purchase the coupons and keep them, subsisting and uncanceled. In such case the holder would undoubtedly have a right to repudiate the transaction, and demand possession of his coupons by returning the money received for them. But, not doing this, he will be presumed to acquiesce in their transfer.

§ 1345. *Circumstances sufficient to put parties on inquiry.*

In the present case many of the parties had actual notice of the nature of the transaction, and all who inquired were informed in relation to it. The circumstances of the payment were calculated to excite inquiry. The coupons were not paid in the usual manner, by the officers or agents of the company, at the place designated for payment; but, after examination, were sealed up in an envelope, and the holder was directed to go elsewhere to get his money. At the place to which he was directed to go he received it, and delivered up his coupons. They were not delivered up to the company. This was an indication that they were not to be canceled. The great advantage to the holder of payment by the company would have been the cancellation of the coupons, so as to diminish the burden on the mortgage security. But he delivered his coupons to a third party, who furnished him the money for them. He ought to have known that that party, whether the bank itself, or some person by whom it was employed and furnished with funds, would at least keep the coupons for its security until the company could pay them. We think that this was notice to the holder, at least sufficient notice to put him upon inquiry. It may not have been, and we think it was not, sufficient notice to bind him absolutely to a contract of sale. He might still have repudiated the transaction by returning his money. But it was certainly sufficient to put him upon inquiry; and his subsequent acquiescence confirmed the title of Duncan, Sherman & Co., whose money he received. Had any other parties than Duncan, Sherman & Co. placed themselves in the gap as they did, and taken up the coupons with their own funds, hardly a doubt would have been raised as to their title to keep the coupons until they were reimbursed. In our judgment, therefore, Alexander Duncan, who obtained the coupons from Duncan, Sherman & Co., is justly entitled to hold them as subsisting demands against the mortgage security.

§ 1346. *Coupons severed from bonds are not entitled to priority over the bonds or subsequently maturing coupons. See Bonds, XV.*

But the claim put forward, that these coupons are entitled to priority over the principal and over coupons subsequently maturing, we regard as utterly untenable. This would be giving to coupons a far greater sanctity than justly belongs to them. They are created as a mere matter of convenience for

collecting the interest. According to them, the additional quality of being severed from the bond, and of being passed from hand to hand, does not clothe them with any additional privileges prejudicial to the bond itself. They have no preference or priority over it, any more than unpaid instalments of interest would have if there were no coupons to represent it. They all stand, as to the security, on the same platform of equality with the principal, unless the mortgage or deed of trust contains some provision to the contrary, which is not the case here (*Dunham v. Railway Co.*, 1 Wall., 254; §§ 1557-58, *infra*); and this is so whether the principal is due or not. It is suggested that the holder of the coupons may cause the mortgage to be foreclosed and the property to be sold to obtain payment. But he cannot do this to the prejudice of the principal. He must bring in the bondholders who are equally entitled to the benefit of the common fund. The latter are not obliged to stand by and see the entire security taken from them at the instance of the owner of the coupons.

§ 1347. *The rule as to equality of claims secured upon a common fund.*

Where a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all; and this whether they have all matured or not. It is true, the bondholders themselves, when they have not parted with their coupons, or when an instalment of interest or principal not represented by coupons is due, may foreclose and sell the whole security for the satisfaction of the amount due, and thus deprive themselves of security for the residue of the debt. But that is because the matter is all in their own discretion, and no other person is injured by their acts. But it does not follow that the holder of separated coupons can do likewise. Equity will not allow him to pursue the entire security, or any part thereof, to the prejudice of other parties equally interested in it. The conclusion to which we have come as to the right of *Duncan, Sherman & Co.* to hold the coupons by purchase renders it unnecessary to discuss the question of subrogation so ably argued by counsel. Whilst we are inclined to think that, as holders of junior securities, *Duncan, Sherman & Co.* would have been entitled to pay the coupons, and hold them by way of subrogation, we are not prepared to concede that this would have placed them on equality with the bondholders. No one can deprive the creditor of his security, or any part of it, without his consent, until his whole debt is satisfied. Sureties and others entitled to the privilege of subrogation, paying only part of the debt, must be postponed to the creditor until they are in a position to demand all his securities.

We observe that many exceptions have been taken to the report of the master and to his rulings, in the course of the examination before him, which we have not yet mentioned. We have examined these exceptions, however, but from the view of the case which we have taken, we do not consider them to be material. A decree should be rendered in the cause in conformity with the views expressed in this opinion, that is to say, that *Alexander Duncan* is entitled to come in on an equal footing with the first mortgage bondholders for the amount of the first mortgage coupons held by him, including in the term "first mortgage bonds" all bonds which are ranked by the master in his report as belonging to the category of first mortgage bonds, such as ten year interest bonds, etc., so far as they represent coupons actually unpaid, excepting, however, the *Tennessee* substitution bonds, which are not passed upon by us, and are not to be affected by the decree, but which are to take their rank of priority according to the decision of the court which has cognizance of the controversy relating to said bonds; also, that the mortgaged premises should be sold as an entirety

to pay and satisfy, first, the said first mortgage bonds and coupons, and then the other securities of the company in the order reported by the master, saving and excepting the rights of the holders of the Tennessee substitution bonds, as before provided. Also, that masters should be appointed to make the said sale and to execute the decree; and that the sale should be duly advertised by them, and fixed to take place on a day named; and that, upon such sale being made, first mortgage bonds and first mortgage coupons should be received in payment in place of cash, when tendered for that purpose, except a sum sufficient to pay the costs and expenses of the various litigations, and the expenses and compensation of the commissioners, reserving for further order the *status* of the said Tennessee substitution bonds in respect to said sale.

Provision should also be made in the decree for executing all proper deeds and conveyances necessary to perfect the title; and all further equities and directions necessary to be made between the parties, or with regard to the mortgage fund, are to be reserved at the foot of the decree. The counsel of the complainants in the original suit will prepare a draft of the decree, and submit it to the opposite counsel, before presenting it to the court, in order that if the terms be not agreed on they may be then settled.

WOODS, J., concurred.

RAILROAD COMPANY v. HOWARD.

(7 Wallace, 392-416. 1868.)

APPEAL from U. S. Circuit Court for Iowa.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Subscriptions were made to the Mississippi & Missouri Railroad Company by certain municipal corporations through which the railroad was located, and the proper authorities of those municipalities issued their bonds in payment of such subscriptions to the stock of the railroad company. Coupons were attached to the bonds providing for the payment of interest semi-annually, and the railroad company, as the immediate transferees of the bonds, guarantied that the principal and interest of the bonds should be paid as stipulated by an instrument in writing on the back of each bond, duly executed by the proper officers of the railroad company. Obvious purpose of that guaranty was to augment the credit of the bonds in the market, and to facilitate their sale to capitalists, to raise money to construct their railroad and put it in operation. Complainants became the lawful holders for value of a large number of these bonds, and the guarantors as well as the obligors neglecting and refusing to pay the coupons as the same fell due, they brought separate suits against those parties, and recovered judgments against them respectively, as alleged in the bill of complaint.

Executions were issued, as well on the judgment against the obligors of the bonds as on the judgment against the guarantors of the same, and the return of the officer in each case was that he found no property. Prior to the date of those judgments, the railroad company had executed several mortgages of their railroad to secure the payment of their bonds, issued at different times, to the amount of \$7,000,000, and the company had become insolvent. They had also become liable as guarantors of the municipal bonds already described, and others of like kind received and used for the same purpose, to the amount of \$300,000, the payment of which was repudiated by the respective municipi-

pal corporations, by whose officers the bonds were issued. Unable to pay the debts of the company, the stockholders of the same determined to sell their railroad. Arrangements were accordingly made between the stockholders and the holders of the mortgage bonds to get up the stock of the company through certain agents or trustees, and to execute and deliver to the several holders of those bonds, and to the owners of the stock of the company, certificates of the amounts that they respectively would be entitled to receive under a distribution of the consideration of the proposed sale. Amount of the consideration, as assumed in the arrangement, was \$5,500,000, and the terms of the arrangement were that the consideration should be distributed among the parties interested therein, according to a prescribed scale, as set forth in the bill of complaint.

By that scale of distribution, sixteen per cent. of the amount, to wit, \$552,400, were to be paid to the owners of the capital stock, but none of the stipulations in the arrangement made any provision for the payment of the bonds or coupons belonging to the complainants. Authorized to carry the arrangement into effect, the proper agents of the company offered to sell the entire property of the railroad to the Chicago & Rock Island Railroad, and the latter company, on the 1st day of November, 1865, accepted the proposition, and the parties entered into written stipulations upon the subject. Those proposing to sell agreed that they would, with all possible dispatch, cause the mortgages on the railroad to be foreclosed, and that the entire property of the company, real and personal, should be sold and conveyed to trustees, and that the same should be transferred to such incorporated company in that state as the other contracting party should designate as the purchaser of the property, if such designation was made within the time therein prescribed. By the terms of the agreement, the Chicago & Rock Island Railroad Company agreed to cause to be incorporated in that state a company which should make the purchase, as proposed, for the sum of \$5,500,000, and complete the railroad to the place therein mentioned, and the other party stipulated that the purchaser at the foreclosure sale should convey the railroad to the new company for that consideration. Pursuant to that agreement the mortgages were foreclosed, and the new company, to wit, the Chicago, Rock Island & Pacific Railroad Company, was created under the general laws of the state, and the entire property of the railroad was sold at the foreclosure sale, and the purchasers conveyed the same to the new company as stipulated in the agreement. All the stockholders in the old company became thereby entitled, as against all those who joined with them in negotiating the sale, to a *pro rata* share in the sixteen per cent. of the consideration reserved to their use under the scale of distribution prescribed in that arrangement.

Statement of the bill of complaint is, that the new company is ready to pay that amount to the stockholders of the old company, and the complainants contend that the facts herein recited show that they are entitled to have their whole debt paid before any portion of the fund derived from that sale shall go to the stockholders of the old company, which is insolvent, and will become extinct when that arrangement is fully carried into effect. Views of the complainants were sustained in the court below, where it was ordered, adjudged and decreed that the complainants and the other parties who were duly admitted as such, and joined in the prosecution of the suit, were entitled, as creditors of the railroad company, to so much of the purchase money as was agreed between the parties, and intended to be reserved and distributed among

the stockholders of the company, and from that decree, as more fully set forth in the record, the respondents appealed.

§ 1348. *The property of a corporation is equitably liable for its debts.*

I. Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid. Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the moneys so received and in their hands.

§ 1349. *Money derived from the sale of capital stock is a fund for the payment of debts.*

Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than *bona fide* creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts. Story's Eq. Jur. (9th ed.), § 1252; Mumma v. Potomac Co., 8 Pet., 286 (CORPORATIONS, §§ 1441-42) Wood v. Dummer, 3 Mason, 308 (CORPORATIONS, §§ 378-388); Vose v. Grant, 15 Mass., 522; Spear v. Grant, 16 Mass., 14; Curran v. State of Arkansas, 15 How., 307 (CORPORATIONS, §§ 1316-29).

Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders, and all others interested in its pecuniary affairs, and any one receiving any portion of the fund by voluntary transfer, or without consideration, may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation. None of these principles are directly controverted by the appellants; but they deny that the sixteen per cent. agreed to be paid to the stockholders belonged to the corporation.

Claim of the complainants to the fund in controversy rests mainly upon two propositions, which present mixed questions of law and fact: 1. That they are creditors of the railroad company, as evidenced by the judgments set forth in the record. 2. That the fund in question was assets of the railroad company.

Authority of the municipal corporations to issue the bonds purchased by the complainants is not denied; but the appellants contend that the railroad company had no power to guaranty their payment, and they also deny that the railroad company had any title or interest in the fund in controversy. On the contrary, they insist that it was a concession made by the holders of the mortgage bonds to the stockholders as a "gratuitous favor" to save them from a total loss, and to induce them not to interpose any obstacles in the way of a speedy foreclosure of the several mortgages. Express allegation of the bill of complaint is that the bonds issued by the municipal corporations were received by the railroad company in payment for subscriptions to the stock of the company, and that the corporation, as the holders of the same, guarantied their payment and sold them in the market, and the stipulation of the parties is that all the allegations of the bill of complaint not denied in the answer are to be considered as admitted. Apart, therefore, from the effect of the judgments, those allegations must be taken to be true, as they were not denied in the answer.

Power to make contracts, and acquire and transfer property, is conferred upon such corporations by the laws of the state to the same extent as that enjoyed by individuals; and the record shows, to the entire satisfaction of the court, that the instrument of guaranty was executed and the bonds sold in the market as the means of raising money to construct the railroad and put it in operation. Counties and cities may issue bonds under the laws of that state in aid of such improvements; and railway companies are expressly authorized to receive such securities in payment of subscriptions to their capital stock, and to sell the bonds in the market for such discount as they think proper.

§ 1350. *Power of a railroad company to guaranty municipal bonds issued in its aid.*

Abundant proof exists in this record that railway companies may issue their own bonds to raise money to carry into effect the purposes for which they were created; and it is difficult to see why they may not guaranty the payment of such bonds as they have lawfully received from cities and counties, and put them upon the market instead of their own, as the means of accomplishing the same end. Undoubtedly they may receive such bonds under the laws of the state, and if they may receive them, they may transfer them to others; and if they may transfer them to purchasers, they may, if they deem it expedient, guaranty their payment as the means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose. Considered, therefore, as an open question, the court is of the opinion that the objection is without merit. Private corporations may borrow money or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business. *White Water Valley Co. v. Vallette*, 21 How., 424; *Partridge v. Badger*, 25 Barb., 146; *Barry v. Merchants' Ex. Co.*, 1 Sandf. Ch., 280; *Angell & Ames on Corp.*, § 257; *Story on Bills*, § 79; *Farnum v. Blackstone Canal*, 1 Sumn., 46.

Railroad companies are responsible in their corporate capacity for acts done by

their agents, either *ex contractu* or *ex delicto*, in the course of their business and within the scope of the agent's authority. *Philadelphia, etc., R. Co. v. Quigley*, 21 How., 202. Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just expectations which their own conduct has superinduced. *Bargate v. Shortridge*, 5 H. of L. Cas., 297; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How., 397; *Bissell v. City of Jeffersonville*, 24 id., 300. Tested by any view of the evidence, it is quite clear that the corporation possessed the power to execute the instruments of guaranty appearing on the back of the bonds, and the necessary consequence of that conclusion is that on the default of payment they became liable to the holders of the same to the same extent as the obligors. Present suit is not one against stockholders to compel them to pay a corporate debt out of their own estate, but it is a suit against the corporation and certain other parties holding or claiming assets which belong to the principal respondent to prevent that fund from being distributed among the stockholders of the corporation before the debts due to the complainants are paid. Viewed in that light it is obvious that the stockholders are precluded by the judgment from denying the validity of the instruments of guaranty, and that the judgments are conclusive as to the indebtedness of the corporation.

§ 1851. *After the discharge of a railroad mortgage the property embraced in it belongs to the corporation and is subject to its debts.*

II. Second defense is that the fund in question did not belong to the corporation as contended by the appellees.

Extended discussion of that proposition is not necessary, as the evidence in the record affords the means of demonstration that it is not correct. Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected and refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation, and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage, as in this case, may exact the whole amount of the bonds, principal and interest, or they may, if they see fit, accept a percentage as a compromise in full discharge of their respective claims; but whenever their lien is legally discharged the property embraced in the mortgage, or whatever remains of it, belongs to the corporation.

Conceded fact is that the property and franchises of the railroad were sold for the consideration specified in the record, and that the mortgage bondholders discharged their lien for eighty-four per cent. of that amount, and that the residue of the purchase money remained in the hands of the purchaser discharged of the lien created by the mortgages, and the complainants contend that it was clear of all liens except that of the creditors. Such a corporation cannot be said to own anything separate from the stockholders, unless it be the tangible property of the company and the franchises conferred by the charter, and it is conceded by both parties that the fund in question was derived from a voluntary sale and transfer of those identical interests. They were heavily incumbered by mortgages, and our attention is called to the fact that the pro-

visional arrangement was negotiated by the stockholders and bondholders; but the decisive answer to that suggestion is that the two railroad companies were parties to the subsequent contract of sale, and that they both agreed to all the terms of sale and purchase and to the mode of transferring and of perfecting the title. Prompt payment was secured by the bondholders, and it is highly probable that they received under that arrangement a larger portion of their claims than they could have obtained in any other way.

§ 1352. *Though a contract for foreclosure be unauthorized, yet if ratified and carried into effect, it must stand.*

Another suggestion of the appellants is that the contract of sale was unauthorized; but the suggestion is entitled to no weight, as the contract was ultimately carried into effect by the consent or subsequent ratification of all parties interested in the subject-matter of the sale.

§ 1353. *In a creditor's suit against a corporation, the stockholders need not be individually made parties if their interests are fully represented.*

Next objection is that there is such a want of parties that a court of equity cannot grant the relief as prayed. Principal suggestion in support of this proposition is that the stockholders should have been made parties, but the court is of a different opinion, because their interest is fully represented by the parties before the court. Respondents in the suit are the two railroad companies and the committee or trustees chosen and appointed by the stockholders and bondholders through whom the provisional arrangement was perfected and the contract of sale was carried into effect. Neither the stockholders nor bondholders were necessary parties under the circumstances of this case. *Bagshaw v. Railway Co.*, 7 Hare, 131; *Holyoke Bank v. Manufacturing Co.*, 9 Cush., 576; *Hall v. Railroad*, 21 Law Rep., 138; 1 *Redfield on Ry's*, 578; *Boon v. Chiles*, 8 Pet., 532; *Story v. Livingston*, 13 id., 359.

§ 1354. *Written contracts inuring to the benefit of the bearer are not necessarily negotiable.*

Remaining objection is, that the certificates issued to the stockholders in lieu of their stock were negotiable, and that they may be in the hands of innocent holders; but the objection is entitled to no weight, because it is based upon an erroneous theory. Written contracts are not necessarily negotiable simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owner. *Mechanics' Bank v. Railroad Co.*, 13 N. Y., 599. Particular mention is not made of the defense that the complainants have an adequate remedy at law, as it is utterly destitute of merit.

Decree affirmed.

§ 1355. Preferred stock issued under agreement that interest shall be paid upon it, and that it shall be a lien taking precedence of any subsequent indebtedness, though not secured by mortgage, creates a lien as between the parties. It also has priority as against subsequent mortgagees having notice of the agreement under which it was issued. *Skiddy v. Atlantic, Miss. & Ohio R. Co.*, 8 Hughes, 820 (§§ 1539-67).

§ 1356. Non-negotiable contract.—Written contracts are not necessarily negotiable because by their terms they inure to the benefit of the bearer. A certificate by which a person acknowledges that he has received a certain number of shares of stock in a corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free, in the hands of the transferee, from the equities which would have affected it in the hands of the original holder. *Railroad Co. v. Howard*, 7 Wall., 893 (§§ 1348-54).

§ 1357. *Mortgage executed outside the state where incorporated.*—As against *bona fide* holders of bonds secured by mortgage it is no defense that the mortgage was authorized and executed beyond the limits of the state where the road is located and has its legal existence. The company is estopped to raise objection, after it has received the benefits of the transaction by sales of its bonds to persons taking them in good faith. *Galveston Railroad v. Cowdrey*, 11 Wall., 459 (§§ 1297-1304).

§ 1358. *Bona fide holders of negotiable bonds* are presumed to hold them for their full value, and their title can be impaired only by specific allegations distinctly proved. *Bronson v. La Crosse & Milwaukee R. Co.*, 2 Wall., 288 (§§ 1460-66).

§ 1359. One holding railroad bonds as collateral security is a *bona fide* holder for value, and is entitled as such to enforce their payment. *Allen v. Dallas & Wichita R. Co.*, 3 Woods, 816 (§§ 1502-1508).

§ 1360. *Demand of payment at the place where railroad bonds are made payable* is not necessary, when the corporation is insolvent and has no funds at the place designated. *Shaw v. Bill*, 5 Otto, 10 (§§ 1280-88).

§ 1361. *Certificates issued for overdue interest* do not constitute a novation of the debt unless a novation be shown to have been intended. Such interest is still a lien if the debt was originally a lien. *Skiddy v. Atlantic, Miss. & Ohio R. Co.*, 8 Hughes, 820 (§§ 1559-67).

§ 1362. *Interest coupons are distinct contracts*, and when they become due they bear interest, and may be sued on separately from the bond. *Brine v. Insurance Co.*, 6 Otto, 827 (§§ 800-804).

VII. RIGHTS AND DUTIES OF MORTGAGE TRUSTEES.

SUMMARY — *Personal claims of bondholders against trustees*, § 1363. — *Trustees represent bondholders*, § 1364.

§ 1363. *Personal claims by bondholders against trustees for income* do not pass to subsequent holders of the bonds. *Dwight v. Smith*, § 1365.

§ 1364. A trustee in a railroad mortgage represents the bondholders. The mere fact that he is a holder of bonds secured by the trust does not render him incompetent to act and bind the bondholders, unless there is some evidence of fraud or unfaithfulness on his part. *Shaw v. Railroad Co.*, §§ 1366-1368.

[NOTES.— See §§ 1369, 1370.]

DWIGHT v. SMITH.

(Circuit Court for Vermont: 9 Federal Reporter, 795-797. 1881.)

Opinion by WHEELER, D. J.

STATEMENT OF FACTS.—This cause has been heard upon a demurrer to the bill of complaint for want of equity in favor of the orators, generally, and for want of sufficient definiteness in stating the grounds for the relief claimed. The bill alone is to be looked at in determining the questions so raised. According to the bill the orators are now holders of the first mortgage bonds to a large amount, but when they became such holders is not shown. Some of the defendants are trustees in that mortgage; others are the representatives of a trustee, deceased; another defendant is the Central Vermont Railroad Company, alleged to be in possession of the mortgaged property; others are directors in the latter corporation. The trustees have both neglected and violated their duty to the first mortgage bondholders, while in possession of the mortgaged property, in not accounting to them for moneys received by them as trustees for them, and in delivering the property to the Central Vermont Railroad Company against their rights and expressed wishes. And the Central Vermont Railroad Company has received the income of the mortgaged property and not accounted for it; and its directors, made defendants, have participated in that act.

§ 1365. *Personal claims by bondholders against trustees for income* do not pass to subsequent holders of the bonds.

If the trustees received income from the mortgaged property belonging to the bondholders and to be distributed to them, the money would belong and be

distributed to the persons who were at that time bondholders, and the right to it would not pass to persons subsequently acquiring the bonds, unless they expressly acquired the right to it also. The claims of the bondholders against the trustees would not be upon the bonds themselves, like the claims against the obligors in the bonds, although they would be on account of the bonds, but would be claims against the trustees personally for the moneys received to the use of the bondholders, and these claims would not be assignable at law, although they might be in equity. In a suit or proceeding upon the bonds themselves, the production of the bonds and coupons, or the allegation of their ownership, might import that the holder had held them at the time of the accruing of the interest incidental to the debt, and entitle him to recover for the whole; but not so as to a claim not upon the bonds, but for money received to the use of the bondholders. The production of the bonds would not make out a cause of action or claim for relief on account of that money. More would have to be shown, and enough more to make out a cause of action or ground for relief, and that would include showing a right to the money at the time it was received. The orators fall short of showing such right. And if the orators had been holders of the bonds ever after they were issued, and had so shown in their bill, it would be incumbent on them to show that their trustees, or those holding the property in place of the trustees, did receive money belonging to them, or did so conduct themselves with the property as to make themselves accountable for money as if they had received it. The bill does not allege that the trustees received any money belonging to the bondholders prior to their appointment as receivers, nor that while they were in fact receivers they received anything more than enough to pay the Vermont & Canada rent, which was to be first paid; nor that they ceased to be receivers in fact until the making of the compromise agreement, nor then otherwise than by the force of that agreement. That agreement is annexed to the bill and made a part of it. The bill does not show that the orators are not bound and willing to stand upon that agreement. If they are, then, as to them, the income raised afterwards was to be distributed according to that agreement. Some of that income was to go to the Vermont & Canada Railroad Company for rent; how much does not appear. A gross amount of income for a term of years is stated; but whether that amount was greater than the amount of rent to be first paid is not shown or stated. The same would be true if the compromise agreement was not binding upon them. The amount to be paid before anything would remain to apply on these bonds would not appear, and consequently whether anything would be left to go to the bondholders would not in either case appear. The bill should show definitely and distinctly, not merely a right in somebody to equitable relief, but a right in the orators to equitable relief against the defendants. The demurrer is sustained.

SHAW v. RAILROAD COMPANY.

(10 Otto, 605-613. 1879.)

APPEALS from U. S. Circuit Court, Eastern District of Arkansas.

STATEMENT OF FACTS.—The Little Rock & Fort Smith Railroad Company, chartered by the state of Arkansas, received from that state a grant of a portion of the lands donated to the state by congress. On the 22d December, 1869, the company mortgaged its railroad, completed and to be completed, to Paine and Dana, as trustees, to secure bonds to the amount of \$3,500,000, and

on June 20, 1870, it mortgaged its land grant to Paine, Dana and Stevens, to secure another issue of bonds to the amount of \$5,000,000. About one hundred miles of the road had been completed, sixty miles remaining incomplete. All the bonds had been issued, the interest was unpaid, and the company without money or credit, when bills were filed by the trustees for a foreclosure of the mortgages. The railroad and the land grant were sold for \$50,000 each, Ripley, Weld and Shattuck being the purchasers, it being understood that a new company, composed of the bondholders, would be organized. With the consent of the trustees the sales were confirmed. Shaw and Greenough filed a petition in the suit, asking a modification of the confirmation of the sales, and on the 6th July, 1875, they filed what they called a bill of review, asking that the decree be reversed and that they be placed in the same situation they would have been in had the decrees never been rendered. There was a demurrer to this bill, which was sustained, and complainants appealed.

§ 1366. *A trustee in a railroad mortgage represents the bondholders.*

Opinion by WAITE, C. J.

We think it clear that the appellants are not entitled to the relief they ask. They were not parties to the original suits, except through their trustees, against whom they make no charges. Indeed, their counsel says in his brief, "It is probable that they [the trustees] believed that they were doing the best possible for their beneficiaries." The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by bill of review. All the errors complained of in these bills of review, as occurring before the confirmation of the sale, are such as affect only the railroad company injuriously. If, in fact, they are errors at all, they were in favor of the trustees and those they represent, and not against them. Of these the trustees could not complain. As no relief was granted under the amendment to the bill in the foreclosure of the railroad mortgage, the court clearly had jurisdiction of that case for the purposes of the decree as rendered.

But if the bills, as filed, are original in their character, to set aside the decrees complained of and not for review only, the appellants are in no better condition. The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in number, representing in the aggregate eight million out of the \$8,500,000 of bonds outstanding, accepted the result and exchanged their bonds for stock in the new corporation. To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he

should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. This company and these trustees were peculiarly situated. The road was unfinished, and the land grant, to a large extent, unearned. While the mortgages, as they stood, were first liens, there was great danger that their value would be seriously impaired unless more money could be raised. The attention of both the trustees and bondholders was called to that fact, and at first it seems to have been thought that the end might be accomplished through the instrumentality of a receiver and receiver's certificates. This necessarily contemplated the creation of a lien on the mortgaged property superior to that which then existed. Although the mortgages were separate, and on separate properties, the value of each depended, to a large extent, on the ability of the railroad company to finish its road.

§ 1367. *Borrowing money on receiver's certificates ought not, in general, to be permitted.*

For some reason the idea of a receiver and receiver's certificates seems to have been abandoned, and what to our minds was a much more desirable plan adopted. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required without asking the courts to engage in the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution.

§ 1368. *That trustees are bondholders does not render them incompetent.*

The bare fact that some of the trustees were holders of bonds secured by their trust is not sufficient of itself to make them incompetent to consent to such a decree as was rendered. From the whole case it is apparent that, from the beginning, their conduct was governed by the wishes of a very large majority of bondholders. If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees, when personally interested, should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done. But when everything is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts. Here the name of Gookin, one of the trustees, appears in the list of bondholders appointing the committee to make the purchase at the sale as the holder of \$200,000 of the bonds. Associated with him in the list were others representing near \$6,000,000. His name openly appeared on the paper when the court was asked to confirm the sale on the conditions agreed to. Certainly this is not sufficient to defeat the plan to which he and his associates gave their consent. Atkins, another trustee, was a creditor of the company, whose debt came within the provision made in the decree for payment by the new corporation. All this was fully explained to the court when the modification of the decree in this particular was asked for, and since no claim can now be paid except with the approval of

the court after notice to the appellants, we see no reason why what has already been done is not sufficient for the protection of all concerned.

On the whole, we see no reason for interfering with the decrees below, and they are each, therefore, affirmed.

§ 1869. Bondholders, and not their trustees, are the real parties to a foreclosure suit.—When trustees foreclose a railroad mortgage, the bondholders who join are the real parties, and foreclose in behalf of their own rights, through the trustees, and the trustees do not represent the rights of any who do not join. The mortgage is incidental to the debt, which is always the principal thing. *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatch., 324, 830.

§ 1870. The trustees hold the legal title to the mortgaged estate, but not the mortgage debt. They cannot foreclose alone, but bondholders may foreclose and have a full decree whether the trustees will or not. *Ibid.*

VIII. PAYMENT AND REDEMPTION.

SUMMARY—*Substitution of new mortgage for old*, §§ 1871, 1872.—*Mortgage cannot be enlarged so as to secure an additional debt*, § 1873.—*Redemption statutes of Illinois do not embrace railroads*, § 1874.

§ 1871. Where a new mortgage is substituted for an existing mortgage, and most of the old bondholders accept new bonds under the second mortgage, those who do not exchange their bonds are not entitled, upon a foreclosure, to be paid in full in preference to the holders of the substituted bonds. *Ames v. New Orleans, etc., R. Co.*, §§ 1875-1878.

§ 1872. But they are not prejudiced by an increase in the number of bonds; and, consequently, they are entitled to the same proportion of the proceeds that they would have had if the second mortgage had not been executed. *Ibid.*

§ 1873. When the amount of a mortgage is limited to a definite sum, this cannot be enlarged either by the mortgagor, or by the trustees of the bondholders, or by a court of equity, so as to make it security for an additional sum. *Vose v. Bronson*, §§ 1879-1881.

§ 1874. The redemption statute of Illinois does not embrace railroad mortgages which cover an entirety the property, rights and franchises of a railroad. There is no right of redemption from foreclosure sales under such mortgages, decreed in the United States courts. *Hammock v. Loan and Trust Co.*, §§ 1882-1893.

[NOTES.—See §§ 1894-1401.]

AMES v. NEW ORLEANS, MOBILE & TEXAS RAILROAD COMPANY.

(Circuit Court for Louisiana: 2 Woods, 206-211. 1876.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—The bill in this case was filed for the foreclosure of a mortgage executed by the principal defendant on its property and road west of the Mississippi river, in the state of Louisiana. It appears from an agreed statement of facts that on the 15th of March, 1870, the railroad corporation, then known as the New Orleans, Mobile & Chattanooga Railroad Company, conveyed by a deed of that date all its estate and property in Louisiana and Texas west of the Mississippi river, to secure bonds, to be issued at the rate of \$12,500 per mile of the main line of road from New Orleans to the Sabine river, and \$25,000 per mile from the Sabine to Houston, in Texas, making the entire amount that might be issued under this deed of trust to be \$5,562,000, and no more. There were issued, in fact, under the deed of trust, \$2,825,000 only. This deed of trust provided that no bonds whatever should be issued on branch roads till they were constructed and their tracks laid.

On the 1st of January, 1872, the railroad company, its name in the mean time having been changed by act of the legislature to the New Orleans, Mobile & Texas Railroad Company, executed a new deed of trust of that date on the

same property as that conveyed by the deed of March 15, 1870. The purpose of this deed was to change the limit of the amount of the bonds of the company to be issued under said deed of trust of March 15, 1870, so as to allow besides the bonds already issued an additional issue of \$25,000 per mile of bonds for each mile of a branch road to be constructed from Brashear City to Vermillionville, but not to exceed the sum of \$1,625,000. This deed of trust recited that it had been arranged and agreed that the holders of the outstanding bonds under the original mortgage and deed of trust should surrender the same for cancellation and receive in substitution therefor bonds to the like amount executed in the name of the New Orleans, Mobile & Texas Railroad Company. This project was so far carried out that all the holders of bonds, secured by the original mortgage and deed of trust of March 15, 1870, except Arphaxad Loomis, and the other petitioners, surrendered their bonds, and received in their stead new bonds issued under and secured by the original mortgage and deed of trust as modified and limited by the deed of January 1, 1872.

Loomis and the other petitioners are the holders of twenty of the original bonds. They claim to have a priority over all the new bonds issued to take up the original bonds, and pray for a decree which shall recognize this priority, and declare their bonds to be a first lien on the property conveyed by the trust deed of March 15, 1870, and that their bonds be paid by preference out of the proceeds of the sale of the railroad property when a sale is made. The theory upon which the prayer of this petition is based is, that those bonds dated January 1, 1872, issued in lieu of the original bonds dated March 15, 1870, are in no way secured by the original trust deed, but have a lien on the railroad property by virtue only of the deed of January 1, 1872. An inspection of this latter trust deed will show that this theory is not founded on fact. The trust deed of 1872 states the fact of the execution of the deed of March 15, 1870, and the inscription thereof, etc., and the purpose of the railroad company to change the limit of the amount of bonds to be issued and secured under the original trust deed; recites that the holders of the outstanding bonds issued under the original trust deed have agreed to surrender the same, "and receive in substitution therefor new bonds for a like amount, executed by the New Orleans, Mobile & Texas Railroad Company, to be issued under and secured by said mortgage or deed of trust (the deed of March 15, 1870), as the same is modified and limited by this instrument."

The deed of January 1, 1872, further declares that "the parties hereto, in consideration of the premises, etc., have covenanted, granted and agreed, and do hereby covenant, grant and agree, to and with each other, that the stipulations and provisions of the above mentioned mortgage or deed of trust of March 15, 1870, shall be and are hereby modified and limited in the manner and to the effect following, with like effect as if such mortgage or deed of trust had originally contained such modifying and limiting provisions which are herein contained," etc. The deed of January 1, 1872, further declares that "the said party of the first (the railroad company), in consideration of the premises and of \$1, etc., in order to secure the payment of the principal and interest of its said first mortgage bonds to be issued in the form and of the tenor and to the effect herein above described in that behalf, according to the tenor and effect of said bonds and the accompanying coupons, and for further assurance and confirmation of the estates and interest conveyed in mortgage by the said original mortgage or trust deed of March 15, 1870, as hereby modi-

fied, hath granted, bargained and sold," etc. These provisions of the deed of January 1, 1872, clearly reveal the purpose of the parties thereto, that the bondholders surrendering their original bonds for the new ones should not lose any right or estate granted by the first deed of trust, save as the same were modified by the second. It was upon this express condition, thrice repeated in the trust deed of January 1, 1872, that the bondholders consented to give up their old bonds and take the new ones.

§ 1375. *The modification of a mortgage does not extinguish it.*

It clearly appears that there was to be no cancellation of the mortgage of 1870; all the bonds were designed to be secured by it. The new bonds correspond with the old in amount, interest, time of payment, and only differ in date, and the name of the company, which has been changed since the old bonds were issued. The modification of the mortgage does not extinguish it, nor is its lien affected by the substitution of a new note for the old one. *Watkins v. Hill*, 8 Pick., 522; *Pomroy v. Rice*, 16 id., 22; *Brinkerhoff v. Lansing*, 4 Johns. Ch., 65; *Dana v. Binney*, 7 Vt., 501; *Chase v. Abbott*, 20 Ia., 154; *Connor v. Banks*, 18 Ala., 42; *Cullum v. Branch Bank at Mobile*, 23 Ala., 798.

§ 1376. *The law of Louisiana does not conflict with this rule.*

The petitioners claim, however, that the question must be governed by the law of Louisiana, and cite the case of *Bell v. Murphy*, 2 La. Ann., 765, as authority to show what the jurisprudence of this state is upon the question in hand. In that case a mortgage was given to secure the mortgagee for a particular indorsement made by him for the accommodation of the mortgagor. The note thus indorsed was partly paid by the mortgagor, and a new note given for the remainder due, which the mortgagee indorsed. The court held that the mortgage did not indemnify the mortgagee for this latter indorsement. The reason given was that the mortgage was not a general one to secure the plaintiff for indorsements. It was given as security against the indorsement of a specific note, which the evidence showed had been subsequently novated and extinguished. That case differs from this in this most material particular, that in this case there was an express understanding that the original mortgage should stand for the benefit of the new bonds, and it was upon that condition that the substitution was made. The court is asked to step in between the parties and annul this contract. The law does not annul contracts made by the parties unless they are fraudulent or against public policy. No reason can be given why the contract made between the railroad company and its bondholders should not be enforced.

§ 1377. *Bondholders refusing to accept with others a modification of a mortgage are not thereby entitled to be paid in full.*

A very instructive case upon the question presented by this petition is *Stevens v. Mid-Hants Ry Co.*, 7 Eng. Rep., 555, reported, also, in 8 Law Rep. Ch. App. Cas., 1064.

In my judgment the petitioners are not entitled to be paid the full amount of their bonds in preference to the holders of the substituted and other bonds, issued under the deed of trust of January 1, 1872.

§ 1378. *Bondholders refusing to accept a modification of a mortgage are only entitled to claim that they shall not be injured by the change.*

The most that petitioners can claim is that they shall not be prejudiced by any change made in the terms of the deed of March 15, 1870, by the deed of January 1, 1872. They are entitled to have their rights preserved under the original trust deed. This may be done by giving them such part of the pro-

ceeds of the sale as they would have been entitled to if the new bonds and new trust deed had never been executed. In other words, as only two thousand eight hundred and twenty-five bonds of \$1,000 each were issued under the original trust deed, of which the petitioners hold twenty, they are entitled to twenty two thousand eight hundred and twenty fifths of the proceeds of the sale, and no more.

VOSE *v.* BRONSON.

(6 Wallace, 452-456. 1867.)

APPEAL from U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—The La Crosse & Milwaukee Railroad Company issued bonds to the amount of \$4,000,000, and gave a mortgage which was foreclosed. The bonds having been sold at heavy discounts were scaled down, and no more being allowed to the bondholders than the company received for them, a margin remained. Vose, who had sold material to the company and taken bonds at eighty cents on the dollar, with an understanding that if bonds should be sold at a lower rate he should have the benefit of the reduction, intervened by a bill in equity, claiming the benefit of that agreement and to have his demand satisfied out of the margin. The bill was dismissed.

§ 1379. *Neither the trustees nor the court nor the grantor can enlarge the terms of a mortgage.*

Opinion by MR. JUSTICE DAVIS.

The question presented by this record is of easy solution. If Vose had brought suit against the La Crosse & Milwaukee Railroad Company for a breach of their contract, the interpretation of it would have been a proper subject of inquiry, but the decision of this case does not depend on the disposition of that question. The appellant places his claim for relief on his right to have an outstanding equity with the La Crosse Company adjusted in the foreclosure suit, and his demand attached to the foot of the mortgage. To do this there must be a power somewhere to enlarge the mortgage, and where is it lodged? Certainly not with the trustees, for their duty is to see that the security held by them for their *cestui que trusts* is enforced according to the terms of the deed. They could neither enlarge the mortgage nor consent to its enlargement. The court could not do it, nor the La Crosse Company, as it had covenanted with the trustees, in behalf of the bondholders, that it would only issue \$4,000,000 in bonds. The rights of the bondholders were fixed by the terms of the mortgage. The value of the bonds as an investment depended in a great measure on the number to be issued, and doubtless each purchaser, before he bought, had information of the character of the security on which he relied. The property might be very well a safe security for \$4,000,000, and very unsafe for any additional amount. The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market, if the provisions made for its ultimate redemption could be altered without his consent.

§ 1380. *One not injured cannot complain of the action of the court.*

But it is said, as the court rendered a decree for less than the face of the bonds, equity will step in and allow the appellant to apply the vacuum of principal secured by the mortgage to liquidate his claim. The answer to this is, that it does not concern the appellant whether the court rightfully or otherwise reduced a portion of the bonds. The bondholders, whose bonds were thus reduced, are the only parties in interest who could have any just cause of

complaint against the action of the court, and if they did not feel aggrieved no other person has any right to complain. The security of the mortgage extended to four millions of bonds only, and whatever amount the court should ascertain was due on those four millions was the amount secured, and no more.

§ 1381. *Necessary parties.*

If Vose had been made a party defendant to the foreclosure suit, the decree would have been the same. But he was not a necessary party to that suit. The trustees, as the representatives of all the bondholders, acted for him as well as the others. It would be impracticable to make the bondholders parties in a suit to foreclose a railroad mortgage, and there is no rule in equity which requires it to be done.

Decree affirmed.

HAMMOCK v. LOAN AND TRUST COMPANY.

(15 Otto, 77-94. 1881.)

APPEAL from U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—In 1871 the Chester & Tamaroa Coal and Railroad Company executed its mortgage on all its property to secure the payment of its bonds, etc. Afterwards it was consolidated with another company, and the consolidated company took the name of the Iron Mountain, Chester & Eastern Railroad Company. In 1874 the road was in possession of Barber as receiver, in a creditor's suit brought by Maxwell, but in June, 1876, the bill was dismissed and Barber discharged as receiver. On the next day after Barber's discharge, Hammock applied in vacation to a state judge, and upon his bill, filed in a state court, and two judgments with returns of *nulla bona*, obtained the appointment of Sams as receiver, who in due time took possession of the railroad. On the 13th June, 1876, suit was brought by the Loan and Trust Company in the court below for the foreclosure of the mortgage, charging the insolvency of the company and the collusion of certain creditors with Barber, the late receiver, to take possession of the movable property of the company and apply it to the payment of unsecured debts. Upon this bill a receiver was appointed and an injunction issued. Soon afterwards the Loan and Trust Company became a party defendant to Hammock's suit in the state court and filed a cross-bill therein, and a petition to remove the cause into the federal court, and in vacation an application was made to the judge to remove Sams as receiver. This was refused. On the 19th July, 1876, the Loan and Trust Company moved in the United States circuit court that it take jurisdiction of the Hammock suit. This motion was granted. In November, 1876, the state court struck from the files the answer, cross-bill and petition for removal filed by the Loan and Trust Company. The causes in the federal court were consolidated, and in January, 1878, an order was made for a sale of the property without redemption. At the sale Cole became the purchaser of the whole property for \$50,000. He conveyed the property to the Wabash, Chester & Western Railroad Company, and that corporation came into the suit by petition, representing that Sams, still pretending to act as receiver, had advertised the property for sale. An injunction was thereupon issued and Hammock and Sams were ordered to show cause why they should not be attached for contempt of court. This injunction was on the final hearing made perpetual.

Opinion by MR. JUSTICE HARLAN.

Whether the state court or the circuit court of the United States first

acquired control and possession of the property conveyed in trust by the Chester & Tamaroa Coal and Railroad Company is the first question to which our attention will be directed. If, when seized under the order of the federal court, it was in the custody of the state court, by its receiver, then, it is claimed, that all the proceedings in the former, so far at least as their regularity and validity depended upon possession of the property, were in violation of the established principles governing courts of concurrent jurisdiction in their relations to each other. *Peck v. Jenness*, 7 How., 612; *Taylor v. Carryl*, 20 id., 583; *Freeman v. Howe*, 24 id., 450; *Hagan v. Lucas*, 10 Pet., 400.

§ 1382. *In Illinois a judge has no power to appoint a receiver of a railroad in vacation.*

The solution of this question, it must be conceded, depends upon the authority which the judge of the state could lawfully exercise in vacation; for if, under the laws of the state, he had no power in vacation to appoint a receiver of the property and effects of a railroad company, the order under which Sams took possession was a nullity, and his custody was not that of the court which he assumed to represent. Counsel for appellants admits that, except to the extent expressly permitted by statute, the judge of the state court could not exercise any judicial functions in vacation. Such, beyond question, is the established doctrine of the supreme court of Illinois. In *Blair v. Reading*, 99 Ill., 600, the court said: "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation, except such as are expressly authorized by statute." In *Devine v. People*, 100 id., 290, the language of the court was that "judges can exercise no judicial functions in vacation, except such as they are especially authorized to do by statute." *Keith v. Kellogg*, 97 id., 647.

§ 1383. — *statute of Illinois as to power of judges in vacation.*

It is stated by counsel, and our examination verifies the correctness of the statement, that in the few cases in which the statutes of Illinois make special provision for the appointment of a receiver, the power is conferred upon the court, and not upon the judge thereof. R. S. Ill., 1874, sec. 25, p. 290; id., sec. 24, p. 553; id., sec. 88, p. 613. But the action of the judge of the state court is attempted to be sustained under the forty-ninth section of chapter 37 of the Revised Statutes of Illinois, enacted in 1874 (p. 332), which is in these words: "Sec. 49. *Powers of judges in vacation:* The several judges of said courts [judges of the circuit courts, and of the superior court of Cook county] shall have power, in vacation, to hear and determine motions, to dissolve injunctions, stay or quash executions, to make all necessary orders to carry into effect any decree previously rendered, including the issuance of necessary writs therefor, to order the issuance of writs of *certiorari*, to permit amendments in any process, pleading, or proceeding in law or equity. Any order so made shall be signed by the judge making it, and filed and entered of record by the clerk of the court in which the proceeding is had, and from the date of such filing shall have like force and effect as if made at a regular term of such court. The pendency of a term of court in another county than that in which the suit is pending, or about to be commenced by the same judge, shall not prevent the granting of such order. L. 1871-72, p. 504, secs. 1, 2."

The succeeding section (sec. 50) provides that "no such order shall be granted in vacation unless the party applying therefor shall give the opposite party, or his attorney of record, reasonable notice of his intended application."

We are of opinion that the authority of a judge, in vacation, to appoint a receiver of a railroad corporation cannot be derived from the foregoing section. This precise question has not, that we are aware, been determined in the supreme court of Illinois. But what fell from that learned tribunal in the cases already cited leads us to believe that when the question is directly presented it will be determined in accordance with the view we have just expressed.

§ 1384. *Construction of statute of Illinois, ch. 37, R. S., sec. 49.*

In the argument before us attention was called to the fact that between the words in section 49, "to hear and determine motions," and the words "to dissolve injunctions," there appears a comma; and that was, to some extent, relied on as showing that a judge in vacation could hear and determine motions of every kind, not simply those relating to matters specially defined in that section. While the comma after the word "motions," if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute. Lord Kenyon, C. J., in *Doe v. Martin*, 4 Term R., 65, said that courts in construing acts of parliament or deeds should read them with such stops as will give effect to the whole. Sedgwick's Constr. Stat. & Const. Law (2d ed.), 223, note a; Bouvier's Law Dic., 347, 402. The general rule is well illustrated in Barrington's Statutes (4th ed.), 438, note x; *Price v. Price*, 10 Ohio St., 316; *Cushing, etc., v. Worrick*, 9 Gray (Mass.), 382; *Geiger's Estate*, 65 Penn. St., 311; and *Hamilton v. Steamer R. B. Hamilton*, 16 Ohio St., 428. In the last case it was said: "But for the punctuation, as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." Apart from the general rule upon this subject, there are reasons why the punctuation of section 49 should not control its interpretation. It will be observed that at the close of that section is a reference to the laws of Illinois passed at the session 1871-72 of the general assembly, indicating that section 49 was, in part at least, founded upon an existing or previous statute. One of the rules prescribed by the revision of 1874 for the construction of statutes is that "the provisions of any statute, so far as they are the same as those of any previous statute, shall be construed as a continuation of such prior provisions, and not as a new enactment." R. S. Ill., 1874, p. 1012, sec. 2. Turning then to the previous law,—the act of March 7, 1872,—we find no comma after the word "motions," but the statute reads, "to hear and determine motions to dissolve injunctions," etc. Sess. Laws Ill., 1871-2, p. 504. We are not prepared to hold that the power of a judge in vacation to appoint a receiver of a corporation, charged with important public duties, was conferred by the introduction of a comma into the Revised Statutes of a state, where the established doctrine is that no judicial functions can be exercised by a judge, in vacation, except where expressly or specially authorized by statute.

§ 1385. *Appointment of receiver involves the exercise of the highest discretion.*

But if, as the argument of counsel would imply, a judge, in vacation, may, by virtue of the powers conferred by section 49, hear and determine every matter presented by way of motion, and not simply motions relating to the dissolution of injunctions, to staying or quashing executions, to orders carrying

into effect decrees previously rendered, to writs of *certiorari*, or amendments in process, pleading, or proceedings in law and in equity,— which are the subjects specifically referred to in that section,— we are satisfied that an application to dispossess those in control of a railroad corporation, whose road is declared by the constitution of the state to be a public highway, and to place its entire property in the hands of a receiver, is not, within the meaning of the statute, a motion which may be heard and determined by the judge out of term time. It is rather a proceeding involving the exercise of the highest discretion and embracing a very wide field of judicial investigation and inquiry. The injustice which may result from the exercise of such a power in vacation is well illustrated in this case by the fact that, while the judge of the state court did not doubt his power, out of term time, to oust those in the control of a public corporation, and appoint a receiver, with authority to carry on the business of a carrier of freight and passengers, he could not, under his view of the statute, determine, in vacation, an ordinary motion to become a party to the suit, made by the trustee in a first mortgage or deed of trust covering the entire property and franchises in question.

§ 1386. *Conflict of jurisdiction.*

It results from what has been said that the seizure of the property by the receiver of the federal court was not an interference with the possession of the state court, nor in derogation of its authority. The property was not, in any legal sense, then in the custody of the state court, or of any officer by it appointed. It was, when seized by order of the federal court, in the custody of one who assumed, without lawful authority, to represent the state court, but who in fact proceeded under a void order of a judge in vacation. The circuit court of the United States, having thus lawfully acquired possession of the property, prior to any action in reference to it by the state court, the former had the right to retain possession for all the purposes of the suit for foreclosure of the mortgage of the 12th of April, 1871. Under the final decree of foreclosure it was, as we have seen, sold in satisfaction of the mortgage debt, leaving nothing to be applied on the claims of Hammock and other judgment creditors.

§ 1387. *Sale without right of redemption.*

We proceed now to inquire whether, in the orders or decrees under which the property had been disposed of, any error has been committed to the prejudice of the substantial rights of appellants. On their behalf it is suggested that the decree was erroneous, in that it required the sale of the real estate, covered by the mortgage, to be made absolutely and without the right of redemption allowed by the local statutes in decretal sales of mortgaged lands. The question is one of great importance, and has received, upon our part, all the consideration which it demands.

§ 1388. — *statutes of Illinois.*

By the statutes of Illinois, in force when the mortgage was made, real estate, taken in execution, if susceptible of division, is required to be sold in such quantities as may be necessary to satisfy the execution and costs. R. S. Ill., 1869 (Gross ed.), p. 397, sec. 11. And it is made the duty of the sheriff or other officer, selling lands or tenements by virtue of an execution, to give to the purchaser, or purchasers, a certificate, in writing, describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when, if the property be not redeemed, the purchaser will be entitled to a deed. *Id.*, p. 380, sec. 15. It

is further provided that the defendant, his heirs, executors, administrators or grantees, might, within twelve months from the sale of his lands or tenements under execution, redeem the same by paying to the officer who sold it, for the benefit of the purchaser, the sum of money which may have been paid on the purchase, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of ten per centum from the time of sale. *Id.*, sec. 16. The right was given to any judgment creditor, after the expiration of twelve and within fifteen months from the sale, to redeem the property by paying the amount paid by the purchaser,—such payment entitling him to have a resale under the execution upon his own judgment. *Id.*, secs. 17, 18. This right given to judgment creditors could be exercised as to the whole or any part of the lands or tenements sold, provided the redemption is made in the like distinct quantities or parcels in which the same are sold. *Id.*, sec. 19.

If the lands or tenements so sold are not redeemed by the defendant, or by a judgment creditor, within fifteen months from the sale, it is the duty of the officer making it to execute a deed to the purchaser. *Id.*, sec. 25. The provision in reference to redemption from mortgage sales is that, "where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree in the same manner as is prescribed for the redemption of lands in like manner sold upon executions upon judgments issued at common law." *Id.*, p. 382, sec. 27. The history of the right of redemption as given by the laws of Illinois may be traced in Statutes of 1825, p. 151; R. S., 1829, p. 85; *id.*, 1833, p. 374; *id.*, 1845, p. 302. When originally conferred as to sales of land under execution, there were no railroads in that state, and very few, if any, when it was first (in 1845) extended to decretal sales of mortgaged lands.

§ 1389. *Case cited.*

In *Brine v. Insurance Co.*, 96 U. S., 627 (§§ 800–804, *supra*), we held that the right of redemption given by the Illinois statutes constituted a rule of property which the federal court, sitting in equity in that state, is bound to recognize and enforce. The property there in controversy was a lot of ground in the city of Chicago, which had been owned by a private person, who conveyed it in trust to secure a loan of money by an insurance company. When the mortgage by the Chester & Tamaroa Coal and Railroad Company was made, there was in force a general statute, passed in 1855, conferring upon any railroad company organized or incorporated under the laws of Illinois the power to mortgage all or any portion of its property and franchises to secure the payment of money borrowed to aid in the construction, completion or operation of its road. Gross ed., p. 553; Laws of Ill., 1855, p. 304. And by the state constitution adopted in 1870, railroads thereafter constructed were declared to be public highways, free to all for the transportation of their persons and property thereon, under such regulations as should be prescribed by law. Art. 11, sec. 12.

§ 1390. *Redemption in Illinois of lands of a railroad corporation sold by decree of foreclosure in a federal court, under a mortgage of the railroad with the corporate franchises.*

The question is, therefore, presented for the first time in this court, whether the statutory provisions giving the right to redeem as well lands or tenements

sold under execution as mortgaged lands sold under decrees of courts of equity, has any application to the real estate of a railroad corporation, which, with its franchises and personal property, is mortgaged as an entirety to secure the payment of money borrowed for railroad purposes. Undoubtedly in all such cases the chief value of the real estate comes from the right or franchise to hold and use it, in connection with the personal property of the corporation, for railroad purposes. It is equally true, not only that the bonds, to secure which the mortgage is given, could not be negotiated in the markets of the country did not the mortgage embrace as an entirety the franchises and all the real and personal property of the corporation used for railroad purposes, but that a sale of the real estate, franchises and personal property, separately, might, in every case, prove disastrous to all concerned, and defeat the ends for which the corporation was created, with authority to establish and maintain a public highway.

§ 1391. — *right of redemption in case of sale of franchise.*

It is, nevertheless, contended by counsel that, as the statute attaches to decretal sales of mortgaged lands the right of redemption, that right exists as well in cases of mortgages, covering the entire property and franchises of a railroad corporation, as where the land is owned and used by private persons for exclusively private purposes. In other words,—for to that result the argument would lead,—the court, in decreeing the sale of the mortgaged property and franchises of a railroad corporation, has no discretion, if the corporation or its judgment creditors so demand, except to order the sale of the real estate separately, in parcels when susceptible of division, and subject to redemption, leaving the franchises and personal property to be sold absolutely and without redemption. Thus, one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property. If the railroad company should redeem the real estate, it could not employ it to any valuable end; for its franchise to be a corporation and to use its real estate for railroad purposes will have been sold to another, and there is no right under the statute to redeem the franchise, it not being real estate, but rather a power or privilege, partaking more or less of sovereignty, and which may not be exercised without a special grant. 1 Redfield on Law of R'ys, 94. Consequences equally injurious would flow even from the sale, as an entirety, of the real and personal property and franchises of the corporation, if the right was reserved to the company, or its creditors, to redeem the realty. Individuals or associations desiring railroad property would not purchase when they could not know, until the expiration of fifteen months from the confirmation of the sale, whether they were to have all for which they might bid. During that period of uncertainty the property would necessarily depreciate in value for the want of repairs and betterments essential to its preservation. A construction of the statute which leads to such results ought not to be adopted, if it can be avoided. And we think it can be without contravening the spirit of the statute or the public policy which suggested its enactment.

§ 1392. *To what class of real estate the right of redemption attaches.*

We are of opinion that mortgaged real estate, to which is attached the right of redemption, is such and such only as could at law be levied upon and sold on execution. The right does not extend to real estate of a public corporation, mortgaged with its franchise to acquire, hold and use property for public purposes, and whose chief value depends upon its being so used and appropriated. The difference between real estate so acquired, held and used, and real estate

which may, at law, be sold under execution, is well illustrated in *Gue v. Tide Water Canal Co.*, 24 How., 257. In that case it appeared that an execution was levied upon a house and lot, sundry canal locks, a wharf-boat and several lots, the property of the canal company, chartered under the laws of Maryland for the construction of a canal from Havre de Grace, in that state, to the Pennsylvania line. The property so levied upon was admitted to be necessary to the uses and working of the canal, which was a public improvement, and a great thoroughfare of trade. It was of little value apart from the franchise to take tolls, and if sold separately under execution, the franchise to take tolls, said Mr. Chief Justice Taney, speaking for the court, would not have passed to the purchaser. It was consequently ruled that the real estate there in controversy could not be seized and sold under *feri facias*, and, consistently with the rights of stockholders and creditors, could not be sold separately from the franchise from which was derived its chief value.

The laws of the state of Illinois having permitted the Chester & Tamaroa Coal and Railroad Company to mortgage its franchises and property as an entirety, it was, we think, the duty of the court to decree the sale, as an entirety, of the whole property so mortgaged, without reference to the local statutes upon the subject of redemption. Real estate, thus mortgaged with the franchises of the company, is of necessity relieved from the operation of that statute. There may possibly be cases in which real estate of an ordinary kind, owned and mortgaged by a railroad corporation, cannot be sold by decree of court, except subject to the right of redemption; as when it is not used for necessary railroad purposes, or when it is mortgaged separately from its franchises and other property. What may be the operation of the statute in such cases we do not now decide. All that we do decide is that, by the laws of Illinois, the real estate, franchises and other property of a railroad corporation, mortgaged as an entirety, may be sold as an entirety under the decree of a court of equity, without any right of redemption in the mortgagor or in judgment creditors as to such real estate.

The construction we have given to the statute is not inconsistent with the provision of the state constitution which declares that "the rolling stock and all other movable property belonging to any railroad company or corporation in Illinois shall be considered personal property, and shall be liable to execution and sale in the same manner as personal property of individuals; and the general assembly shall pass no law exempting any such property from execution and sale." Art. 11, sec. 10. When the mortgage of April 12, 1871, was executed there was no levy upon the movable property of the company, and consequently the rights of the mortgagee were superior to the lien arising from a subsequent levy, by execution, upon the movable property. The state constitution did not forbid the creation, by mortgage, of such superior lien. So far from that section militating against the construction we have given the statute, it rather fortifies it. It furnishes a strong implication that the right to levy an execution upon the movable property of a railroad corporation was intended to be restricted to that kind of corporate property. It is a partial modification of the general rule that the property of a railroad corporation, used for necessary railroad purposes, cannot be seized and sold under an execution at law.

§ 1393. *The chattel mortgage law of Illinois is not applicable to an ordinary railway mortgage.*

The next question to be considered relates to the distribution of the proceeds of the sale of the mortgaged property. The argument upon this branch of

the case, in behalf of the appellants, briefly stated, is this: That by the laws of the state in force when the mortgage of April 12, 1871, was executed, a mortgage of personal property, certified by a justice of the peace in the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where the mortgagor resides, shall, "if *bona fide*, be good and valid from the time it is so recorded, for a space of not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor, provided that such conveyance shall provide for the possession of the property so to remain with the mortgagor" (Gross ed., 1869, p. 67); that more than two years having expired after the execution of the mortgage of April 12, 1871, and before the suit for foreclosure,—the property mortgaged remaining in the possession of the railroad company until seized in Hammock's suit,—the judgment creditors, by virtue of their suit in the state court, acquired a lien, at least upon the rolling stock and other movable property covered by the mortgage, superior to any claim on the part of the mortgagee and those it represented; and that since the personal property was surrendered and the proceeds of its sale applied in discharge of taxes upon the real and personal property and capital stock of the corporation, the court upon principles of equity should have appropriated to the judgment creditors so much of the proceeds of the decretal sale as was equal to the taxes on real estate paid from the proceeds of the sale of personal property by the collectors.

We are of opinion that the statutory provisions in regard to chattel mortgages (Gross ed., p. 66) do not embrace mortgages by a railroad corporation, in connection with its real estate and franchises, of its personal property used and appropriated for railroad purposes. The statute provides a mode by which possession of the mortgagor of personal property should not defeat the mortgage, viz., the acknowledgment and record of the mortgage. The acknowledgment is required to be made before a justice of the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where he resides. These directions are wholly inapplicable to a railroad company, whose line of road might pass through several justices' districts and extend through several counties. And, if the construction contended for be sound, a railway mortgage security, so far as the personalty of the corporation is concerned, would cease to be of any value after the expiration of two years from its execution, unless the mortgagor, before the expiration of that time, takes possession of it,—the authority to do which, in advance of the maturity of the mortgage debt, and when there has been no default of the corporation in meeting its interest, would render the negotiation of the mortgage bonds difficult if not impossible. Clearly the chattel mortgage statute has nothing to do with the present case.

What we have said renders it unnecessary to consider the other branches of the proposition last stated, and disposes of all questions of importance upon the merits, arising on the appeal from the final decree ordering a sale of the mortgaged property, and directing a disposition of the proceeds arising therefrom. We have seen that the Farmers' Loan and Trust Company, in vacation, filed in the clerk's office of the state court a petition to be made a party to the creditor's suit of Hammock, with an answer and cross-bill, and also a petition for the removal of that suit into the federal court, accompanied by the required bond; and that the judge of the state court, in vacation, declined to act upon the petition to be made a party, or to recognize the right of removal. Whether

the cause was, under these circumstances, properly docketed in the court below as one legally removed under the act of congress, or whether the federal court exceeded its authority in the final order of injunction, made on the 17th day of January, 1879, upon the petition of the Wabash, Chester & Western Railroad Company, are questions about which there is a difference of views among those members of the court who heard the cause and participated in its decision. We, therefore, forbear to make any expression of opinion upon them. And it is not at all important to the parties that we should do so. The object of the suit in the state court was to reach the property of the railroad company, and from it, or from the income to be derived therefrom, obtain satisfaction of the judgments against the corporation. Whether that suit was or not, under the act of congress, legally removed into the federal court, the entire property, we have seen, passed lawfully into the custody of the latter court, and by proceedings therein, to which the judgment creditors were parties, and by which they are concluded, it has been all sold, and the proceeds adjudged to be rightfully distributed in satisfaction of the mortgage debt. It would, consequently, serve no valuable purpose for the appellants, were it now decided that the suit commenced in the state court was not legally removed into the federal court, or that the order of January 17, 1879, was beyond the power of that court to make. The decrees appealed from are therefore affirmed.

§ 1394. *Extension of payment of interest.*—Where there is no specified time mentioned in an agreement to extend the payment of interest under a mortgage no definite extension can be claimed. But the mortgagor is entitled to reasonable notice of the termination of an indefinite extension of the time to pay the interest. *Union Trust Co. v. Railroad Co.*,* 5 Dill., 1.

§ 1395. *There is no redemption from the sale of railroad property under foreclosure proceedings in the federal court.* *Turner v. I., B. & W. R'y Co.*, 8 Biss., 380 (§§ 1609-20).

§ 1396. *Relief from payment of prior mortgage under mistake.*—One who has paid a prior mortgage under the belief that he had good title to the mortgaged property can have relief only when he has made the payment under mistake of fact, and not a mistake of law. He cannot have relief when he has acted in bad faith towards any parties interested in the property. *Railroad Co. v. Soutter*, 13 Wall., 517.

§ 1397. *Subrogation—Rights of bondholders.*—The holders of state bonds issued in lieu of railroad bonds, the state having taken bonds from the railroad company secured by statutory mortgage, are entitled to enforce the lien of that mortgage and are subrogated to the rights of the state. *North Carolina R. Co. v. Drew*,* 3 Woods, 691; S. C., 13 Otto, 118 (BONDS, §§ 1830-37).

§ 1398. *The fact that railroad bonds were exchanged for state bonds so that the stockholders might use the proceeds for their own private advantage, and that they were so used, is no defense against a bona fide holder of railroad bonds.* *Ibid.*

§ 1399. *Where the lien of a bondholder is created by statute, his rights are governed by the statute, even where a resulting equity would have arisen without the aid of the statute.* *Ibid.*

§ 1400. *The possession of negotiable bonds is strong prima facie evidence of just title.* *Ibid.*

§ 1401. *In ordinary cases it throws upon the party questioning it the burden of showing that it is not bona fide; that the holder had notice of some vice or defect which vitiates the title.* *Ibid.*

IX. REMEDIES AND JURISDICTION OF COURTS.

SUMMARY—Jurisdiction of corporation existing in several states, § 1402.—Jurisdiction of federal courts when bill is pending in state court with different parties, §§ 1403, 1404.

§ 1402. *When two or more states have by concurrent legislation united in creating one and the same railroad corporation, as they may do, a court in either state may exercise jurisdiction over the entire line. If in a suit to foreclose such a mortgage the corporation be*

served with process in the state in which the suit is brought, and it enters its appearance and answers the bill by its common name, the court will have jurisdiction through such appearance of the separate corporations which have joined under such common name, if it be conceded that the corporations are separate and distinct. *Wilmer v. Atlanta & Richmond Air Line Ry Co.*, §§ 1405-1409.

§ 1403. The pending of a foreclosure suit in a state court does not bar a suit in a federal court upon the same subject-matter, when the parties are different. A proceeding to foreclose a mortgage in a federal court while a bill for the same purpose is pending in a state court, the property not being in the custody of the latter court by its officers or appointees, is no contempt of that court. *Brooks v. Vermont Central Railroad Co.*, §§ 1410-1414.

§ 1434. A plea that trustees should not be removed because whatever they did, which was objected to, was done under the direction of a state court, is bad. *Ibid.*

[NOTES.— See §§ 1415-1423.]

WILMER v. ATLANTA & RICHMOND AIR LINE RAILWAY COMPANY.

(Circuit Court for Georgia: 2 Woods, 447-457. 1873.)

STATEMENT OF FACTS.— From an earlier opinion in this case (2 Woods, 409), on a bill filed praying that the deed of trust should be so construed that the trustees be compelled to take possession of the railway and appurtenances, etc., and sell the same, and for the appointment of a receiver, the following allegations appear: That the complainants were owners and holders of first mortgage bonds of the Atlanta & Richmond Air Line Railway Company, which were secured by trust deed on all the property and franchises of the company. That the company was a corporation under the laws of Georgia, North Carolina and South Carolina, having its principal office at Atlanta. That by an act of the Georgia legislature, a company known as "The Georgia Air Line Railroad Company" was authorized to build a railroad from Atlanta to the South Carolina state line. That this company, pursuant to legislation by the states of Georgia and South Carolina, consolidated with the Air Line Railroad Company of South Carolina, forming the defendant company. That the defendant company issued its bonds and gave a deed of trust on its entire road and all of its property. That it had made default.

The court appointed John H. Fisher receiver, who afterwards applied to the court to enable him to obtain possession of a part of the property, but the property in question being in possession of a receiver of a state court, appointed prior to Fisher's appointment, the federal court refused to interfere.

Opinion by Woods, J.

The substance of the bill having been stated in the opinion given in this case upon the motion for the appointment of a receiver (2 Woods, 409), it is unnecessary here to recapitulate its averments. The company known as The Atlanta & Richmond Air Line Railway Company, and the same which is made defendant to the bill of complaint, answers the bill and admits the averments thereof as to the legislation of Georgia, South Carolina and North Carolina; admits the union of the said "Georgia Air Line Railroad Company" and "The Air Line Railroad Company in South Carolina," under the corporate name of The Atlanta & Richmond Air Line Railway Company, which is the name of this defendant, and that this defendant now possesses and has since said union possessed all the property of the said two railroad companies, including the line of road extending from Atlanta, in Georgia, to Charlotte, in North Carolina. The defendant company exhibits what it calls the agreement of union or consolidation, and prays that it may be taken as a part of its answer.

The answer of the defendant company also admits that, under the name of The Atlanta & Richmond Air Line Railway Company, it issued the bonds

mentioned in the bill, and to secure the same, principal and interest, executed upon its entire property and line of road extending from Atlanta to Charlotte, the deed of trust mentioned in the bill of complaint, and a copy of which is appended thereto as an exhibit. The answer of the defendant company further admits the averments of the bill to the effect that "said railroad with all its appurtenances is in the nature of an entirety; that it constitutes one and a continuous line of railway from Atlanta to Charlotte; that its unity and continuity are the most important elements of its value, and that to separate it from its appurtenances, or those from it, or any part from any other part, would greatly impair the whole." Answers have been filed to the bill by the trustees, Austill and Lancaster, admitting generally its averments.

An amendment has been filed to the bill making Samuel B. Hoyt, Wm. A. Russell, B. Y. Sage and T. S. Garner parties defendant, and making certain allegations and charges against them which it is unnecessary particularly to state. These new defendants have also answered the bill. The Richmond & Danville Railroad Company and the United States Security Company were also made defendants, and it was alleged that they claimed to have some lien upon the property of the defendant railroad company, but that the same was inferior to the lien of the complainants. A decree *pro confesso* has been taken against these last named defendants for want of an answer.

At the March term, 1875, of this court, Julius M. Patton was appointed a special master, to report, among other things, the number, character and description of the outstanding bonds of the defendant, the Atlanta & Richmond Air Line Railway Company, the amount of interest due on the same, the names of the present holders, and description of the bonds held by each. The master has filed his report, in which he states that four thousand two hundred and forty-eight first mortgage bonds of \$1,000 each were issued and negotiated by the Atlanta & Richmond Air Line Railway Company. He reports that twenty-one of these bonds are held and owned by the complainants Wilmer and Richard, four thousand and ninety-five by other persons, whose names and the number held by each he gives. All these bonds were presented to and counted by the master. On the 1st day of July, 1875, there was due for interest on the four thousand one hundred and sixteen, so presented to and reported by the master, the sum of \$658,565, not including any interest on the coupons due and unpaid. This report was filed on the 16th day of August and has not been excepted to.

The complainants produce the original deed of trust, and the report of the master, and pray for a decree declaring that by the true construction and intent of said deed of trust the trustees therein named have the right and power, and it is their duty, under the facts set forth in the bill, to take possession of the entire trust property and sell the same for the purpose of paying off the principal as well as the interest of the bonds thereby secured, and that they may be compelled to execute said trust accordingly, and according to the directions of the deed of trust, by taking possession of and selling all the property covered thereby, at public outcry, in the city of Atlanta, for the purpose of paying off both the principal and interest of said bonds.

§ 1405. *Upon a bill to execute a trust in favor of numerous bondholders a decree may be entered although all the bondholders are not made actual parties.*

Objection is made to any such decree by the Atlanta & Richmond Air Line Railway Company and other defendants. 1. It is objected that the decree moved for cannot be made until all the persons entitled to participate in the fund raised from the sale of the property are made parties to the proceedings,

and that such persons so interested have not yet been made parties. The answer to the objection is found in the eighty-fourth equity rule, which provides: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such case the decree shall be without prejudice to the rights and claims of the absent parties." This case is the very one provided for by this rule. Here are four thousand bonds payable to bearer, secured by the deed of trust, to enforce which is the purpose of the suit. Necessarily the parties interested in the fund to be recovered by a sale must be very numerous, and many of them must be unknown. To require all of them to be made actual parties, and, in case of the death of any, that the suit should be revived in the name of the personal representative of the deceased party before any final decree could be rendered, would be to deny the bondholders any relief in this court. The course and practice of courts of equity are not so exacting and oppressive. The rule and the general equity practice provide that the case may proceed when the court has sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants. There is no complaint here that any interest except that of the bondholders who are not parties is not represented.

But the interests of all the bondholders are represented: 1st, by those who are actual parties complainant; and 2d, by the trustees of the trust deed who are made the defendants. The trustees were expressly appointed to represent the bondholders, and if the suit had been brought by them it would not have been necessary to make all the bondholders complainants or defendants. The course is to file the bill in behalf of all who choose to come in as complainants and bear their share of the costs of the suit or allow them to propound their claims and interest before the master. 2 Redfield on Law of R'ys, 486; 2 Redfield's Am. R'y Cas., 692, 630; Campbell v. Railroad Co., 1 Woods, 368. This has been the course pursued in this case, and I am clear that all the parties necessary to the decree asked are before the court.

§ 1406. *Construction of trust deed. Upon failure to pay interest the trust property may be sold.*

2. The next objection to the decree prayed for is that there can be no sale of the trust property or any part of it to pay either the principal or interest of the bonds until the year 1900, when the principal of all the bonds is due. One of the solicitors for the defendants, however, admits that there may be a decree for interest in default and a sale of so much of the property covered by the deed of trust as is necessary to pay the interest due, but insists that no more can be sold. The terms of the deed of trust ought to be very clear to justify the court in holding that there could be no sale, even for interest, until the year 1900. Here are bonds to the amount of \$4,248,000, bearing eight per cent. interest, payable semi-annually, and due as to principal in thirty years. The property covered by the deed of trust to secure these bonds is not estimated to have cost over \$7,000,000. If no interest were paid until the maturity of the bonds, the principal and interest would then amount to over \$20,000,000, calculating interest on the coupons as they mature. For this vast sum the bondholders would have a security on property which only cost \$7,000,000. In the mean time, during nearly the life of a generation, the railway company would hold the money of the bondholders, and, although it had

agreed to pay interest semi-annually, could refuse to comply with its contract, and the bondholder would be without any effectual remedy. I do not believe there is a railroad company so bold as to ask a loan of money on a deed of trust which could bear such a construction, or a capitalist so foolish as to grant the loan.

There are certain expressions in the deed of trust which give some faint color to the theory under consideration, but there are other clauses which indicate a contrary purpose most unmistakably. The trust deed declares explicitly that, "should default be at any time made in the payment of any part, either of the accruing interest or of the principal sum secured to be paid by any bond or bonds issued under the authority aforesaid," the trustees shall take possession of the property mentioned in the deed of trust and proceed to sell the same at public auction in the city of Atlanta, and shall apply the net proceeds of the sale in the payment of the interest due on the bonds and to the extinguishment of the principal of such of the bonds as may then be due. It seems to me that this provision of the trust deed completely overturns the idea that there can be no proceeding for a sale of the trust property or any part of it until the maturity of the principal of the bonds. One of the solicitors of defendant, while not agreeing with the construction of that deed just noticed, insists that until the bonds mature there can only be a sale of so much of the trust property as may be necessary to discharge the interest due and unpaid. But in the view I take of the case it is unnecessary to pass upon this dispute. It is clear to my mind, and it is conceded by one of the solicitors for defendants, that there may be a sale of trust property sufficient to satisfy the interest due and unpaid. On the other hand, complainants insist that a default in the payment of interest makes both principal and interest due, and that the court should order a sale for the whole amount of both principal and interest. Without going into a critical examination of the language of the deed of trust, I content myself with saying that it seems very clear that when the interest is in arrear, the trustees may sell the entire trust property. The trust deed seems to contemplate but one sale, and on such sale a full and complete settlement of the trust.

§ 1407. *Where railway property cannot be sold in parcels without manifest injury to its value the whole may be sold for the payment of interest, although the principal debt be not due.*

Conceding, then, that there must be a sale to pay the interest due and unpaid, the question arises, Should there be a sale of the entire trust property or only a part of it? I think this question is settled by the averment of the bill admitted by the answer of the defendant railroad company, and nowhere in the pleadings denied that the railroad with its appurtenances is in the nature of an entirety, and constitutes one and a continuous line, and that its unity and continuity are the most important elements of its value, and that to separate any part from any other part would greatly impair the whole. This averment of the bill is not only admitted by the answer of the defendant company, but there is not a scrap of evidence in the record to show that it is not entirely true. And, as a general rule, it must be evident that to cut up a railroad and sell it piecemeal would destroy its value. While a sale of a particular part might be made, in some cases, without serious detriment to the part sold, yet from that fact it would by no means follow that the residue would remain uninjured. That where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgaged property cannot be

sold in parts without injury to its value, the whole may be sold on default of the payment of interest before the principal is due, is sustained by the following authorities: *Salmon v. Clagett*, 3 Bland's Ch., 125, and other cases there cited; *Seaton v. Twyford*, 11 Law Rep., Eq. Cas., 591; *Dunham v. Railway Co.*, 1 Wall., 254 (§§ 1557-58, *infra*); *Olcott v. Bynum*, 17 id., 44; *Pope v. Durant*, 26 Ia., 233. Upon the case as presented, I am therefore of opinion if any part of the road is sold the whole may and should be sold. If a sale of the whole is made, it will be then time to consider what shall be done with the proceeds. That is a question which, it seems to me, does not, under the practice of courts of equity, present any grave difficulty.

§ 1408. *A corporation, non-resident of the district, appearing and answering, is bound by the decree.*

It is objected to a sale of the whole property of the defendant railroad company that the property is owned by two distinct corporations, one of which, a resident of South Carolina, owns the property of the railroad in that state, and that there can be no merger of railroad corporations extending through several states which will so destroy their individuality as to confer on the united corporation all the franchises of the several parts; that a corporation cannot be chartered by two states so as to have a common individuality in both. The inference drawn from this proposition is, that this court can only order a sale of the railroad property in Georgia which is owned by the Georgia corporation, which alone is a party defendant to the bill, and that the court cannot order a sale of the property in South Carolina, which is owned by a distinct corporation which is not before the court. It would seem to be a sufficient reply to this proposition to say that the Atlanta & Richmond Air Line Company has answered, admitting the union and consolidation of the two companies into one company, has contracted as one and not as two companies, has issued bonds and secured them by a deed of trust as one company, covering its entire line of road and property, and has agreed that the whole might be sold by one sale, at Atlanta, in the state of Georgia. Even if this proposition of defendants' solicitor were true, we think the facts would estop the South Carolina company from setting up its separate existence and separate property, and we think that it has, by the answer of the Atlanta & Richmond Air Line Company, entered its appearance in this cause.

But is it true that a corporation cannot be chartered by two states so as to make one and the same corporate body? When this case was up on motion for the appointment of a receiver I passed upon this question, and held that two states might, by concurrent legislation, unite in creating the same corporate body. It is unnecessary to repeat what I then said. See *Philadelphia, etc., R. Co. v. Maryland*, 10 How., 376; *Railroad Co. v. Harris*, 12 Wall., 65.

Counsel for defendants refer to the following cases as establishing the doctrine upon which they rely: *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286; *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 325; *Railway Co. v. Whitton*, 13 Wall., 270; *Tomlinson v. Branch*, 15 id., 460 (CONSTR., §§ 2273-75); *Railroad Co. v. Jackson*, 7 id., 262; *The Delaware Railroad Tax*, 18 id., 206 (CONSTR., §§ 2328-35). I have examined these cases and cannot find in them anything to overturn the positive declaration of the court in *The Railroad Co. v. Harris, supra*. On the contrary, *The Delaware Railroad Tax Case, supra*, strengthens the view of the court in that case. I am of opinion, therefore, that the Atlanta & Richmond Air Line Railway Company is one and the same corporation, both in Georgia and South Carolina, and that this one corporation

is properly before the court. But concede that there are two corporations under the name of The Atlanta & Richmond Air Line Railway Company, one created by and residing in Georgia, and the other created by and residing in South Carolina. It is made perfectly clear by the pleadings and evidence that these two corporations, if there be two, have joined under their common name in executing the bonds and deed of trust in the bill mentioned, over the common property of the two corporations. Now the Georgia corporation has been served with process and is before the court, and the South Carolina corporation has entered its appearance, and both the corporations have united in a common answer to the bill. The court, therefore, has jurisdiction over both; for while the South Carolina corporation, if it exists as a distinct corporate body, has the right to demand that it shall be sued only in the district where it resides or is found, it may waive this right and enter its appearance as a defendant in any district it pleases. *Northern Indiana R. Co. v. Michigan Central R. Co.*, 15 How., 242. It has appeared in this court in this cause as a defendant, and it therefore may be bound by its decree.

§ 1409. *Where the court has jurisdiction of the parties, it may order a sale of the entire line of a railway, although a large part of it lies beyond the jurisdiction of the court.*

It is further insisted by the defendants' counsel that as a large part of the property covered by the deed of trust is beyond the territorial jurisdiction of this court, we are without power to order the sale. The paper executed by the Atlanta & Richmond Air Line Railway Company is a deed of trust to trustees, conveying to them all the railway and other property of the company, with power to sell the whole at the city of Atlanta, in the state of Georgia, if default should be made in payment of interest or principal. Now it cannot be seriously contended that these trustees could not, without the aid of this court, by following the direction of the deed of trust, have sold the entire line of the defendant company's road, and have conveyed a good title to the whole, extending as it does from Atlanta to Charlotte. Is the power of the trustees any less, because this court has been asked to construe the deed of trust and to order them to execute the trust? If the trustees, under the direction of this court, sell the whole road, they do so by virtue of the power vested in them by the deed of trust. We are not asked to foreclose a mortgage. We are not asked to confer on the trustees any power which they do not already possess, by virtue of the deed of trust, or to impose upon them any new duties, but simply to tell them what their powers are under their deed, and require them to exercise their powers for the benefit of the *cestuis que trust*. The complainants may, by reason of obstacles existing in the other states through which the railroad runs, be compelled to file ancillary bills in those states; nevertheless, I think it is proper, and that this court has jurisdiction to order in this case a sale of the entire line of road.

I think what has just been said is an answer to the argument that, under the code of Georgia, a mortgage can only be foreclosed when the entire principal or an instalment of it is due. No foreclosure is asked here. The complainants seek only to exercise what they think to be their rights under the deed of trust, by a sale according to the terms of the trust deed. The conclusions I have reached are the following: 1. That the Atlanta & Richmond Air Line Railway Company, whether it is a single corporation or two corporations of that name, is properly before this court. 2. That it is the meaning of the deed of trust, that the road of the company, or so much as may be necessary,

may be sold to pay interest coupons due and unpaid, without waiting for the maturity of the bonds. 3. That the road is an entirety and cannot be sold piecemeal without injury to the value of the road, and therefore the entire road may and should be sold. 4. That the trustees, by virtue of their power under the deed of trust, can, by the direction of this court, sell the entire road lying in three states, and convey a good title to the whole. 5. That the trustees ought to be required to make the sale in accordance with the directions of the deed of trust. 6. When the proceeds of the sale are brought into the court, the court will direct how the residue remaining after the payment of the interest due shall be disposed of.

BROOKS v. VERMONT CENTRAL RAILROAD COMPANY.

(Circuit Court for Vermont: 14 Blatchford, 463-473. 1878.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—This bill is brought by the orators as holders to a large amount of first mortgage bonds of the defendant railroad company, in behalf of themselves and other like holders, not citizens of the state of Vermont, to foreclose the mortgage, remove the trustees in the mortgage, who are the other defendants, and have the mortgaged property declared to be free from any lien claimed upon it in favor of debts held by the trustees, created in its management subsequent to the mortgage. To so much of the bill as goes for a foreclosure the railroad company has pleaded the pendency of a bill of foreclosure in the court of chancery of the state of Vermont for the county of Chittenden, commenced in the year 1856 or 1857; to so much as relates to the lien claimed by the trustees, it has pleaded the pendency of proceedings in the court of chancery of the state for the county of Franklin, involving the validity of the same lien; and, to the residue of the bill, other proceedings in the same court, concerning the mortgaged property. The other defendants, the trustees, have demurred to the whole. The pleas were set down for argument by the orators, and a hearing has been had upon them and upon the demurrer.

§ 1410. *The pendency of a foreclosure suit in a state court is not a good plea to a like suit in this court, when the parties are different.*

The sufficiency of the first plea depends upon whether the suit in the court of chancery for Chittenden county is between the same parties or those fully authorized to represent the same parties, in the same behalf and for the same relief. It is not enough that it relates to the same subject, nor that it is founded upon the same instrument. *Buck v. Colbath*, 3 Wall., 334; *Watson v. Jones*, 13 Wall., 679. The bondholders who joined in that suit were Enos Collins, of Halifax, Nova Scotia, John E. Thayer, Gardner Brewer and Charles T. Alwyn, of Boston, Massachusetts, who are not only not any of these orators, but were not, so far as appears, then or ever holders of any of the bonds now held by the orators. So, the orators themselves have not been parties to the institution or prosecution of that suit, nor do they hold under any one, nor are they represented by any one, who has been such a party, unless it be by the trustees.

The mortgage is referred to in and expressly made a part of the bill of complaint. The operative part of it is a conveyance, according to the requirements of the law for conveying real property to the trustees. Then it provides for issuing the bonds to an amount not exceeding \$2,000,000, to be dated November 1, 1851, to be payable November 1, 1861, and to bear interest at the rate of seven

per cent., payable semi-annually. Then it contains the following condition: "Now, therefore, the condition of this obligation is such, that, if the said Vermont Central Railroad Company shall well and truly pay, or cause to be paid, the accruing interest upon said notes or obligations, according to the terms thereof, and shall also pay the principal thereof pursuant to their promise, when the same falls due, then this obligation shall be void, otherwise to remain in full force." There are other provisions in the instrument creating further rights, but none for defeating the effect of the conveying part by making payment to the trustees. Defeasance could be made only by payment to the bondholders. Under this instrument the trustees, apart from the bondholders, took nothing but a naked dry trust. Each holder of a mortgage bond has had rights of his own to the mortgage security, and the trustees have, since default of payment, held the legal title for each and for all of the bondholders, and not at all for themselves. The situation became and has been like that where mortgages of farms or other real estate are made to secure several negotiable notes, which are afterwards passed to various holders. In most such cases, the mortgage property and the number of holders are very small compared to those here, but the rules of law by which their rights are governed are precisely the same, so far as applicable. In either case, the debts are the principal things, and the mortgage and estate of the holders of the legal title mere incidents. In neither could the ones having the legal title under the mortgage without the debts maintain a foreclosure alone. *Davis v. Hemingway*, 29 Vt., 438. A suit by the trustees under this mortgage, without joining some of the bondholders, would be wholly without foundation. So the suit pleaded was not brought without joining some of them in it, as was necessary. But any bondholder could institute and maintain such proceedings of his own motion, whether the trustees would or not, by making them defendants. *Jones on Mort's*, §§ 1383, 1384, 1385.

The suit pleaded was instituted in behalf of all who would come in as complainants. The plea alleges that it was instituted by the bondholders who joined in it, in behalf of themselves and all other bondholders, without confining it to those who would come in; but those bondholders, clearly, were not agents for the rest, so they could institute a suit for them without they would come in. So it is to be taken that it was in effect a suit in behalf of the bondholders who did and all others who would join in it. There is no doubt but that they could become parties to that proceeding, but they were not obliged to do so. If that suit had proceeded to a decree and an accounting to ascertain the sum due in equity, no one but the orators could present their bonds to be reckoned. If the accounting had been had and a final decree passed without their bonds having been reckoned, they would not have lost their rights. *Wright v. Parker*, 2 Aikens, 212. In *Palmer v. Earl of Carlisle*, 1 Sim. & Stu., 423, and *Lowe v. Morgan*, 1 Bro. Ch., 368, where parts of debts secured by single obligations and by mortgage were sought to be foreclosed without the other parts, the foreclosures were refused. So, probably, a foreclosure had of such a part would be a bar to another foreclosure of the residue of the same debts. But, here, each bond is distinct and separate. In *Montgomerie v. Bath*, 3 Ves. Jr., 560, there was a foreclosure of a part without the rest.

Neither were the trustees agents for the bondholders, before foreclosure accomplished, certainly, to institute any suit or proceeding for enforcing payment of their bonds. *Sturges v. Knapp*, 31 Vt., 1; *Miller v. Rutland & Wash. R. Co.*, 36 Vt., 452. But, even if the trustees had authority to institute such pro-

ceedings in the name of the orators, as bondholders, or to prove their bonds in their behalf, after decree, so as to involve them in the proceeding, they have not done so. The suit has been merely kept on foot in the name of the trustees, by making new trustees parties, as others have disappeared, without, for many years, making any other progress. While the trustees are shown to have continued the cause, it is not shown that the bondholders who joined have survived, or that any others have entered; but, probably, it is to be presumed, in the absence of anything to the contrary, that they still continue to be parties. The implication of agency of the trustees for the bondholders is not near so strong in this mortgage as in that of the Rutland & Washington Railroad; for there the condition was, if the mortgagor "shall pay or cause to be paid, to the said trustees or the legal holders, two hundred and fifty bonds of \$1,000 each," the conveyance should be void, so that a default could be saved by payment or tender to the trustees, while in this mortgage there is no such provision. And, when that suit was commenced, there had been no default in payment of the principal of the bonds, for it would not be due for several years after, and it is not alleged that there had been default in the payment of the interest even on the orator's bonds, or on all the bonds, so as to include them, and there might well enough be a failure to pay it on a part, and not on all, in which case there might be a foreclosure for those on which there had been a default, in which holders of others could not join.

From all these considerations it seems apparent that the suit pleaded was not the suit of the orators. They never brought it, nor joined in it, could not discontinue it, and cannot be barred by it. So, the allegation in the plea, that it was "for the like relief and purpose" as this, must be understood to mean like relief to those parties to that claimed here for these. This plea is, therefore, overruled.

By leave of court the orators have amended the bill by striking from the special prayer all that part praying for relief sought by that part of the bill to which the second plea is pleaded. It is urged, for the defendant, that this leaves all the facts in that part of the bill standing alleged, and that the relief could be had under the general prayer, so that, in effect, the bill is the same as before. This is probably true. But the court understood the application for the amendment, under the circumstances, to be, in effect, a concession that this part of the bill could not be maintained in the face of the plea, or that, if it could, they did not care to undertake to maintain it. If there should be no judgment on that plea placed on the record, the defendant would be left in doubt as to whether it must answer that part of the bill further, which would not be just. To remove the doubt there should be a judgment allowing that plea.

§ 1411. *A plea that trustees should not be removed, because whatever they did was done under the direction of a state court, is bad.*

The third plea is pleaded to the residue of the bill. There does not, however, seem to be anything of the residue except that part for the removal of the trustees. The substance of the plea is, that, whatever the trustees have done, alleged in the bill to be in violation of, or in opposition to, their trust, they have done under the direction of the court of chancery for the county of Franklin, in proceedings to enforce other rights claimed to exist in respect to the mortgaged property. From the bill and the plea it appears that the trustees are not now in possession of the property in any capacity. Therefore, there is no question here, on this particular point, in relation to any interfer-

ence by this court with the jurisdiction of that, growing out of the possession by that of the mortgage property, by them as its agents or officers. Those proceedings may be a full justification for all the trustees have done under them, as to everything except their right to continue to be trustees, and still they may have come out of them with such relations towards and interests in the property as that their position is hostile or in opposition to the interests of the orators, of which they are trustees, as alleged in the bill. If so, those proceedings are not now any bar to the substitution of those not so situated in their places. This does not signify that there may not be other considerations on this subject that would be entitled to weight. The point right here is, whether those proceedings alone now should bar removal, and it appears that they should not.

§ 1412. *Proceeding in this court for a foreclosure while a bill is pending in a state court is no contempt of the state court.*

The demurrer of the trustees raises the question, whether the bill, as drawn, can properly be maintained in this court. The principal reason urged against its maintenance is, that, to proceed with it, would interfere with the possession and control of the mortgage property by the state court, and so would be a contempt of that court. It was said by the late learned Circuit Judge Johnson, in *Pond v. Vermont Valley R. Co.* (pamphlet, p. 31), with reference to this same subject, that it is no bar to a suit in one jurisdiction, that bringing it may be regarded as a contempt in another. It is for the court whose authority a party has disregarded to vindicate its own authority. This is, doubtless, the correct rule, as matter of strict right. *St. Joe & Denver R. Co. v. Smith*, 16 Alb. L. J., 408. But, if this were not so, or if, as a matter of comity towards the state court, this court would not, as it probably would not, proceed with a cause so as to involve any such interference, it remains to be inquired of, whether proceeding with this suit by requiring the bill to be answered would bring any such consequences. It is quite clear that it would not, unless the property is in the custody of the court by its officers or appointees, and not in that of individuals or corporations by other authority. The nature of the possession, as shown by the proceedings in the state court, made a part of this record, has lately been before the highest court of the state for consideration, and, as this is a question arising under the laws of the state, the construction of the state courts, of the effect of the laws and proceedings, must control. There is some controversy as to what was and what was not settled by that decision. The court, through Barrett, J., after an exhaustive review of the situation and proceedings up to and including the compromise decree, so called and known, of 1864, says of that decree (pamphlet, p. 35): "It was devised and put in form as the outcome of the mind and will of the parties—as the mode of consummating into validity a mutual arrangement by the parties as to their respective rights and interests, and as to the mode and means by which the property was to be held and used in serving and satisfying those interests. That decree adopted what had been created by the court as a receivership, as known and warranted by the law; but the administration of it was not left to the judicial judgment and direction of the court, under the law authorizing and governing a receivership, known to the law as such. Instead thereof, the parties enacted a code *ex contractu* for the administration of the property, and provided *ex contractu* that there should be the formality as of a decree supervening thereupon. Since that the administration has proceeded in pursuance of that fact and of that formality—practically, an administration by the

agreement of leading real and representative persons and parties." It is argued that this was said with reference to a different proceeding from this, and that, notwithstanding those might be the views of that court with respect to proceedings for a sale of the property by the court, such as were then in hand, it does not show but that the possession of the property was that of the court. And such seems to be the opinion of the learned chancellor of the court of chancery for Franklin county, as stated in proceedings had before him in respect to the property, since the decision in the higher court. But, whichever is correct, this case is not affected, unless these proceedings under it would necessarily interfere with the possession of the property. The property has once been surrendered by the mortgagor in pursuance of the mortgage, and it has not since been in possession of the mortgagor, nor of any one claiming under the mortgagor, by any title acquired subsequently. The mortgagor has still left to it the equity of redemption of the mortgage. This bill, so far as it is for foreclosure, is brought to foreclose that. The prayer of the bill is, that an account be taken of the sum due in equity, a time of payment thereof fixed, "and, in default thereof, that said Vermont Central Railroad Company, and all persons claiming under it, may be barred and foreclosed of and from all equity of redemption in said mortgaged premises." If there should be a decree upon the bill as framed, it would run, that, in default of payment according to it, the mortgagor and all persons claiming under it should be foreclosed and forever barred of all equity of redemption in the premises.

§ 1413. *Writ of possession.*

It was said in the argument that upon the expiration of the time this court would issue a writ of possession to its officer, and, in its execution, conflict of jurisdiction and officers then might ensue. It is true that under the statutes of the state, on a decree of foreclosure in the state courts, a writ of possession issues. Gen. Stat. Vt., 255, § 74. But the processes of the state courts are not adopted in proceedings in equity in the United States courts as they are in proceedings at law. R. S. U. S., §§ 913, 914. Such a decree, not redeemed, would merely cut off the title of the mortgagor, and no process of the court would be needed to follow it. 2 Black. Comm., 159; 4 Kent's Comm., 180. But if a writ of possession should follow the decree it would run only against the parties to the suit and those claiming under them, which would mean those so claiming by title since the proceedings. Jones on Mort., § 1411. In this case there are no such parties so claiming, as appears, and there is no possession of the parties to the suit to be delivered.

§ 1414. *Subsequent mortgagees not necessary parties to a foreclosure suit.*

Another ground urged in support of the demurrer is, that the bill shows a second mortgage of the property, and that those mortgagees are not made parties. If this was a bill to go further than to foreclose, this ground might be good. But, as a bill for that purpose merely, the subsequent mortgagees cannot be concluded by proceedings to which they are not parties. So, while they would be proper parties, they are not necessary parties. Weed v. Beebe, 21 Vt., 495; Jones on Mort., § 1558. There are further remedies provided for in the mortgage instrument, one for possession under the mortgage after default for the space of ten days, and another for a sale of the property after default for six months, on demand of two-thirds in amount of the holders of the bonds, in writing, under their hands. These remedies are merely cumulative to, but do not displace, the one by strict foreclosure. Cheever v. Birchard, Sup. Ct. Vt., Gen. T., 1869, pamphlet opinion of Steele, J., 32. The remedy by posses-

sion has been had. There are no allegations of any demand in writing, nor of any facts in the direction of a sale under any provision of the mortgage. So the effect of any such proceedings is not now in question, and sales under ordinary proceedings for foreclosure are not known under the laws of Vermont. *Gates v. Adams*, 24 Vt., 70; *Wing v. Cooper*, 37 Vt., 169.

As this case now stands, these orators, owning a large amount of bonds secured by this mortgage, the trustees of which are so situated as to be interested in opposition to them, seek to foreclose the mortgage, so far as their rights are concerned, in this court. That they have the right to so proceed in this court would seem to be well settled by the decision and opinion of another late learned circuit judge, Woodruff, in the same cause before mentioned (*Pond v. Vermont Valley R. Co.*, 12 Blatch., 280), in connection with the opinion of Judge Johnson. That a similar suit is maintainable in the federal circuit court, notwithstanding there is a suit pending in the state court in the same district, in which the orator might join or be joined, has been held by Chief Justice Waite, in the fourth circuit. *Parsons v. Greenville & Columbia R. Co.*, 1 Hughes, 279. And that the pendency of a suit in the state court is no cause for abatement of another suit for the same cause of action in the federal courts of that district, seems to have been held by Mr. Justice Clifford, in *Loring v. Marsh*, 2 Cliff., 311. The doctrine of this latter case is somewhat criticised by Love, J., in *Brooks v. Mills County*, 4 Dill., 524, so far as it is applicable to suits in the same district. In the latter case, such a plea was held not to be good where it did not allege that the parties were the same.

There are some matters here presented looking in the direction of defenses to these bonds, but these matters are not now for consideration in that respect. The question now in hand is not at all whether the bonds are enforceable against the defendant railroad company, or otherwise, but it is whether the orators have the right to have their rights to foreclose the equity of redemption of their bonds tried in this court. So far as appears, as these objections are now considered, they have that right. The second plea is allowed. The first and third pleas and the demurrer are overruled.

§ 1415. Power of sale does not prevent foreclosure in equity.—The insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure, where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction, in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and would be inequitable. *Hall v. Sullivan R. Co.*,* 21 Law Rep., 188.

§ 1416. Power waived.—A power under a deed of trust may be waived. *Williamson v. New Albany, etc.*, R. Co., 1 Biss., 193 (§§ 1514-1518).

§ 1417. Foreclosure where corporation exists in two states.—When a mortgage executed by a railroad corporation organized under the laws of two or more states, covering its entire road and franchises, is foreclosed by suit in a court having jurisdiction in one state only, but having jurisdiction of the mortgagor and of the mortgage trustees, a valid decree of sale of the entire mortgaged property may be made, although a part of the property be situated beyond the court's jurisdiction. *Muller v. Dows*, 4 Otto, 277, 443.

§ 1418. The decision of a state court as to the validity of a foreclosure of a railroad mortgage, made in conformity to the state law in a court of the state, is a rule of decision to the federal courts in the same matter. *Sullivan v. Portland & Kennebec R. Co.*, 4 Cliff., 212 (§§ 1621-28); *S. C.*, 4 Otto, 807 (§§ 1629-30).

§ 1419. Trustee must report to tribunal where proceedings were commenced.—When a bill has been filed in the circuit court to foreclose a mortgage, and upon the faith of its orders bonds have been surrendered and other interests adjusted, this is the proper tribunal for closing the trust and the trustee should report to this court. He has no right to turn over to another tribunal matters which have been partially adjudicated in the circuit court, for that is the only court whose decision upon the matter involved would be binding upon the parties. *Bill v. New Albany, etc.*, R. Co., 2 Biss., 398, 399.

§ 1420. A service of subpoena is not necessary on a supplemental bill except as to new parties; for such bill is a mere adjunct to the original bill, and, where the parties have already been served, no further subpoena for them is required. *Shaw v. Bill*, 5 Oto, 10 (§§ 1280-83).

§ 1421. Railroad indivisible.—A railroad for purposes of a sale under execution or mortgage is indivisible. *Ludlow v. Clinton Line R. Co.*, 1 Flip., 33.

§ 1422. In Ohio it is against the declared policy of the state to disintegrate a line of railroad by a sale of a portion of the land over which it runs. The whole road, and the land necessary for its operation, together with the franchises of the corporation to maintain the railroad and demand compensation for the transportation of passengers and property, must be sold, and, for the purposes of the sale, such property is to be considered as one tract of land, lying in different counties. *Ibid.*

§ 1423. Where a mortgage of a railroad is recorded in one of several counties through which the mortgaged railroad runs, its lien is as to judgment creditors confined to the portion of road lying in the county in which the mortgage was recorded. *Ibid.*

X. FORECLOSURE PROCEEDINGS UNDER RAILROAD MORTGAGES.

SUMMARY—When bondholders may institute proceedings, § 1424.—Provisions for foreclosure at request of majority of bondholders, §§ 1425, 1433, 1439.—Proceedings by one bondholder alone, § 1426.—Prior mortgagees not proper parties, § 1427.—Mortgagees of another distinct portion of the road, § 1428.—When stockholders may become parties, § 1429.—Subsequent judgment, § 1430.—Subsequent lease, § 1431.—Road in two or more states, § 1432.—Cross-bill, § 1433.—Bonds in payment, §§ 1434, 1435.—Time for payment after decree, § 1436.—Reversal, § 1437.

§ 1424. Where a mortgage trustee refuses to foreclose the mortgage, individual bondholders may properly institute such a suit against the mortgagors, and may implead the trustee as a respondent. *Hotel Co. v. Wade*, §§ 1440-1446.

§ 1425. A single bondholder may insist upon a foreclosure although the mortgage provides for a foreclosure by the trustee upon request of the majority of the bondholders secured by the mortgage. *Alexander v. Central Railroad of Iowa*, §§ 1447, 1449.

§ 1426. When a railroad company mortgages its property directly to all its bondholders by name, to secure specifically to each the amount due on the bonds to him, no one bondholder, even when professing to act in behalf of all bondholders who may come in and contribute to the expenses of the suit, can proceed alone against the company, and ask a sale of the property. It is a general rule, both at law and in equity, that a suit upon a written instrument must be brought in the name of all persons who are parties to it, or have an interest in it. Then if it appears that the mortgage is an inadequate security, there is another reason why one bondholder or a part of the bondholders cannot proceed without the others. In such case it is the interest of every bondholder to diminish the claim of every other bondholder. *Railroad Co. v. Orr*, §§ 1449-1453.

§ 1427. It is neither necessary nor proper to make prior mortgagees parties to a foreclosure suit, unless the circumstances are peculiar, as where a sale of the entire property is sought, or the amount of the lien of the prior incumbrance is in doubt. *Jerome v. McCarter*, §§ 1453-1456.

§ 1428. Upon the foreclosure of a mortgage upon a distinct portion of a railroad, the mortgagee of another distinct portion is not a necessary party. *Bronson v. La Crosse & Milwaukee R. Co.*, §§ 1457-1459.

§ 1429. Individual stockholders may be allowed to become parties to a foreclosure suit where it is alleged that the directors have fraudulently refused to attend to the interests of the corporation and defend the suit. *Bronson v. La Crosse & Milwaukee R. Co.*, §§ 1460-1466.

§ 1430. A mortgage or judgment, prior in point of time, is paramount to a subsequent judgment, though this is first enforced. *Ibid.*

§ 1431. Until a mortgagee takes possession under his mortgage, or files a bill to foreclose it, and obtains the appointment of a receiver, he is in no way responsible for the dealings of the mortgagor with third persons; such, for instance, as the leasing of a railroad which is the subject of the mortgage, although the lease be fraudulent against the company. Such dealings, after the execution of the mortgage, cannot affect the rights of the mortgagee, and he has no control over them. *Ibid.*

§ 1432. The fact that a railroad company running through two states is incorporated in both does not prevent a court sitting in one of these states from ordering a sale of the entire property situated in both states, under a mortgage of the entire line of road executed by one

corporate body. The execution of the mortgage in this way would estop the corporation from setting up a separate existence in the two states. *Ibid.*

§ 1433. A security may be enforced upon a cross-bill filed by a defendant. *Railroad Companies v. Chamberlain*, § 1467.

§ 1434. The court in decreeing a foreclosure sale is not bound to follow the terms of the mortgage as to accepting from the purchaser bonds in payment or part payment on his bid. The court may adopt the method of procedure pointed out in the mortgage, but is not bound to do so. *Farmers' Loan & Trust Co. v. Green Bay, etc., R. Co.*, §§ 1468-1473.

§ 1435. The court may fix the rate at which bonds shall be applied to the bid, without regard to the terms of the mortgage. *Ibid.*

§ 1436. According to the usual practice a decree directing a sale of the mortgaged premises usually provides that the sale must be made upon the defendant's failure to pay the amount found due within six months, which is the usual time; though the sale may be made within a shorter time, or even immediately by consent of the parties, or when it is considered to be for the benefit of all parties. But a decree requiring payment of the principal debt, amounting to a very large sum, within twenty days may be erroneous. *Chicago & Vincennes R. Co. v. Fosdick*, §§ 1474-1477.

§ 1437. A decree *in personam*, dependent on a decree of foreclosure and sale, will be reversed if the latter shall be. *Ibid.*

§ 1438. Where a mortgage provides that the trustees may declare the whole mortgage debt, both principal and interest, to be due upon the happening of a default, and that a sale of the mortgaged premises shall be made "upon the written request of the holders of a majority of said bonds then outstanding," a sale of the mortgaged property should not be decreed without the written request of a majority of the bondholders. *Ibid.*

§ 1439. One purpose of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests. In declaring the principal sum due before the date fixed by the credit, upon a default in the payment of interest, the trustee is acting for the whole number of bondholders, and the provision that subjects his action in enforcing the stipulation to the wishes of a majority is meant for the protection of the class. *Ibid.*

[NOTES. — See §§ 1478-1494.]

HOTEL COMPANY v. WADE

(7 Otto, 13-24. 1877.)

APPEAL from U. S. Circuit Court, District of Nebraska.

§ 1440. *Jurisdiction of the circuit courts.*

Opinion by MR. JUSTICE CLIFFORD.

Jurisdiction of the circuit courts, concurrent with the courts of the several states, under the existing act of congress, is extended, where the matter in dispute exceeds the sum or value of \$500, to all suits at common law or in equity in which there shall be a controversy between citizens of different states, without any exception or qualification, employing the very words contained in the constitution. 18 Stat., 470; Const., art. 3, sec. 2.

STATEMENT OF FACTS.—Motives of a public character induced certain residents of the city of Omaha to become organized as a corporation, to facilitate their efforts to erect a hotel at that place. Expenditures to a large amount were incurred by the Hotel Company in purchasing the lot and in erecting and enclosing the building; and, being unable to complete the same without pecuniary aid from others they decided to mortgage the premises to raise the necessary funds for the purpose. Arrangements were first attempted and partly perfected to make a loan of \$75,000; but it was soon after determined that it would require \$25,000 more to accomplish the object. Negotiations of various kinds ensued, which resulted in a vote of the stockholders in favor of the proposition ultimately carried into effect, to borrow \$100,000 to complete the hotel. Action of a corresponding character was had by the board of directors; and they voted to accept the proposition made to the stockholders, and directed the president and secretary of the company to execute, acknowledge and deliver to

Milton Rogers, trustee, a mortgage or trust deed of the hotel lot and building, as more fully set forth in the record. Bonds of the company executed to bearer, with interest coupons attached, to the number of one hundred, each for the sum of \$1,000, with interest at the rate of twelve per cent., payable semi-annually, were issued, the principal payable in five years, with the privilege to the company of paying the same two years earlier. Payment of the bonds, principal and interest, was secured by the mortgage or trust deed executed by the president and secretary of the company in pursuance of the aforesaid vote of the board of directors, to carry into effect the proposition previously adopted by the stockholders at their meeting duly notified and held for the purpose.

Covenants alleged to have been broken are the following: 1. That the company shall keep the hotel building insured in good and responsible companies, to be agreed between the parties, in the sum of not less than \$100,000, and that the company shall assign the policies to the trustee for the benefit of the holders of the bonds. 2. That the company shall pay all taxes and assessments upon the mortgaged premises. 3. That the sum raised by the mortgage shall be applied to the construction and completion of the hotel building. 4. That the company shall well and truly pay the interest as it becomes due, and the principal at maturity; and the instrument provides that in case of failure to pay the interest or to perform any other of the covenants or agreements therein contained, then in that case not only the interest but the principal shall become due and payable, and the trustee shall have the right to take immediate possession of the property, foreclose the mortgage and sell the mortgaged premises.

Specific breaches of the covenants of the instrument are alleged, and failures, neglects and refusals of the company to perform the same, in consequence of which the complainants aver and charge that the principal as well as the interest of the mortgage debt has become due, and that they are entitled to a decree foreclosing the mortgage. Service was made, when most of the respondents entered an appearance, and two of the respondents, to wit, E. D. Pratt and Charles W. Hamilton, filed an answer. Certain interlocutory proceedings followed which it is not material to notice in this investigation. Six other respondents subsequently appeared and filed an answer, and at a still later period the Hotel Company appeared and filed their answer. Special reference need only be made to the answer of the Hotel Company, as the other two answers relate chiefly to the application for a receiver.

Four principal defenses were set up by the company: 1. That the circuit court had no jurisdiction of the case. 2. That the bonds and mortgage were void because of the trust relation which the lenders of the money sustained to the stockholders. 3. Because the lenders of the money contracted for and received usurious interest. 4. That the complainants were not *bona fide* holders of the bonds and that the bonds do not equitably bind the Hotel Company.

Due process was served, and it is conceded that the respondents who did not answer suffered the bill of complaint to be taken as confessed. Without unnecessary delay, the complainants filed the general replication, and proofs were taken on both sides. Hearing was had upon bill, answer, replication and proofs; and the circuit court entered a decree in favor of the complainants as fully set forth in the record, the details of which are not material to the questions to be decided in this court. Prompt appeal was taken by the respondents; and since the cause was entered here they have filed as an assignment of errors the rulings of the circuit court in overruling the four defenses set up in the answer of the Hotel Company, the first being that the circuit court had not

jurisdiction of the case, by which is meant that proper parties are not made in the bill of complaint to enable the circuit court to decree the relief for which the complainants pray.

Want of proper parties is the true nature of the alleged error, the principal defects specified being the following: 1. That the suit is in the name of certain bondholders, and not in the name of the trustee designated in the mortgage. 2. That the other bondholders are not joined as complainants in the suit. Application was made to the trustee by the complainants to take possession of the mortgaged premises, and to bring an action in proper form for the foreclosure of the deed of trust and for the sale of the premises; and they allege that he refused to comply with their request, notwithstanding that they offered to indemnify him and save him harmless.

§ 1441. *Where a trustee refuses to file a bill and foreclose a mortgage the beneficiaries may do so.*

Sufficient appears to show, beyond controversy, that the complainants had a right to have suit for a foreclosure in the name of the trustee; and having applied to him for that purpose, and he having refused to perform his duty, the complainants, with the other parties interested in the security, might properly become the actors in such a suit against the mortgagor, impleading the trustee also as a respondent. Resident parties interested to foreclose the mortgage or trust deed also refused to join in the suit with the complainants, and they were joined as respondents with the Hotel Company and the recusant trustee.

§ 1442. *Jurisdiction of United States circuit courts.*

Circuit courts, it is admitted, have jurisdiction, under the judiciary act, of all suits of a civil nature, at common law or in equity, where the amount in dispute is sufficient, and the suit is between a citizen of the state where the suit is brought and a citizen of another state. 1 Stat., 78. Words and phrases of a much wider signification are used in the recent act of congress defining the jurisdiction of the circuit courts, which provides that those courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum or value of \$500, and in which there shall be a controversy between citizens of different states. When the decree in this case was entered, the latter provision was in operation, but the suit was commenced before the act which contains it was passed. 18 id., 470.

§ 1443. *The fact that some of the defendants were made such because they refused to be complainants does not impair the jurisdiction of the court.*

Tested by either provision, the court is of the opinion that the objections to the jurisdiction of the circuit court cannot be sustained, as the respondents are citizens of the state where the suit is brought, and the complainants are citizens of other states; nor does it make any difference that some of the respondents were joined as such because they refused to unite with the complainants in the prosecution of the suit. Equity practice, in such cases, is more flexible than the rules of pleading at common law, and often enables a complainant in equity to maintain the jurisdiction of the court in a case where a plaintiff in an action at law would find it to be difficult to do so, and perhaps impossible. Argument to show that the case made in the record shows that the holders of the overdue and unpaid securities were entitled to sue for the foreclosure of the mortgage or trust deed is unnecessary, as the pleadings and proofs are full and decisive to that effect; and if so, then it is clear that the complainants, under the circumstances of this case, might select the circuit court as the forum

for the adjudication of their rights. Holders of such securities otherwise entitled to sue in the circuit court to foreclose the mortgage or trust deed are not compelled to join as respondents other holders of similar securities, if resident in other states, even if they refuse to unite as complainants, as the effect would be to oust the jurisdiction of the court. Cases of the kind frequently arise; and the rule is that such a party, if he refuses to unite with the complainant, may be omitted as a respondent, unless it appears that his rights would be prejudicially affected by the decree. But it is suggested that the proper parties for a decree are not before the court, as the bill of complaint shows that there are other holders of the securities besides the complainants.

§ 1444. *Rule as to parties in an equity suit to foreclose a mortgage, or similar proceedings.*

It is true, beyond doubt, that all persons materially interested in the fund to be distributed should be made parties to the litigation; but this rule, like all general rules, will yield whenever it becomes necessary that it should be modified in order to accomplish the ends of justice. Authorities everywhere agree that exceptions exist to the general rule; and this court decided that the general rule will yield if the court is able to proceed to a decree and do justice to the parties before the court, without injury to others not made parties, who are equally interested in the litigation. *Payne v. Hook*, 7 Wall., 425. Examples of the kind are put by Judge Story, in his work on Equity Pleading. Speaking of a bill brought by one of several residuary legatees for a final settlement and distribution of the estate of a testator or intestate, he says, all the residuary legatees or distributees ought in general to be made parties; but he admits that, if some are out of the jurisdiction of the court and cannot conveniently be joined, the court will dispense with them, and proceed to decree the shares of those before the court, the rule being that the decree is conclusive only as to those who are parties to the litigation. Story, Eq. Pl., sec. 89; *West v. Randall*, 2 Mason, 193; *Wood v. Dummer*, 3 id., 308. Parties who are not named may intervene and make themselves actual parties, so long as the proceedings are *in fieri* and are not definitely closed by the course and practice of the court. *Campbell v. Railroad Co.*, 1 Woods, 369.

§ 1445. *A corporation is estopped from pleading that a mortgage and bonds secured by it are void because its directors loaned the money, when the transaction was sanctioned by a stock vote.*

Suppose that is so, then it is insisted that the bonds and mortgage are invalid because the lenders of the money sustained a trust relation to the stockholders. Voluminous as the proofs are, it is scarcely possible to enter into the details of the evidence without extending the opinion to an unreasonable length, nor is it necessary, as we are all of the opinion that the finding of the circuit judge in respect to the theory of fact involved in the present proposition is correct. His finding is that the bonds and mortgage are not void upon the ground that the lenders of the money were also the directors of the company; that the terms of the contract were sanctioned by the stockholders; and that the money loaned was needed to complete the building, and that it was applied to effect the purpose for which it was borrowed.

Preliminary to any action in the matter, the proposition for the loan was submitted to the stockholders, and the record shows that it was adopted by a stock vote. Stockholders and directors knew what amount was to be borrowed, and all the terms and conditions of the contract, and that bonds payable to bearer were to be issued for the loan, and that the bonds were to be secured

by a mortgage or trust deed of the hotel property. All knew that a loan was indispensable to the completion of the building, and all were anxious that it should be effected without further delay. Differences of opinion existed among the stockholders as to the best way of raising the money, and prior discussions had not tended to quiet the dissensions, but the stockholders at the meeting referred to decided to adopt the proposition which was carried into effect. Beyond doubt, some of the conditions of the proposition were somewhat peculiar, but the proofs show that it was openly submitted to the stockholders, and that they adopted it by a majority of their votes; that the bonds were subsequently issued, and that they were voluntarily secured by the mortgage or trust deed set forth in the record.

Taken as a whole, the proofs satisfy the court that the money was advanced in good faith, and that the bonds were duly executed and delivered; nor is the legality of the transaction affected by the fact that others of the directors besides the party who submitted the proposition took certain proportions of the bonds and furnished corresponding proportions of the money. It was the company or their agents that prescribed the form of the bonds, and, having issued the same in the form of negotiable securities, it must have been expected that they would be negotiated in the market. Enough appears, also, to warrant the conclusion that the stockholders were more interested to raise the money than to ascertain who would become the holders of the bonds. Examined in the light of the circumstances attending the transaction, as the case should be, the court is of the opinion that the evidence fails to support the proposition that the bonds and mortgage are invalid because the directors became the holders of the bonds and advanced the money. Transactions of the kind have often occurred; and it has never been held that the arrangement was invalid, where it appeared that the stockholders were properly consulted and sanctioned what was done, either by their votes or silence. *Stark v. Coffin*, 105 Mass., 328; *Credit Association v. Coleman*, Law Rep., 5 Ch., 568; *Troup's Case*, 29 Beav., 353; *Hoare's Case*, 30 id., 225; *Smith v. Lansing*, 22 N. Y., 520; *Busby v. Finn*, 1 Ohio St., 409.

§ 1446. *Where a contract on its face is for legal interest only, a corrupt agreement must be proved to make it usurious.*

Most of the directors who took the bonds and advanced the money were owners of stock in the bank where the money when paid to the use of the company was deposited. Interest not having been paid on the deposits, it is insisted by the respondent company that the transaction was usurious; but the court is not able to sustain the proposition, as there is no evidence that any agreement was ever made that the money should be deposited in that bank. Usury, certainly, is not to be favored; but the rule is well settled, that, when the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement, device, or shift to cover usury, and that it was in full contemplation of the parties. *Bank of United States v. Waggener*, 9 Pet., 378. Nor is that rule at all inconsistent with what was previously decided by the court. Profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon the loan, and to be a violation of those laws which limit the lender to a specified rate of interest. *Bank of United States v. Owens*, 2 Pet., 527; *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.), 267. Much depends upon the intent of the parties in the transaction. Conse-

quently, where a certificate of deposit was given, payable at a future day, it was held not to be usury, it appearing that it was given at the request of the depositor, and for his accommodation, without any intent to secure usury. *Knox v. Goodwin*, 25 Wend. (N. Y.), 643. Decided cases also establish the rule that the withholding a part of a loan for a time in violation of the agreement of the parties does not constitute usury, as the retention of the money was no part of the contract or loan. *Auble v. Trimmer*, 17 N. J. Eq., 242; *Howell v. Auten*, 1 Green (N. J.), Eq., 44. So where checks were drawn before the discount was made and deposited, and the bank treated the note as discounted at the date of the checks, the court held that it was not usury, as the circumstances negatived any unlawful intent. *Walker v. Bank of Washington*, 3 How., 62.

When the bonds were converted into money, the proceeds were deposited in the aforesaid bank, which, no doubt, resulted in an incidental advantage to the directors owning portions of the capital stock; but that matter was adjusted in the decree to the satisfaction of the court, and may be dismissed without further comment. Some delay ensued after the bonds were issued before the money was deposited; but nothing of the kind was contemplated when the agreement was made, nor did it take place as a means of increasing the rate of interest. Other defenses failing, the suggestion is that the complainants are not *bona fide* holders of the securities for value; but the suggestion is unsupported by proof, and, of course, cannot prevail, the burden of proof being upon the respondent company. *Goodman v. Simonds*, 20 How., 343 (BILLS AND NOTES, §§ 420-425); *Collins v. Gilbert*, 94 U. S., 753. Suffice it to say, there is no error in the record.

Decree affirmed.

ALEXANDER v. CENTRAL RAILROAD.

(Circuit Court for Iowa: 3 Dillon, 497-490. 1874.)

STATEMENT OF FACTS.—This is a bill by bondholders to foreclose a mortgage executed by the railroad company. The provisions of the mortgage were to the effect that in case of default for the space of six months, in the payment of interest, and after the expiration of twelve months after such interest became due, at the election or option of a majority of the bondholders, without demand or notice, the whole principal should become due, and the mortgage might be enforced. Also, on such default, the trustee was empowered, upon the request of a majority of the bondholders, to take possession of the property and franchises and operate and sell the same. The Farmers' Loan and Trust Company was the trustee, and it was alleged that demand had been made upon it to bring suit, and that it refused, and that it was therefore made a defendant. The trustee denied that demand had been made by a majority of bondholders, and the railroad company demurred on the ground that there was no averment that action on the part of the trustee had been demanded by a majority.

§ 1447. *The right of foreclosure not effectual by a special remedy, such as the right to take possession.*

Opinion by DILLON, J.

1. The authority in the deed of trust to the trustee, on default of the payment of interest, and upon the written request of a majority of the bondholders, to take possession of the road, to operate it and receive its income, and on three

months' notice to sell the same, and divide the proceeds of the sale *pro rata* among the bondholders, is a cumulative remedy for the benefit of mortgage creditors, and does not exclude their right to resort to the judicial tribunals for a foreclosure. Especially is this so, as the laws of the state of Iowa forbid sales under powers of this character by proceedings *out of court*.

§ 1448. *The special restriction upon the right to foreclose considered.*

2. Provisions in an instrument of this character, limiting the right of a mortgage creditor to resort to a court of chancery to foreclose his security, are not to be extended beyond the fair meaning of the language used; and it is our opinion that there is no restriction in the deed of trust before us upon the right of the coupon holder to foreclose *for interest* upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the *whole principal sum* become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon-holder to foreclose *for interest*, in the manner sought in the present bill, and it was not necessary that a *majority* of the coupon-holders should unite in bringing the bill, or in a request to the trustee to bring it.

3. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon-holders, making the trustee a defendant.

4. If the plaintiffs elect to dismiss the bill as to the trustee, we will allow the trustee to become a party plaintiff, and to file a bill for the benefit of all the bondholders; but it would be anomalous to have the trustee on the record both as defendant and plaintiff in the same proceeding. The demurrer of the railroad company to the bill is overruled.

Ordered accordingly.

RAILROAD COMPANY v. ORR.

(18 Wallace, 471-475. 1878.)

APPEAL from U. S. District Court, Middle District of Alabama.

STATEMENT OF FACTS.—Orr brought this suit for himself and others, holders of certain bonds issued by Limestone county, in the state of Alabama, against said county and the Nashville & Decatur Railroad Company. The bill stated that the county subscribed \$200,000 to a railroad company, of which the defendant company is the successor, and delivered the bonds to the company; that the company sold the bonds to various parties, complainant being one, and mortgaged its property to secure them, giving in the mortgage the names of fifteen persons, complainant included; that payment of complainant's bonds was refused by the proper authorities of Limestone county and notice given to the defendant railroad company. The bill prayed an account and a foreclosure of the mortgage, etc. Limestone county did not answer the bill and a decree *pro confesso* was entered. The railroad company demurred for want of proper parties and other causes. There was a decree for complainant.

§ 1449. *The general rule in equity is that all parties entitled to litigate the same questions are necessary parties.*

Opinion by MR. JUSTICE HUNT.

The principal question in the case, and the one upon which the decision is now placed, is whether there are the proper parties present in the suit? It is a

general rule in equity that all parties entitled to litigate the same questions are necessary parties. All persons having an interest, although remote, in the subject-matter of the bill must be made parties, or the bill must be so framed as to give them an opportunity to come in and be made parties. *Bailey v. Inglee*, 2 Paige, 278; *La Grange v. Merrill*, 3 Barb. Ch., 625. The principle that all must be made parties whose interests may be affected by the decree is only departed from where it becomes extremely difficult or inconvenient to enforce the rule. *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344. The principle is also well settled that when it appears on the face of the bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation, and it should be so stated in the bill. *Egberts v. Wood*, 3 Paige, 517; *Mitchell v. Lenox*, 2 id., 280; *Baldwin v. Lawrence*, 2 Sim. & Stu., 18. The rule in the United States courts is thus expressed: "That all persons who have any material interest in the subject of the litigation should be joined as parties, either as complainants or defendants." *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 299; *Story v. Livingston*, 13 id., 359.

§ 1450. *No one bondholder, even professing to sue for all others, can enforce a mortgage made to secure several persons named as holders of bonds.*

The frame of the mortgage now sought to be enforced differs from the ordinary trust deed or mortgage by which the payment of railroad bonds is secured. A trustee is ordinarily named, to whom the security runs as mortgagee, and the instrument recites that the mortgage is made to him in trust to secure the bonds described to the holders thereof. Here the mortgage is made directly to the persons holding the bonds, who are named and their several interests described. The bill does not distinctly allege the insufficiency of the fund to pay all the debts secured by it. It does, however, allege that the county of Lime-stone, the maker of the bonds, has refused to pay them, that the railroad company neglects to make payment, and that the rights and interests of the bondholders are greatly endangered.

§ 1451. *Where the fund is apparently inadequate to secure all parties interested, it is necessary that all should be before the court.*

Upon two grounds, therefore, it would seem to be necessary that the other bondholders should be parties to this suit: 1st. The adequacy of the security of the mortgage for the payment of all the bonds purporting to be secured by it is quite doubtful. The fund is, to some extent, "*tabula in naufragio*." It is the interest of every bondholder to diminish the debt of every other bondholder. In so far as he succeeds in doing that he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it. If upon a fair adjustment of the amount of the debts there should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value.

§ 1452. *A suit should be brought on a written instrument in the name of all parties to such instrument.*

2d. It is a rule of general application, both at law and in equity, that a suit upon a written instrument must be brought in the name of all who are formal

parties to it and who retain an interest in it. No reason is shown in this bill to take the case out of the rule. No reason is assigned why the fifteen persons named do not unite in the action. No allegation is made that they have been requested so to unite and have refused. The general rule is applicable to this action. See *Ribon v. Railroad Companies*, 16 Wall., 450; *Shields v. Barrow*, 17 How., 130.

For the cause set forth in the demurrer, to wit, a want of proper parties, the decree must be reversed and the cause remanded with directions to dismiss the bill without prejudice.

JEROME v. McCARTER.

(4 Otto, 734-740. 1876.)

APPEAL from U. S. Circuit Court, Eastern District of Michigan.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—There are no less than twenty-seven assignments of error in this case, but the subjects of real controversy are few. The bill is an ordinary one for the foreclosure of a junior mortgage covering the canal and franchises of the Lake Superior Ship Canal, Railroad and Iron Company, and covering also two separate bodies of land, each containing two hundred thousand acres. The mortgage was given expressly subject to two prior mortgages, one dated July 1, 1865, upon the canal and one of the bodies of land, and the other, dated July 1, 1868, upon the canal and the other body of two hundred thousand acres of land. Each of these prior mortgages was made to secure the payment of the company's bonds of even date therewith, amounting to the sum of \$500,000; and all the bonds were issued, and they are now outstanding. The first of these prior mortgages is known as the Sutherland mortgage. Default having been made in the payment of interest upon the bonds secured by that, John L. Sutherland, the trustee, filed his bill to foreclose it, making all the subsequent mortgagees parties; and they all appeared. In that case Isaac H. Knox was appointed receiver of all the property covered by the several mortgages, and subsequently, in order to obtain the money necessary for completing the canal by order of the court, he was authorized to create, issue and sell certificates of indebtedness to the amount of \$500,000, to be secured by a mortgage, which he was empowered to make, covering all the property, and which was to be prior in right to all other mortgages. Pursuant to this authority, the receiver did issue and sell such certificates, and for their security executed the mortgage directed by the court. These certificates are now all outstanding.

§ 1453. *To bill to foreclose junior mortgage, prior mortgagees not necessary parties.*

Such was the condition of affairs when the present bill was filed. But the company having afterwards gone into bankruptcy, a supplemental bill was exhibited making the assignees in bankruptcy parties defendant, and they appeared and made defense, and they are the only parties appellant.

It is now contended, on their behalf, that the bill cannot be sustained, because the prior mortgagees were not made parties. This position cannot be sustained. It is undoubtedly true there are cases to be found in which it was ruled that prior incumbrancers were necessary parties to a bill for the foreclosure of a junior mortgage, but in most of these cases the circumstances were peculiar. Where the effort of the junior mortgagee is to obtain a sale of

the entire property or estate, and not merely of the equity of redemption, there is reason for making the prior incumbrancers parties, for they have an immediate interest in the decree. And so, when there is substantial doubt respecting the amount of the debts due prior lien creditors, there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing. But the case in hand has no such peculiarities. The prior mortgages were not due when this bill was filed; and, without the consent of those mortgagees, nothing more than the equity of redemption could be sold under any decree made in the case or under the decree which was sought. Nor is there any doubt entertainable respecting the amount due under the prior mortgages. Indeed, the company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two \$500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior mortgage expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it now. *Bronson v. La Crosse & Milwaukee R. Co.*, 2 Wall., 283 (§§ 1460-66, *infra*).

Apart from the exceptional cases, we understand the general rule to be that, in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties. So it has been held in England in *Rose v. Page*, 2 Sim., 471; *Richards v. Cooper*, 5 Beav., 304; *Delabere v. Norwood*, 3 Swanst., 144. Such, also, is the rule asserted in this country, where the bill of a junior mortgagee, as in this case, seeks only a foreclosure or sale of the equity of redemption. *Edwards on Parties*, p. 91, and cases cited; *Gihon v. Bellville*, 3 Halst. Ch. (N. J.), 581; *Williamson v. Probasco*, 4 id., 571. The subject has been under consideration by this court in *Hagan v. Walker*, 14 How., 37, in which it was shown that it is not necessary in all cases to make a prior mortgagee a party. And it is not easy to see why it should be in any case, when the decree asked cannot injure or affect him. In *Payne v. Hook*, 7 Wall., 432, it was said, "It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. See, also, *French v. Shoemaker*, 14 Wall., 315. We think this is the correct rule. It is certainly consonant with reason, and we see nothing in the present case that justifies a departure from it. We hold, therefore, that the bill is not defective for want of proper parties. The appellants next contend that the decree is erroneous, because the mortgagors were declared bankrupt after the bill was filed, and before the decree was entered; and it is urged that the bankrupt court had absolute and exclusive jurisdiction, and was entitled to the entire administration of the bankrupts' property. That this objection is without merit was shown in *Marshall v. Knox*, 16 Wall., 551, and *Eyster v. Gaff*, 91 U. S., 521, to which we need only refer.

§ 1454. *Objection that leave was not given to file bill of foreclosure of property in hands of receiver not sustained when made a year and a half afterwards.*

A further objection insisted upon is, that while the property was in the charge of a receiver appointed in the suit brought by Sutherland to foreclose the first mortgage, and therefore, as it is said, was *in custodia legis*, this bill was filed without leave of the court. If there could, under any circumstances, be any force in this objection, there is none now. Both suits were brought in

the same court; these appellants appeared, answered and cross-examined witnesses, and made no allegation that the suit had been brought without leave until about a year and a half afterwards. It was then too late. They must be held to have acquiesced; and, if not, leave of the court to commence and prosecute the suit must be presumed after the orders made to facilitate its progress.

§ 1455. *Neither the mortgagor nor his assignee in bankruptcy can question the priority of receiver's certificates established by decree.*

The only remaining assignments of error that require particular notice relate to the ascertainment of the liens on the property of the company anterior to the mortgage now in suit, to the determination of their relative priority, and to the adjudication of the amount of the debt for the payment of which that mortgage is a security. The court decreed not only that the two five hundred thousand dollar mortgages, one dated July 1, 1865, and the other dated July 1, 1868, are liens for the full amounts specified in them, and prior in right to the complainants' mortgage, but that the lien of the mortgage given by the receiver appointed in the suit of Sutherland against the company, in pursuance of the direction of the court in that case, is also a prior lien to the extent of the certificates issued by the receiver; namely, to the extent of \$500,000 and interest. This portion of the decree, it is now insisted, was erroneous. But if the receiver's certificates, issued by order of the court which had the property in charge, are liens at all, what have the appellants, who stand in the place of the company, to do with the order of priority of liens? What difference does it make to them whether the certificates be paid before any other liens are discharged, or after all the debts secured by any mortgage shall have been satisfied? The assignees can get nothing until all the liens on the assigned property have been removed. If the circuit court has made a mistake in determining in what order the incumbrances are entitled to payment, that is a matter for the consideration of the incumbrancers, in which neither the company nor the appellants have any interest. We do not understand the appellants to contend that the entire sum of \$500,000, for which the receiver's certificates were issued, is not due, or that the receiver was not authorized to make the issue and secure it by mortgage, as he did. This is admitted in the pleadings, and there is positive proof of it in the record. It would be superfluous to spend much time in considering the power of the court to confer the authority upon its receiver that it attempted to confer. As a court of equity, having the mortgaged property in charge, it was its plain duty to preserve it, not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the court had displaced. Under the provisions of the acts of congress granting the lands covered by the mortgages, the lands reverted to the United States unless the ship canal should be finished within a fixed period, and that period was passing away when the order was granted to the receiver to raise money for completing the canal by the issue of certificates secured by his mortgage. The canal was unfinished, and there were in the receiver's hands no funds to finish it. Hence there was a necessity for making the order which the court made,—a necessity attending the administration of the trust the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors. Whether the action of the court could make the receiver's mortgage superior in right to the mortgages which existed when it was made, it is needless to inquire. None of the creditors secured by those other mortgages objected to the order when it was made, though they

were all then in court. None of them object to its lien or its priority now. And we think the appellants, either as representatives of their assignors or of general creditors, cannot be heard to object. Beyond doubt, they would not be entitled to a return of the property discharged from liability for the receiver's certificates remaining unpaid, even if all the other mortgages were satisfied. As against them the certificates are certainly charges upon the property, and they have, therefore, no right to complain of the decree, which gives the certificates priority to other liens.

§ 1456. *A pledgee may, upon default, sell bonds held in pledge, notwithstanding the pledgor's bankruptcy.*

That all the bonds secured by the first two mortgages are outstanding and due is, we think, an established fact. We have observed that the mortgage upon which the present suit has been brought was made subject expressly to those two prior mortgages. In it the mortgagors recited that the company did, simultaneously with those mortgages, "execute, issue, negotiate and sell" all the bonds covered thereby, and declared that they were an outstanding and subsisting lien. How can these appellants, who stand in the shoes of the mortgagors, be heard to deny these recitals? Yet, if they can, we find no evidence that all those bonds are not now a subsisting debt of the company to the full extent of the sums named in them. There is some proof that, when the company became bankrupt (August 28, 1872), some of the bonds were held as collaterals for loans made to the company smaller in amount than the bonds pledged. But the bonds were subsequently sold by the pledgees, and the present holders hold them by absolute right. The position that the pledgees could not sell the pledge after the adjudication in bankruptcy is quite untenable. It is sustained by nothing in the bankrupt act. The bonds were negotiable instruments. They passed by delivery, and even were there no expressed stipulation in the contracts of pledge, that the pledgee might sell on default of the pledgor, such a right is presumable from the nature of the transaction. Certainly the bankrupt act has taken away no right from a pledgee secured to him by his contract.

In regard to the bonds covered by the McCarter mortgage, which is the one now in suit, we find no error in the decree of which the appellants can complain. Most of those bonds, though at first issued as collaterals for loans made to the mortgagors, have been sold, and they are now owned by the purchasers. There are some, it is true, that are still held in pledge; but the pledgees have a clear right to use them, either by sale or by collection, until the full amount of the debts due from the mortgagors is satisfied. We cannot close our eyes to the patent fact that the entire property mortgaged is insufficient to pay the debts with which it is incumbered. The holders of the bonds covered by the Union Trust Company will obtain nothing, and none of the bondholders under the McCarter mortgage will obtain full payment. At least, such is the strong probability. If, therefore, the holders of the McCarter bonds, who hold them as collaterals, are allowed to hold them only for the sums for which they have been pledged, the bonds may, and probably will, prove an insufficient security for the debts actually due from the obligors to the holders. They will prove insufficient, unless the mortgaged property shall bring at the sale enough to pay in full all the bonds held by purchasers, and also all the debts for which the pledged bonds are held. If the sale produces less, there must be a ratable abatement. On the other hand, if the pledgees are allowed to prove the bonds held by them for their full face, these appellants are not injured. If, at the

sale, the mortgaged property shall bring more than sufficient to pay the debts for which the bonds are held in hypothecation, the proceeds of the sale will be under the control of the circuit court, and it will take care that a proper distribution is made. And if this were not so, the pledgees would hold any excess they might receive in trust for other incumbrancers or for the appellants. The only persons, if any, who can possibly be injuriously affected by the decree which was made, are the absolute owners of the McCarter bonds, and they acquiesce in it. It is not for those who are not injured to complain.

Of the only other assignment of error which requires notice it is sufficient to say that, in view of the circumstances of the case, a sale in bulk is the only possible mode of sale which will enable purchasers to buy with confidence. And a sale by parcels, though ordinarily the proper mode, cannot be made with any hope of justice to the creditors.

Decree affirmed.

BRONSON v. LA CROSSE & MILWAUKEE RAILROAD COMPANY.

(2 Black, 524-532. 1862.)

APPEAL from U. S. District Court, District of Wisconsin.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—F. P. James, Isaac Seymour and N. A. Cowdrey ask leave to intervene in this cause, and to dismiss the appeal, and predicate their motion on two affidavits of F. P. James. The first affidavit states substantially that on the 31st of December, 1856, the La Crosse & Milwaukee Railroad Company executed a mortgage on the western division of their road, lying between Portage and La Crosse, to Greene C. Bronson, James A. Soutter, and Shepard Knapp, as trustees, to secure certain bonds, which mortgage was afterwards foreclosed in the district court of Wisconsin, and the mortgage property sold, and purchased by the parties asking to intervene; that the same railroad company, on the 17th day of August, 1857, executed another mortgage to these complainants, Bronson and Soutter, on the eastern division of their road, lying between Portage and Milwaukee, to secure certain other bonds; that suit was also brought on said mortgage in the district court of Wisconsin, where a decree was passed on the 13th day of January, 1862, for one-half of the face of the bonds, from which decree an appeal was taken by Bronson and Soutter to this court; and that the parties to the suit have entered into fraudulent stipulations to reform the decree rendered below, so that the bonds will be paid in full, and that James, Cowdrey and Seymour, as purchasers under the first mortgage, will be injured if the decree is thus reformed.

The second affidavit states that Nathaniel S. Bouton, on the 5th day of April, 1859, recovered a judgment in the same district court for upwards of \$7,000 against the La Crosse & Milwaukee Railroad Company, which judgment was assigned to F. P. James & Co., and was a lien when this suit was instituted, and that neither Bouton nor his assignees were notified of the pendency of these proceedings; that there were issued under the mortgage of December 31, 1856, bonds to the nominal or par value of \$4,000,000, the greater portion of which are held by James and his associates in their own right or in trust for others, and that they have by the advice of counsel determined to abandon their purchase and ask for a resale of the whole property mortgaged by the deed of December 31, 1856.

Have James, Seymour and Cowdrey a right to intervene in this cause, to make a motion to dismiss this appeal, or for any other purpose? The La Crosse & Milwaukee Railroad is a corporation created by the laws of Wisconsin to build a continuous line of railroad from the city of Milwaukee, on Lake Michigan, to La Crosse, on the Mississippi river. Power was given to the company to mortgage separate portions of their road, and in execution of that power the mortgage of December 31, 1856, on the western division, and the mortgage of August 17, 1857, on the eastern division, were given. These mortgages were executed to secure specific liens on different parts of the road, and the bondholders evidently relied on these liens alone for their security. Separate suits were brought at different times to foreclose these mortgages, and the parties in one suit were not necessarily parties in the other. The right to intervene as made by the first affidavit rests solely on the ground that James and his associates were purchasers of the western division of the road, which, as they insist, included "the personal property, machinery, rolling stock, franchises, rights and privileges of the entire road."

This court cannot in this suit decide whether the construction contended for by these parties as to the extent of their purchase is correct or not. Under the pleadings, no question is or could have been raised as to what property is covered by the mortgage deed. The controversy in the court below was whether there should be a decree *nisi* for any amount, and if so, how much. The court, in fixing the amount due on the mortgage, estimated the bonds not at par, but at the rate of fifty cents on the dollar, and decreed accordingly, and the complainants below appealed. It is not perceived *how* the stipulation to reform the decree can affect the *right* of James & Co. to the claim which they advance. If under their purchase they take the rolling stock and franchises of the whole road, what concern is it to them whether the decree is for \$500,000 or \$1,000,000?

§ 1457. *One mortgagee of a part of the property cannot intervene in the suit of another mortgagee for a foreclosure as to a different part of the property.*

Such a *right* is surely not dependent on the amount of the decree. But it is claimed, in the second affidavit, that Bouton, a judgment creditor, having lien, and necessarily a party, had no notice of the pendency of this suit. The answer to this statement is, that the record informs us (p. 297) that Bouton did appear by attorney, and consented that a decree might be rendered pursuant to the prayer in the bill. One other ground remains on which the right to intervene is placed — that of general creditors. James and his associates, owning a large portion of the bonds secured by the lien of the first mortgage, insist that the mortgage is an insufficient security, and that they are, therefore, interested in lessening the amount of the decree to be rendered in this cause. Every creditor is, of course, concerned that his debtor should reduce his obligations. The less the debtor owes the greater his ability to pay.

§ 1458. *A general creditor cannot interfere in a contest between his debtor and a mortgagee.*

But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties? If the general creditors of a mortgagor are suffered to intervene in an appellate tribunal, this court would become the triers of questions of fact outside of the record, and that, too, on *ex parte* affidavits — by no means the best mode of ascertaining truth. If the right was conceded to one creditor it would have to be to another, and where the creditors are numerous, as in the

case of railroad bondholders, the exercise of the right would lead to great embarrassment. If, as is charged, the parties to this suit have made agreements in fraud of the law, or rights of third persons, the circuit court of Wisconsin can give relief in a suit instituted there for that purpose, where testimony can be taken, and the valuable right of cross-examination at the same time preserved. In any case — where it is apprehended that the parties to the record seek to dispose of it by stipulations fraudulently made, and which will affect injuriously the rights of others — the court will respectfully hear and consider *suggestions*, and will endeavor to protect itself from imposition, and prevent the wrong that is contemplated. But the court cannot lay down any general rule of practice by which it will be governed, for each case must depend on its own circumstances. The motion is overruled.

MOTION TO DISMISS APPEAL.

§ 1459. *A decree in a foreclosure suit which ascertains the amount due and directs a sale is a final decree.*

Opinion by MR. JUSTICE DAVIS.

This case is again before us. A motion is now made by one of the defendants to dismiss the appeal, because there was no final decree in the meaning of the act of congress which authorizes this court to exercise appellate jurisdiction only by appeal or writ of error from a *final* judgment or decree.

This is a suit in equity brought by Bronson and Soutter in the district court of Wisconsin to foreclose a second mortgage, given by the La Crosse & Milwaukee Railroad Company, to secure a large issue of bonds. The company being in arrears for interest, Bronson and Soutter sought the aid of a court of equity to enforce their trust. Numerous persons were made defendants, who had, or were supposed to have, liens, and the record, which has swelled to a printed volume of six hundred pages, shows the litigation to have been protracted and bitter. The bill was filed on the 9th day of December, 1859. A part of the defendants answered, which answers were replied to, and a *pro confesso* decree was taken as to those who did not answer; and the cause came on for final hearing on the 13th day of January, 1862. The court judicially ascertained that there was owing to the complainants, on the security of their mortgage, the sum of \$500,000 for principal, and \$65,260.05 for interest, and decreed that the mortgaged premises should be sold at public auction by the marshal, unless the amount found due for arrears of interest, with taxed costs, should be paid before the day of sale. The equity of redemption was foreclosed, and it was ordered, if a sale should be made, that the purchaser should have possession, and that those who had control of the road should surrender the possession on production of the deed from the marshal with a certified copy of the order confirming the sale. It was also decreed, if the interest and costs were paid, that further proceedings should be stayed until some future default should be made in the payment of interest, when, on petition, the court would found another order for sale.

The litigation between Bronson and Soutter and the defendants, on any matter in which there was a joint interest, is closed by this decree. The object of the suit was to ascertain how much money was due on the security of the mortgage and to sell the property unless the amount was paid. The court did find what was due, and ordered a sale. The very purport of the litigation, which was initiated by Bronson and Soutter, was accomplished and nothing remained for them to do, if they felt aggrieved by the finding of the court, but

to appeal. Their right of appeal attached on the rendition of the decree, and the time limited in which an appeal could be taken began to run from the date of the decree. It is said that some exceptions to the report of the master were pending and undetermined when this decree was made; but those exceptions did not relate to any claim of Bronson and Soutter; they were collateral to the main purpose of the suit, and concerned the defendants alone. If Bronson and Soutter should have to sit quietly by until the equities of the different lien creditors of the La Crosse & Milwaukee Railroad Company — with which they have no concern — are determined, they might be ruined before they could avail themselves of their right of appeal. Bronson and Soutter insist that there is due them as trustees on this mortgage \$1,000,000, with large arrears of interest, which claim was reduced one-half by the court below.

The La Crosse & Milwaukee Railroad Company is evidently greatly embarrassed, and the property mortgaged is doubtless the only security relied on by the trustees for payment. Now, if the court had the right to make the decree and order the sale — of which there can be no question — and the right of appeal is in abeyance until the sale is perfected, and the different collateral equities between the railroad company and other parties are settled, great mischief might ensue. If this court *should* find that Bronson and Soutter are entitled to their whole claim, and in the mean time the property is sold and out of their control, how would their success benefit them? It would be a victory barred of results. If the decree was reversed there could be no restitution of the road, its property and franchises; for purchasers at a judicial sale are protected. A rule, from which consequences so injurious to the rights of parties litigant would necessarily result, has never received the sanction of this court.

This decree is not final, in the strict technical sense of the word, for something yet remains for the court below to do. But, as what was said by Chief Justice Taney in *Forgay v. Conrad*, 6 How., 203, "this court has not, therefore, understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." In the case of *Ray v. Law*, 3 Cranch, 179, and *Whiting v. Bank of the United States*, 13 Pet., 15, this court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies. The court rested their decision on the ground that when the mortgage was foreclosed and a sale ordered, the merits of the controversy were finally settled, and the subsequent proceedings were simply a means of executing the decree. But in denial of the right of appeal, it is said that a cross-bill filed by leave of the court is undetermined. This cause was heard and determined on the pleadings then existing, and no cross-bill was pending, although the litigation had been protracted beyond two years. It is true that the court, on the 7th day of January, 1862, and before the decree was passed, gave leave to the "defendants Sebre, Howard, Graham and Scott, the Milwaukee & Minnesota Railroad Company, and any other defendants who have liens subsequent to those claimed by Selah Chamberlain, to file a cross-bill against Chamberlain, contesting the liens under the lease or assignment or judgment claimed by him in his answer, provided said cross-bill should be filed by the 1st of February, 1862."

The bill was filed on the 1st of February, after the decree of foreclosure was made and sale of the premises was ordered, and Bronson and Soutter were made parties, although there was no order of the court permitting it to be done, and process was regularly issued and served on them. It is an independent

proceeding, instituted by certain lien creditors of the road, who were defendants in the original suit, seeking to invalidate a prior lien set up by Chamberlain, another defendant, in his answer. It can affect in no wise the right of Bronson and Soutter to foreclose their mortgage, and has no bearing on the legitimate questions presented for the consideration of the court in the bill filed by them for that purpose. Such must have been the view entertained by the judge of the district court, for we cannot suppose that he intended to embarrass the parties to the original suit, after it was ended, by allowing the defendants to that suit to litigate their own claims to the injury of the original complainants. It is proper to say that we do not approve of the practice of filing a cross-bill after the original suit has been heard and its merits passed on. If any of the defendants in this suit wished to have the equities between themselves settled without instituting an original suit for that purpose, they should have applied to the court at an earlier stage of the litigation, and not waited until the pleadings were perfected, proofs taken, and the cause, after two years of delay, ready for hearing. The motion is overruled.

BRONSON v. LA CROSSE & MILWAUKEE RAILROAD COMPANY.

(2 Wallace, 288-312. 1868.)

STATEMENT OF FACTS.— This was a suit by Bronson and Soutter in the circuit court for the district of Wisconsin, to foreclose a mortgage given to secure the bonds of the company to the amount of \$1,000,000. The Milwaukee & Minnesota Railroad Company, which had previously purchased the equity of redemption of this road at a sale under a third mortgage, was made a party defendant, but made no defense. Two of the stockholders of this company, Rockwell and Fleming, asked and obtained leave to file their answers for the company, upon the ground that the president of the company declined to make any defense. The defendants, Rockwell and Fleming, who claimed under the third mortgage, alleged that the bonds secured by the prior mortgage had been conveyed to complainants without consideration; also that the foreclosure was collusive as between the railroad company and its lessee, Chamberlain, who fraudulently and collusively refused to apply the earnings of the road to the payment of interest on the bonds. Certain judgment creditors were also made defendants, their judgments having been obtained since the execution of the mortgage.

§ 1460. *When a defendant corporation refuses to appear and defend, equity may permit a stockholder to answer and defend as to his own interest.*

Opinion by MR. JUSTICE NELSON.

As the two stockholders (Rockwell and Fleming), though not made defendants by the bill, were permitted, by leave of the court, to appear and put in answers in the name of the Milwaukee & Minnesota Company, it is material to inquire into the effect to be given to them. That they cannot be regarded as the answers of the corporate body is manifest, as a corporation must appear and answer to the bill, not under oath, but under its common seal. And an omission thus to appear and answer according to the rules and practice of the court, entitle the complainants to enter an order that the bill be taken *pro confesso*. A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the inequality that would exist between the parties to the litigation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, no:

by any admissions made in the answer or stipulations that might be entered into by the parties or their counsel. It is thus apparent, that, while the name of the corporation is thus used as a real party in the litigation so far as the rights and interests of the complainants are concerned, it is an unreal and fictitious party so far as respects any obligation or responsibility on the part of the respondents.

It is insisted, however, that the directors of this company refused to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and, hence, the necessity, as well as the propriety and justice, of permitting the defense by a stockholder in their name. Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case, the court in its discretion will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defense. But this defense is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong. A complainant, if he chooses, may compel a corporation to appear and answer by a writ of *distringas*; or he may join with the corporation, a director or officer, if he desires a discovery under oath. But we are not aware of any other except a complainant who can compel an appearance or answer. Now, although the appearance and answers of the stockholders (Rockwell and Fleming) were irregularly allowed by the court, as each was permitted to appear and answer in the name of the company, yet, as the defense set up is doubtless the same as that which they would have relied on if they had been admitted simply as stockholders, we are inclined to regard the answers the same as if put in by them in that character, in the further views we shall take of the case. Each one swore to the truth of his answer in the usual way.

§ 1461. *A cross-bill filed without leave will not be considered by the court.*

Before we enter upon an examination of the merits of the case, it will be proper to dispose of the cross-bill filed by Fleming against the complainant. This bill was filed in the name of the company alone, signed by their solicitors and counsel. The name of Fleming does not appear. And in addition to this, it appears that Fleming, in his petition for leave to appear and answer the bill in the name of the company, also asked leave to file a cross-bill. Leave was granted to put in the answer, but not to file the bill. The filing of it subsequently, therefore, was an irregularity for which the court below very properly afterwards set it aside. The cross-bill, so much spoken of in the argument, is thus out of the case. In this connection we may as well refer to the answers of the judgment creditors, who were made parties defendant to the bill of complaint.

§ 1462. *Judgments obtained subsequent to a mortgage are cut off by its foreclosure.*

Sebre Howard recovered a judgment in the United States district court, on the 28th November, 1859, against the La Crosse & Milwaukee Railroad

Company, for the sum of \$16,379.86; and Graham & Scott, a judgment in a state court of Wisconsin, on the 25th November, 1858, against the same company for the sum of \$29,820.71; and another judgment in the same court on the 21st September, 1858, for the sum of \$11,188.15; and also a judgment against the same company, in the United States district court, on the 11th January, 1860, for the sum of \$44,413.18. This latter judgment appears from the answer, as we understand it, to have been founded on the two previous judgments in the state court. Now, it appears that each of these judgments were recovered after the date of the third mortgage of the La Crosse & Milwaukee Company, upon the foreclosure of which the Milwaukee & Minnesota Company was formed. The liens of these judgments were subsequent to this mortgage, and were cut off by its foreclosure. Indeed, the judgment of Howard, of November, 1858, and the last judgment of Graham & Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse & Milwaukee Company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukee & Minnesota Company. These judgment creditors, therefore, according to their answers, have no interest in the subject-matter of this litigation. We may add that, as replications were filed to the answers, the proof of these judgments should have been produced at the hearing. But the only proof of them that we have found in the record is in a list of judgments annexed to the report of the master. They were material, and were put in issue by the replication.

These answers of the judgment creditors being thus disposed of, the issues in the case are brought down to those raised by the answers of Rockwell and Fleming, in the name of the Milwaukee & Minnesota Company, which we have agreed to consider rather by indulgence than as matter of strict right, as the answers of the individual stockholders. And this brings us to an examination of what may be called the merits of the case.

§ 1463. *Mortgagee has no interest in earnings of railroad until filing of bill for foreclosure and appointment of receiver.*

Before we take up the questions presented by these answers to the bill which bear upon the merits, it will be proper to refer to some matters there presented, and very much discussed on the argument, which, in our judgment, should be laid entirely out of the case, as tending only to confuse and embarrass the real questions involved. We refer to those parts of the answers which relate to the dealings between the La Crosse & Milwaukee Company and Chamberlain, in which the complainants in this suit were not concerned, and with which they had no connection, as, for instance, the lease of the road to Chamberlain, and the allegation of fraud against him and against the company in conducting the business of running the road under this lease. Also, in respect to other contracts between these parties in relation to the indebtedness of the company to Chamberlain, and to the building and completion of unfinished portions of the road, and equipping it with the rolling stock for use. These relate to the dealing of the mortgagor, the La Crosse & Milwaukee Company, with a third person, over which the complainants, as mortgagees, had no control, and for which they were not responsible. These dealings were subsequent to the execution and lien of the mortgage, and could not affect prejudicially the rights of the mortgagees. They had no interest in the earnings of the road, or concern in

the appropriation of them, until the filing of the bill and the appointment of a receiver.

§ 1464. *The defense in the answer, that the bonds secured by prior mortgage were negotiated without consideration, not sustained.*

The only matters, therefore, set forth in these answers and in the proofs, which have any bearing on the merits, are: 1. The allegation that Chamberlain received from the La Crosse & Milwaukee Company two hundred of the bonds secured by this mortgage fraudulently and without consideration. 2. That S. R. Foster received one hundred of the bonds in the same way. 3. That J. T. Soutter, one of the trustees, received fifty-five of them, and refused to deliver them to the company. 4. That Greene C. Bronson, the other trustee, received fifteen for the stock of the company. 5. That Prentiss Dow, an officer of the company, received fourteen for less than \$1,000. And 6. That Chamberlain, who had covenanted in the lease of the road from the company, to apply the proceeds derived from the use of it to the payment of the interest accruing on the bonds, withheld the payment in pursuance of a fraudulent arrangement with the trustees, or with their agents, for the purpose of bringing about a foreclosure of the mortgage, that he might be enabled to purchase the road.

These are the allegations that bear upon the merits of the controversy, and deserve to be considered. We shall not, however, incumber this opinion with any very detailed explanation of them, but shall briefly refer to the proofs relating to each of these charges.

1. *As to Chamberlain.* It appears that he held a large claim for damages against the company, on account of their failure to fulfil contracts made with him to build the western division of the road. The work on the road was suspended by reason of this failure. And in the fall of 1857, upon the issue of the bonds of the company, under this second mortgage, an arrangement was entered into by the company, by which he received these two hundred bonds, at fifty cents on the dollar, towards payment of this claim.

2. *As to S. R. Foster.* He had loaned the company over \$150,000 and had taken their bonds as security, and, among others, the one hundred in question. It appears that, at a meeting of the board of directors, 24th May, 1858, the matter between them was adjusted by delivery of forty land-grant bonds to Foster.

3. *As to T. J. Soutter.* The fifty-five bonds in controversy between him and the company were settled, as appears by a receipt of their chairman and vice-president, on 14th September, 1858, by the delivery of other bonds to the company.

4. *As to G. C. Bronson.* He had purchased \$15,000 of stock, one hundred and fifty shares, from the company, in the spring of 1857, and paid eighty cents cash on the dollar, the president at the time agreeing that the company would repurchase it at the same rate at any time thereafter if he should wish to surrender it back. The company was doubtless pressed for money at the time. At a meeting of the board of directors on the 2d of September, 1858, it was resolved that it would take into consideration the stock theretofore purchased by Judge Bronson, as he rendered many services to the company for which he had received no compensation; and afterwards, in September of the same year, it appears that the president of the company, who had induced him to purchase the stock, received it back and delivered to him the fifteen bonds in question. The truth of the case, therefore, is, that instead of receiving from

the company the money he had advanced for the stock, according to their agreement, he received in place of it only bonds of the company of less than half the value; and, as it appears, nothing for his legal advice and services.

5. *As to Prentiss Dow.* It appears that but thirteen bonds had been received by him, and for which he paid the company, at the time, \$11,400 in cash, stock and other bonds, and was afterwards engaged in its service as agent, settling claims against the company.

In this connection, it is proper to refer to the terms as published in a circular by the La Crosse & Milwaukee Company, and under which these bonds were negotiated and put into circulation. This paper is dated August 10, 1857. The company state that the importance of completing the road this season to the junction of the western division (sixty miles from Portage), by which they would not only control the coming winter's travel of the Upper Mississippi, but receive over three hundred thousand acres of the land grants, have determined the board of directors to place before the stock and bondholders extraordinary inducements to furnish the means; that the sum of \$400,000 would be required. To obtain this sum, the company now offers the holders of its stock and of unsecured bonds, a new issue of one million of eight per cent. bonds, etc. The terms proposed are to receive in payment for a bond of \$1,000, \$400 in cash, and the like sum in the stock or unsecured bonds of the company. It was upon these terms that the directors went into the market in the city of New York and elsewhere for the purpose of negotiating the bonds which now constitute the subject of litigation.

§ 1465. *The defense in the answer as to collusive agreement to foreclose not sustained.*

6. *As to the charge of collusion of the complainants with Chamberlain in the proceedings to foreclose the mortgage.* This allegation is founded upon an agreement entered into with Chamberlain on the 13th of November, 1859. At the time of this agreement he was in possession of the road and in the receipt of its earnings, and the obvious object of it, on the part of the trustees, was to procure the control of the net proceeds of its earnings, pending the proceedings of foreclosure. For this purpose, Chamberlain agreed to deposit the whole of the earnings with the agent of the trustees from day to day; and the trustees, on their part, agreed to appropriate them to the objects and uses provided for in the lease, as the exigencies and proper working of the road might require. The trustees, in order to secure the fidelity of the officers and agents of Chamberlain connected with the earnings of the road and the receipt of its revenues, stipulated for a supervision and control over these persons and for the discharge of any of them from the service in case of a dereliction of duty. They provided, also, for access to the books and papers relating to the revenues, management and running of the road; also, for the appointment of a receiver in case of the non-fulfilment of the agreement on the part of Chamberlain. These provisions were very important, as the revenues of the road, according to the terms of the lease, after covering running expenses and paying the interest on prior incumbrances, were to be applied to the discharge of the interest on these second mortgage bonds. The interest then due on them amounted to \$40,000. It was also agreed that the proceedings of foreclosure should be conducted amicably; that is, no unreasonable opposition should be made to them by Chamberlain. It was further agreed that the sale should be made, if practicable, subject to the lease of Chamberlain, and that no opposition should be made to his purchase of the road at the sale under the foreclosure; but the

trustees expressly reserved the right to bid at the sale for the protection of the bondholders. The trustees also agreed that in case Chamberlain should become the purchaser, they would extend a credit of nine and twenty-four months upon so much of the interest as had become due.

It is supposed that the arrangement was entered into for the fraudulent purpose of enabling Chamberlain to purchase the road at the foreclosure sale, and thereby cut off subsequent incumbrances, and especially the rights and interests of the Milwaukee & Minnesota Company, formed under the third mortgage. But there is no evidence of this charge in the proofs, nor even of any previous dealings between the parties tending to this conclusion. They came together for the first time after the trustees had determined to foreclose the mortgage for default in the payment of interest, and finding Chamberlain in the possession of the road, and refusing to deliver it over to the trustees, as provided for in the mortgage, but, on the contrary, insisting upon his right to run the same pending the legal proceedings, it is not strange that the trustees should have endeavored to arrange with him for a supervision and control, in the mean time, over the earnings and management of the road, and that he should forbear any unreasonable opposition to the foreclosure suit. And as to the provision relating to the purchase in case of a sale, there is nothing in it interfering with any rights that belonged to the trustees, or to the prejudice of third parties, the judgment creditors, or company formed under the third mortgage. In a word, the arrangement was highly beneficial to the bondholders represented by the trustees, and prejudicial to no one concerned in the foreclosure suit.

We shall not, however, dwell longer on this branch of the case; indeed, much that we have thus far said has been rather by way of explanation, and for the purpose of clearing it of matters and issues that do not belong to it, and have served only to confuse and embarrass its consideration. In view of this object and purpose, we have referred to the two answers of the stockholders, Rockwell and Fleming, and have endeavored to separate the irrelevant matter from that which bore upon the merits, so as to confine the examination to the latter, namely, to the charges against the validity of the bonds impeached, of the number of some three hundred and eighty, in the hands, or which passed into the hands, of several individuals named, and have shown, as we think, by a reference to the proofs, that these charges are not well founded. The general and sweeping allegations against the other portion of the bonds, without specification or identity, we have not specially noticed. These charges are too general to be entitled to consideration, and the proofs relied on are as general and indefinite as the allegations. We have also shown that the judgment creditors who appeared and answered have no interest in the matters in controversy; and, lastly, that the charges of a fraudulent collusion between the trustees and Chamberlain rest upon suspicion instead of upon proofs.

§ 1466. *Bonds secured by prior mortgage, that have been negotiated, should be paid in full as against junior mortgage bonds.*

We now come to a branch of the case which presents a more conclusive answer to all the charges, whether in allegations or in proofs of the respondents, and overrides all other views that may or can be taken of them. As we have seen, this third mortgage, under which the Milwaukee & Minnesota Company was formed, was executed and delivered to Barnes, the trustee, on the 22d June, 1858, to secure the payment of an issue of \$2,000,000 in bonds, and a supplement to this mortgage was executed to the same trustee, on the 11th

August following. These two mortgages, or rather one in two parts, were, in express terms, *made subject, among other incumbrances mentioned, to the bonds secured by a second mortgage on the eastern division of the road, to the amount of \$1,000,000.* Again, the bonds issued under this third mortgage, one of which is in the proofs, have an indorsement on the back, as follows: "*State of Wisconsin, La Crosse & Milwaukee Railroad Company, third mortgage sinking fund bond, seven per cent., etc.,*" subject, among other things, "*to a second mortgage on the same line of road of \$1,000,000.*"

At the time this third mortgage was executed and thus made subject to the second mortgage bonds, all these bonds had been negotiated by the company, and were in circulation in the business community. They were all negotiated in the months of September, October, November and December, 1857. This, the company, of course, well knew at the time of the execution of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgment of the indebtedness and previous lien; and, especially, what right have the Milwaukee & Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrances of \$1,000,000. They have the benefit of that incumbrance by an abatement of that amount in the price of the purchase.

Without pursuing the case further, we are satisfied the decree of the court below, reducing the indebtedness of the La Crosse & Milwaukee Company to the bondholders, is erroneous, and that the decision should have been for the full amount of \$1,000,000, and interest.

We shall therefore reverse the decree and remit the cause to the circuit court of the United States for the district of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same; and that if the moneys thus applied are not sufficient to discharge the interest due on the 1st day of March, 1864, then to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court, and on bringing the proceeds into court, they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale; and if they exceed that, to the principal of the bonds, in case the bondholders assent, or *pro rata* to those who may assent, and

any remaining balance of the proceeds to be invested, under the direction of the court, for the payment of future accruing interest, and ultimately the principal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal. And further, that the court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings, and also such counsel fees in behalf of the trustees as to the court, in its discretion, may seem right to allow.

Decree accordingly.

RAILROAD COMPANIES v. CHAMBERLAIN.

(6 Wallace, 748-750. 1867.)

APPEAL from U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—There was a bill filed by the Milwaukee & Minnesota Railroad Company to set aside a lease made by the La Crosse & Milwaukee Railroad Company to Chamberlain, and also a judgment in his favor confessed by that company. The St. Paul Company was admitted as defendant as it had become the owner of the lease and judgment. The St. Paul Company filed a cross-bill against the Milwaukee, etc., Railroad Company and Chamberlain, setting up the lease and judgments, and praying that the latter might be declared a valid lien and be enforced accordingly. The court dismissed both bills, the first on the merits, the second because the parties were both residents of Wisconsin.

§ 1467. *A security may be enforced upon a cross-bill filed by the defendant.*

Opinion by MR. JUSTICE NELSON.

We think that the court erred in dismissing the cross-bill. It was filed for the purpose of enforcing the judgment which was in the circuit court, and could be filed in no other court, and was but ancillary to and dependent upon the original suit—an appropriate proceeding for the purpose of obtaining satisfaction. The lease was in the nature of a mortgage, and held only as collateral security, and followed the judgment. *Freeman v. Howe*, 24 How., 451. The decree in the first suit must be affirmed, and that in the second reversed, and the cause remitted to the court below to enter a decree in conformity with this opinion.

FARMERS' LOAN & TRUST COMPANY v. GREEN BAY & MINNESOTA RAILROAD COMPANY.

(Circuit Court for Wisconsin: 6 Federal Reporter, 100-112. 1881.)

Opinion by DYER, D. J.

STATEMENT OF FACTS.—On the 23d day of January, 1878, the complainant in the above entitled cause, as trustee for bondholders, filed a bill in this court to foreclose two mortgages on the railroad and property of the defendant company, given to secure the payment of certain issues of bonds, amounting in the aggregate to \$5,300,000. On the 3d day of April, 1879, a decree of foreclosure and sale of the mortgaged property was entered. On the 10th day of January, 1881, and but a few days before the sale under the decree of foreclosure was advertised to take place, Mary M. Kelly, a holder of bonds secured by one of the mortgages, filed a petition in said cause praying leave to file a bill of review for certain alleged errors and irregularities in the foreclosure proceedings; and

the question has been raised by demurrer to the petition, and argued and submitted, whether or not leave to file such a bill should be granted. The determination of petitioner's right to file a bill of review involves, therefore, a consideration of the contents of the petition in connection with such parts of the record in the foreclosure case as are brought into controversy by the allegations of the petition.

As appears by the foreclosure decree, the original issue of bonds secured by the first mortgage was \$3,200,000, and the issue of bonds secured by the second mortgage was \$2,100,000. The petitioner alleges herself to be the holder of second mortgage bonds amounting to \$14,320, besides interest. The decree adjudges that "of the said second mortgage bonds the sum of \$850,260 was issued in exchange for interest coupons, due upon said first mortgage bonds, and is, with the interest due thereon, a lien under the said first mortgage, and constitutes a part of the debt secured thereby" and by the decree it is further adjudged and decreed "that the entire amount of bonds secured by the said first mortgage is the sum of \$4,050,260, being the amount of first mortgage bonds of \$3,200,000, . . . and the said amount of \$850,260 of second mortgage bonds issued as security for interest due on said first mortgage bonds. . . . That the entire amount of bonds outstanding and unpaid, secured by the said second mortgage, . . . is the sum of \$2,100,000, of which amount the sum of \$850,260 was issued to secure past-due interest coupons on said first mortgage."

Further provisions of the decree important to notice are that any of the bondholders may become purchasers of the mortgaged property at the foreclosure sale; that the sum of \$25,000 shall be paid in cash at the time of sale, and that the purchaser shall comply with his bid on the day of the sale; that "after the payment to the marshal of the sum of \$25,000 in cash, of the sum bid by the purchaser at said sale, the marshal may receive from said purchaser for the balance of the sum bid at such sale, in lieu of cash, any of the outstanding and unpaid bonds or coupons secured by the said first mortgage, *at such percentage of the face value thereof as this court shall at the approval of said sale authorize and direct.*" Also, "that so much of the purchase money at said sale as shall be necessary to pay the costs of this suit as taxed, and the costs and expenses of said sale, and the amount hereby adjudged to be due to the said complainant and its solicitors, shall be paid in cash, and that the remainder of said purchase money may be paid *in cash or in said first mortgage bonds, or such of said second mortgage bonds as are by this decree held to be secured by said first mortgage* in the proportion aforesaid."

§ 1468. *Second mortgage bonds for unpaid interest on first mortgage bonds, not entitled to priority of payment.*

1. It is claimed by the petitioner that, in various particulars set forth in her petition, error and ambiguity are apparent in the decree; and one of the allegations upon which this claim is founded is that "it appears on the face of the decree that a cash bid of \$25,000 is not sufficient to make valid and effectual the terms of the decree, in this: that the said decree provides on its face that \$850,260 of the second mortgage bonds given in exchange for first mortgage coupons, with the interest thereon, shall be a first lien and charge upon all the property, real and personal, by said first mortgage conveyed, and to satisfy said \$850,260, as a first lien, a sum of over \$25,000 in money should and ought to be directed to be paid." This objection to the decree is founded upon a misapprehension of its scope and meaning. The decree does not give to the \$850,260 a rank in advance of the first mortgage bonds. It declares that

second mortgage bonds of that amount were issued in exchange for interest coupons due upon the first mortgage bonds, and are, with interest, *a lien under the first mortgage*, and entitled to be proved *under that mortgage* and constitute *a part of the debt secured thereby*. Again, in another part of the decree, it is declared that "the sum of \$350,260 was issued to secure past-due interest coupons on said first mortgage, and *is secured by said first mortgage* as aforesaid;" and, as we have already seen, it is further provided that the purchase money on the bid "may be paid in cash or in said first mortgage bonds, or such of said second mortgage bonds as are by this decree held *to be secured by said first mortgage*." It is clear, therefore, that the second mortgage bonds to the amount of \$350,260 are simply placed on the same footing as the first mortgage bonds—not as having a preference over the latter, but as being equally secured under the first mortgage with the first mortgage bonds. There was, therefore, no greater or other reason why the decree should provide for a cash payment on the bid of a purchaser sufficient to cover the \$350,260, than there was for a cash payment adequate to cover the entire amount of the first mortgage bonds.

§ 1469. *How far the court in a foreclosure decree is bound to follow the terms of the mortgage as to cash payments.*

2. The mortgages provided that in case of default in payment of either the principal or interest due on the bonds secured thereby, and on written request of the holders of a specified proportion of the bonds, the trustee might sell the mortgaged property; and it was therein further provided that "the amount of the bid or purchase money of said sale may be paid and satisfied in whole or in part by the outstanding mortgage bonds, or any of them, issued hereunder, and the same shall be taken and received in whole or in part payment and satisfaction by the party of the second part, its successor or successors, according to their value, to be ascertained and determined by the net amount arising from such sale as compared with the amount of outstanding bonds issued hereunder as aforesaid." The decree, as we have before observed, provides that after payment of \$25,000 in cash of the sum bid at the sale under the decree, the purchaser may pay the balance of his bid in outstanding bonds and coupons, secured by the first mortgage, "at such percentage of the face value thereof as this court shall, at the approval of said sale, authorize and direct." Now, it is alleged in the petition that the decree is erroneous in that it does not observe or follow the terms of the mortgages as to the receipt of bonds as part of the purchase price for the property sold. The sale authorized in the mortgages was one to be made in certain contingencies by the trustee. It was a sale to be made in accordance with the stipulations of the parties. The course of procedure there prescribed was one to be pursued in case of a sale without foreclosure, and it was competent and proper for the parties to place upon the trustee certain restrictions, and to define the limits within which he must act in making such a sale. But those provisions could not bind the court if foreclosure proceedings should be instituted, and a sale should be made under its direction. In such case the sale would have to be made according to the usual course of practice in judicial proceedings, and the court would be no more bound to adopt the provisions of the mortgages, as to the acceptance from a purchaser of bonds to apply on his bid, or the proportion in which bonds should be so received, or the manner in which their value should be ascertained, than it would be bound to adopt the directions to the trustee, contained in the mortgages, as to the advertisement of the property for sale. As a test of this ques-

tion, suppose the court, ignoring the provisions of the mortgages altogether, should order the property sold for cash, and in no manner authorize the payment of a bid in bonds, would that be an error of which a bondholder could complain? Clearly not. Undoubtedly, the court might adopt, so far as practicable, the method of procedure pointed out in the mortgages, but it would not be error affecting the validity of the decree not to do so, unless wrong and injustice were apparent in the decree entered by the court; and I am unable to perceive wherein the decree in the particular under consideration fails to observe the rights of all the parties.

§ 1470. *Procedure prescribed by mortgage, when not binding on the court in foreclosure proceedings.*

3. This brings us to another point urged against the validity of the decree, and which in some aspects connects itself with the question last considered. It is alleged in the petition, as one of the grounds on which the court should allow a bill of review to be filed, that the decree does not establish the percentage value of the bonds or coupons secured by either of the mortgages; that, in order to secure just and equitable bidding at the sale, the value of the bonds should be ascertained by proof, on reference to a master before the sale, and that, without such previous ascertainment of value, no bidder can know what amount of bonds or coupons he can pay on his bid. In the first place, it may be remarked that the provision in question in the decree is similar to that inserted in railroad mortgage foreclosure decrees in this circuit, as I am advised by the circuit judge, whom, for certainty of information, I have consulted on the point. Obviously, the value of the bonds and coupons must depend on the value of the mortgaged property, and that value is best ascertainable by sale of the property. I do not see, therefore, how it would be possible, or at least practicable, to determine the value of the bonds, or to determine what percentage of value should be applied on the bid, before the sale transpires. There may be prior liens to be paid in the shape of intervening claims, and I cannot perceive how a proper and effectual sale can be made, if bonds are to be applied on the bid, unless the court is permitted to fix the rate, after the sale is reported, at which bonds shall be received. And it would seem that an attempted ascertainment of value of the bonds, before the sale, for the purpose of fixing the rate at which they may be applied on the bid, would be more likely to involve injustice, especially to small holders, than an ascertainment made subsequently, because, before sale, the only value susceptible of proof might be one merely nominal, while after the sale the value would be actually represented by a realized price. In this connection it is urged that the decree does not determine what amount of bonds may be taken to apply on the bid. Whether it can be said, in strictness of definition, that the sale authorized by the decree is a cash sale or not, I think it is equivalent to that. The decree provides that \$25,000 in cash shall be paid by the bidder at the time of the sale; that, after such payment, the *balance* of the bid *may* be paid in bonds and coupons, or, as it is expressed in another part of the decree, after the payment of costs, and expenses, etc., the remainder of the purchase money *may* be paid in cash or in certain designated mortgage bonds. Certainly the court would have the power to require the entire amount of the bid to be paid into court in cash, and then to apply the money in payment of costs and upon the bonds at such a percentage as the entire bid would pay. In that case the court would receive the money and directly pay it out again in dividends on the bonds. In the case contemplated by the decree the bonds are brought

in as representing a part of the cash bid, and suitable indorsements and cancellations made, so that the transaction is made equivalent to the payment in cash of the entire purchase money, and the application of it on the bonds in the manner before indicated. Could the court have foreseen what has occurred since the entry of the decree, especially in regard to the presentation of intervening claims, it is probable that it would have required, in terms, the payment of a larger sum in cash at the time of the sale than \$25,000; but I do not think that very important, because the court has the undoubted power to require a sufficient sum to meet all exigencies to be paid into court as a condition of confirming the sale. After careful consideration of the question, I am unable to perceive how injustice could result to bondholders from the terms of this decree in the particulars referred to. Every bondholder or other person is at liberty to bid at the sale. He may bid what he thinks the property is worth. He knows that the price for which the property may be sold will represent the value of the property, and will fix the value of the bonds. He knows that the proceeds of the sale must be used to pay bonds, and that they must be applied *pro rata* upon bonds. He knows, also, that the percentage so to be applied will depend upon the amount for which the property sells and the amount of the bonds; and knowing further that if the sale is properly conducted, and if he is the highest bidder, he will get the property, he is left to freely and fairly exercise his judgment as to the sum he will bid. On the whole, my opinion is that the decree is not erroneous, and does not, "in form or substance, deviate from correct practice in the particulars which have been considered.

§ 1471. *Rule in the foreclosure sale of railroad as to real estate, the title to which is in litigation.*

4. The petition alleges that the receiver in the foreclosure action has filed a bill in this court against D. M. Kelly and others to set aside certain deeds of depot grounds, right of way and other lands, which, it is claimed by the receiver, belong to the railroad company, and which, it is claimed by the defendants in said bill, belong to them; that the right of the company to said property should be adjudicated in the foreclosure suit; and that the title deeds thereof were of record before the bill in the foreclosure action was filed; and it is further alleged in the petition that the said D. M. Kelly and others, who are defendants in the action brought by the receiver to settle the title of the lands in controversy in that action, were necessary parties in the foreclosure suit, and that without their presence in that suit their legal or equitable rights to the lands cannot be cut off by the foreclosure decree, and a perfect title thereto given to the bidder at the foreclosure sale. I am unable to see how the rights of the petitioner are injuriously affected by the facts thus alleged. It is apparent, from the allegations she makes, that D. M. Kelly and others are claiming the lands in question as their own under a title adverse to the railroad company. If they succeed in the litigation with the receiver, they will hold the lands. If they fail, then it will result that the lands fall into the general mass of property covered by the mortgages, and the title will pass to the purchaser at foreclosure sale. Such a question of adverse title could not be litigated in the foreclosure suit; and moreover the petitioner, in my opinion, divests herself of all right to make this objection to the decree and the foreclosure proceedings, because, in connection with her allegations on the subject, she denies that the lands in question are the property of the railroad company, and of

course thereby inferentially affirms the right and title to the lands of the defendants in the action brought by the receiver.

§ 1472. *Question of fact whether the foreclosure suit was fraudulently and collusively brought.*

5. But it is charged in the petition that the action to foreclose the mortgages in suit was fraudulently and collusively brought; and in the consideration of this phase of the case it is necessary to take notice of the allegations of the petition. Those allegations, stated in somewhat condensed form, are that certain bondholders, including John I. Blair and William E. Dodge, caused the foreclosure bill to be filed; that to carry out certain schemes for getting control of the mortgaged property, and to obtain unjust and improper advantages over the petitioner and other bondholders and stockholders, Blair and Dodge retained J. P. C. Cottrill, Esq., as attorney for the railway company; that Mr. Cottrill had never before acted as the general attorney of the company, and that, immediately after retaining him, Blair and Dodge caused the bill in the foreclosure action to be filed, and a subpoena to be issued and served upon said Cottrill as attorney of the company; that the only service which Mr. Cottrill or his firm thereafter rendered in the case was to file an answer, which had been previously prepared by the counsel for Blair and Dodge and their party of bondholders. It is alleged that neither Mr. Cottrill nor his firm had any personal knowledge of the facts stated in the foreclosure bill or in the answer thereto, and that they had nothing to do with the drafting of the answer, and were not consulted or advised with about the subject-matter thereof. It is charged that at the time the said Cottrill was so appointed attorney of the defendant company, William E. Dodge was the president of the company and that upon his appointment as such attorney Mr. Cottrill went with the solicitor of the complainant, the Farmers' Loan & Trust Company, before the judge of this court, and consented to the appointment of a receiver in the foreclosure suit; that at the time of his appointment as attorney for the company said Cottrill was shown by one of the solicitors for the complainant a letter from Dodge appointing him such attorney, and that he acted under such letter of appointment; that the appointment of said Cottrill was obtained by Blair and Dodge, and those in interest with them, for the fraudulent purpose of obtaining a fraudulent and collusive service of process in the foreclosure suit, and not with *bona fide* intent to make him the general attorney of the company to defend its interests. It is then charged, generally, that the appointment of said Cottrill as attorney, for the purpose of serving process of subpoena upon him, was fraudulent as to the stockholders and other bondholders of the company not parties thereto, and was made by Blair and Dodge, and their associates, for the fraudulent and collusive purpose of obtaining service of the subpoena in the foreclosure suit. And so, it is further alleged, that such service was fraudulent and collusive, and was a fraud on the court, and upon all stockholders and bondholders who did not know or assent to the same, and should therefore be set aside, with all proceedings in the foreclosure suit subsequent to the issuing of the subpoena. It is then stated that the complainant, the Farmers' Loan & Trust Company, had knowledge of and colluded with Blair and Dodge in the matter of the appointment of said Cottrill as attorney for the company, and in the service of process on him, and that the petitioner had no knowledge of any of these alleged facts until the 7th day of January, 1881.

Many of these allegations are made on information and belief; but, admit-

ting them all to be true, the question is at once suggested, wherein consists the fraud upon the petitioner, and how is she injured by the matters complained of? She cannot be heard in behalf of stockholders, for they are not here complaining. She cannot be heard in behalf of other bondholders, for they must speak for themselves if they have been wronged. The only question is, wherein has the petitioner been injured or defrauded by the proceedings mentioned? This was not the case of a fictitious action without a genuine subject-matter to support it. Here were large mortgages given to secure bonds, the interest on which was unpaid. The genuineness of these instruments, and the validity of the debt they represented and secured, are not questioned. By the allegations of the bill in the foreclosure suit, which is part of the record, it appears that the holders and owners of bonds, amounting to more than one-half of the entire issue under each of the mortgages, requested the trustee to institute foreclosure proceedings. This is not denied in the present petition, and, if true, it was the duty of the trustee to file the bill in behalf of all the bondholders. It could not concern bondholders how service of process on the company was obtained, provided the court legitimately obtained jurisdiction of the parties. And why should not the mortgages be foreclosed, provided a reasonable proportion of the holders of bonds requested it to be done? Certainly the petitioner cannot be heard to say that it was the duty of the company to resist and obstruct a foreclosure. If the mortgages were valid, and the debt due, and if the company could not make payment,—the contrary of which the petition does not allege,—then it was the duty of the company to permit the trustee to foreclose, and the bondholders to realize their money. Nor upon such a state of facts does it seem to me that it would be a fraud upon bondholders if the president of the company were to employ counsel to act for the company, even in advancement of the foreclosure. The gist of the petitioner's allegations is that certain bondholders—one of whom was the president of the company—retained counsel for the company for the purpose of procuring service of process of subpoena in a genuine action to foreclose valid mortgages given to secure a just debt. Stockholders being silent, I am unable to perceive how the petitioner can maintain that the proceeding complained of was a fraud upon her, or a fraud upon the court.

There are allegations to the effect that the object of Blair and Dodge and their associates was to obtain ultimate control of the mortgaged property. But the proceedings to foreclose the mortgage were necessarily public. The sale following the decree must likewise be public and open to all bidders. Confirmation of the sale by the court must of necessity also be open to the resistance of any party in interest, if the sale should not be fairly conducted, or if there should be such inadequacy of price as might involve a sacrifice of the property or injury to parties interested. Considering this matter in all the points of view suggested, the manifest infirmity in the petitioner's case, upon this branch of it, is that she shows no fraud upon her and no injury to her. Attention was called on the argument to certain admissions contained in the answer of the company filed by Cottrill & Cary in the foreclosure suit as prejudicial to the rights and interests of the petitioner. But it is not perceived how or wherein they could operate to her injury; and, moreover, the truthfulness of those admissions is nowhere denied or questioned in the present petition.

I have examined with care the cases cited by petitioner's counsel: *Lord v. Veazie*, 8 How., 251; *Gaines v. Hennen*, 24 How., 553; *Wood Paper Co. v. Heft*, 8 Wall., 334; *Cleveland v. Chamberlain*, 1 Black, 419; and *Forrest v. M.*,

S. & L. R'y Co., 65 Eng. Ch. Rep., 125. This opinion has been already extended to such length that I forbear to enter upon a review of those cases further than to say that I deem them upon their facts, and in the principles they involve, inapplicable to the case at bar.

§ 1473. *Objections to plan of reorganization.*

6. Incorporated in the petition is a copy of the bondholders' agreement and proposed plan of reorganization of the Green Bay & Minnesota Railroad Company, which, it is alleged, Blair and Dodge and their associates seek to consummate to the alleged detriment and injury of other bondholders and of stockholders. I have been somewhat at a loss to determine just the extent to which this extrinsic matter should be considered by the court as bearing upon the validity of the proceedings in the foreclosure suit, or as affording ground for the petitioner to file a bill of review. Certainly it can only be considered to the extent that the particular interests of the petitioner may be involved. The agreement appears to be a voluntary one, and all holders of bonds, second as well as first mortgage bonds, with certain stockholders of the company, are permitted to participate in it. The provisions are such as, I believe, are usual in such agreements. The plan of reorganization contemplates the issue of first and second mortgage bonds, and of preferred and common stock, by a new company, and provides for the exchange, on certain terms and at certain rates, of bonds and stock of the old company for bonds and stock of the new. Such equality of footing as may render secure the various interests of the parties who may enter into the arrangement appears to be accorded to different classes of bondholders and stockholders; and on the whole, in considering this branch of the case, I do not think that such grounds of objection are presented, or such probable injury to petitioner is shown, as makes the petition sustainable.

Finally and generally, it may be stated that even if the court were in doubt as to the disposition that should be made of the present petition, it would be a serious question whether that doubt would not have to be resolved against the petitioner because of her own *laches*. As before stated, the bill in the foreclosure suit was filed in January, 1878. Since that time the bill, subpoena, record of service of subpoena, and the answer have been on file. The decree was entered in April, 1879. Nearly two years afterwards, and within a few days before the sale was advertised to take place, the present petition was filed. Certainly the delay has been great, and it can hardly be said that it is sufficiently excused by any averments to that end contained in the petition. Then it is not certain that the petitioner, as the holder of the bonds described in her petition, has any real interest in the subject-matter of this controversy. Her bonds are secured by the second mortgage. There is no allegation that they are included in the \$850,260 of second mortgage bonds which were issued to take up past-due first mortgage coupons, and which became secured by the first mortgage. Nor is there any averment that the mortgaged property is of sufficient value to pay more than the first mortgage bonds. There is, in fact, no allegation whatever touching the value of the property covered by the mortgages. And in conclusion, upon all the grounds, and for the various reasons stated, the demurrer to the petition will be sustained, and the petition will be dismissed.

CHICAGO & VINCENNES RAILROAD COMPANY v. FOSDICK.

(16 Otto, 47-85. 1882.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—These appeals bring into review decrees in the same suit. The bill was filed by Fosdick and Fish, as mortgagees in trust for holders of bonds, for the foreclosure of a mortgage, given by the Chicago, Danville & Vincennes Railroad Company upon its railroad, and for a sale of the mortgaged premises. A decree in accordance with the prayer of the bill was rendered, and under it a sale was had and confirmed by the court. From these decrees respectively the present appeals are prosecuted. The bonds, amounting to \$2,500,000 in all, secured by the mortgage in question, were dated March 10, 1869, and payable April 1, 1909, with interest at the rate of seven per cent. per annum, payable semi-annually on the 1st day of April and October of each year, on the delivery of annexed interest warrants in the city of New York, at such place as might be designated by the company, by advertisement published in that city. The mortgage bears even date with them, and after reciting the resolutions of the board of directors which authorize the issue of the bonds and the execution of the mortgage, conveys to Fosdick and Fish, as trustees, and to their successors and assigns, the road of the company, extending from its terminus, in Chicago, southerly through certain named counties to Danville, and thence southeasterly to a point on the state line of Indiana, connecting at that point with the Evansville, Terre Haute & Chicago Railroad, being in length about one hundred and fifty miles, "including all the property between said terminal points, which said party of the first part now has and possesses, or may hereafter acquire," etc.

The conditions and trusts upon which the conveyance is made are expressed in a series of articles, nine in number, of which it is important to notice only the following: The fifth article provides, in substance, that in case default shall be made in the payment of any interest, or of the principal of any of said bonds, without the consent of the holder, the company shall, within six months thereafter, the same default still continuing, on demand of the trustees, surrender to them possession of the road and mortgaged property; the trustees operating the same shall apply the net profits and income to the payment of the interest so in default until such default shall have been satisfied, when the mortgaged premises shall be surrendered to the mortgagor; but it is provided that no such demand for possession shall be made by the trustees until they shall have been required to take such possession by the holders of at least one-half of all of the said issue of bonds then unpaid and outstanding.

The sixth article provides, further, that in case default shall be made and shall continue as aforesaid, it shall be lawful for the trustees, after entry into possession, taken as above authorized, or other entry, or without entry, to sell and dispose of, to the highest bidder, the mortgaged premises, as an entirety, at public auction, in Chicago, at such time as they may appoint, first having demanded of the mortgagor payment of all money then in default, and having given sixty days' notice of the time and place of sale, by advertisement, as specified, and to convey the same when sold to the purchaser on payment of the purchase money in fee-simple, which conveyance it is declared shall be a perpetual bar in law and equity against the title of the mortgagor or any other person claiming under it. The net proceeds of such sale are to be applied by

the trustees to the payment of the interest on the bonds then outstanding, *pro rata*, until all such interest shall be paid, and afterwards to the payment of the principal, and any surplus to the mortgagor,—the payments to be made on the bonds, whether the same shall then have become due or not. By the seventh article it is provided that at any sale of the mortgaged premises, made under the power contained in the deed, or by judicial authority, the trustees may become purchasers of the same in behalf of the bondholders, at a price, in case the sale is of the whole property as an entirety, not exceeding the whole amount of said bonds and interest then outstanding.

The eighth article is as follows: "8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided."

It is averred in the amended bill of Fosdick and Fish that all the bonds described in the mortgage had been issued and were outstanding. It is also alleged that on March 4, 1872, the Chicago, Danville & Vincennes Railroad Company became consolidated into one corporation, by the same name, with the Rossville & Indiana Railroad Company; and on March 9, 1872, a further consolidation was effected, by the same name, with the Western Railroad Company, an Indiana corporation, whereby the consolidated company was empowered to build and operate a railroad from the state line in Warren county to Brazil, in Indiana; and that on March 12, 1872, the consolidated company, to raise means wherewith to construct its Indiana Division, issued its bonds to the amount of \$1,500,000, bearing interest at the rate of seven per cent. per annum, and payable forty years after date; to secure which, on the same day, it executed a mortgage to Fosdick and Fish, the complainants, covering its Indiana Division, and a branch road extending from a point three miles south from Covington to the village of Newburg, being about eighty miles in all. All the bonds secured by this mortgage were issued. It is further alleged, that, as further security for both these issues of bonds, the company, on April 24, 1872, executed another mortgage to the complainants, conveying the Indiana Division as security for the first issue of bonds on the Illinois Division, and conveying the Illinois Division as security for the bonds issued originally on the Indiana Division. The company made a subsequent consolidation on May 6, 1872, under the same name, with the Attica & Terre Haute Railroad Company.

The road as built in Illinois extends from Dalton, about twenty miles south of Chicago, to Danville, about one hundred and eight miles, with a branch from Bismarck in Vermilion county to the east line of the state of Illinois, about seven miles. It obtains an entrance into Chicago over the roads of other companies. The company has constructed, in Indiana, its line from a point where the Bismarck branch intersects the state line, a distance of eighteen miles, and has done a large proportion of the work required to carry its road

to Brazil. It is further alleged that the company paid all coupons on both classes of bonds maturing on and prior to April 1, 1873, but that "none of the coupons maturing since that time, or any part thereof, have ever been paid, but the said company, though often requested, has never paid the same, but so to do has made default."

Shortly after the first default on October 1, 1873, to wit, on November 11, 1873, the company issued a circular to the holders of its bonds, proposing to fund the coupons maturing from October 1, 1873, to April 1, 1875, in convertible seven per cent. bonds, to be issued for that purpose, the coupons to be deposited with Fosdick, one of the complainants, as a trustee, to be held by him until October 1, 1876, when they were to be canceled, but in case of non-payment of any coupons becoming due up to October 1, 1876, the coupons deposited with the trustee were to be returned to the original owners, and the second mortgage or convertible bonds surrendered to the company. In response to this proposition, coupons to a considerable amount were deposited with the trustee and convertible bonds received in exchange. Soon after, on November 20, 1873, another proposition was submitted to the bondholders, to exchange these four coupons for certificates of indebtedness, payable in five years from February 1, 1874, with interest payable semi-annually, the coupons to be held by the trustee until after that date, when they were to be canceled; but in case of non-payment of the interest or principal of the certificates, or of the coupons on the first mortgage bonds, between October 1, 1875, and February 1, 1879, both inclusive, then the coupons were to be returned by the trustee to their owners, upon surrender of their certificates, with their original rights unimpaired.

It is alleged that the holders of \$2,801,000 of both classes of bonds accepted one or the other of these propositions, and deposited their coupons accordingly. To secure the convertible bonds referred to in the first proposition, a mortgage was executed by the company, of which James W. Elwell was trustee, to the amount of \$1,000,000, payable, with interest semi-annually at the rate of seven per cent. per annum, on February 1, 1893, covering the entire line and both divisions of the railroad. It is alleged in the bill that all these bonds, except about \$45,000, have been issued.

It is charged that the company failed to pay all the coupons upon the certificates of indebtedness due February 22, 1875, and that it has not paid any that fell due August 1, 1875. It is also charged that the company has never paid any of the coupons upon any of the \$1,000,000 of bonds, which were not funded and which matured subsequent to October 1, 1873, amounting to \$1,199,000, and that the coupons thereon are overdue and remain unpaid, the owners thereof never having consented to such default; and it is alleged that the company is wholly insolvent. It is further shown that on June 12, 1875, the railroad company made a further issue of bonds to the amount of \$1,000,000, due January 12, 1877, and to secure the same executed a chattel mortgage to R. Biddle Roberts, upon its rolling stock, engines, cars, tools and equipment; but it is charged that the same was not executed, acknowledged and recorded as required by law, and is, therefore, null and void; but that, if valid, it is subject to each of the three mortgages of prior date. About \$936,000 of these bonds, it is averred, are held as collateral to debts due by the company, the remainder not having been issued.

It is claimed, also, that by reason of its insolvency the company will not be able to pay the certificates of indebtedness issued by it, or the interest thereon,

and that, in consequence of its failure to pay the interest thereon already accrued, the owners of the unpaid coupons of the \$1,000,000 of bonds are entitled to rescind the funding arrangement, and to demand and enforce payment of the coupons funded as aforesaid. It is further alleged that, "by reason of the default of said company in the payment of the coupons due October 1, 1873, and subsequent thereto, which have never been funded, the principal of all of the said bonds has, by the terms and conditions of the mortgage securing the same, become due and payable; and all of the said Illinois division bonds and of the said Indiana division bonds were, by the terms and conditions of the mortgage securing the same, and in consequence of the defaults aforesaid, due and payable prior to the commencement of this suit. Your orators further allege that, of the said Illinois division bonds, \$398,000 thereof have never been funded by the holders thereof, and the holders thereof have never in any way consented to the continuance of the default in the payment of interest thereon. Your orators allege that they have been requested by the holders of a majority of said Illinois division, and also by the holders of a large number of the said Indiana bonds, to proceed to collect the principal and interest of said bonds by foreclosure and sale of all of the railroad, franchises, property and appurtenances of said company within the state of Illinois." It is also alleged that the Indiana division of the road is wholly insufficient to secure the payment of the Indiana division bonds, and that, while the Illinois division is more than sufficient to secure the payment of the Illinois division bonds in full, it is not sufficient in addition to pay in full the whole of the Indiana division bonds.

The original bill was filed February 27, 1875, and made no party defendant except the company. It contained the following averments, which are not found in the amended bill: "Your orators further show to your honors that they have been required by the holders of more than one-half of the twenty-five hundred bonds to demand possession of the said railroad property, franchises and appurtenances of and from the said railroad company, and have made such demand in pursuance of said requirement, but that said railroad company has not delivered the possession thereof to your orators, but so to do have wholly neglected and refused. Your orators further show unto your honors that they are informed and believe, and therefore charge the fact to be, that at least ninety per cent. of the said coupons which matured upon said bonds on the 1st day of October, 1873, have been duly presented for payment to the said railroad company, and payment thereof demanded from said company, and that the same have never been paid, nor any part thereof; and that the holders of six hundred and ninety-eight of said bonds have never in any way consented to the continuance of said default; and that in consequence of the continuance of said default without the consent of said holders of said six hundred and ninety-eight bonds, the principal and interest of all of the said bonds have become due and payable, and that your orators as trustees as aforesaid, under and by virtue of the provisions of said mortgage, and the authority therein conferred upon them, have declared the principal of all of said bonds to be due and payable, and have notified the said railroad company thereof."

On May 17, 1875, James W. Elwell, acting trustee in the mortgage of December 16, 1872, appeared and filed a cross-bill, setting out the terms of the mortgage, the issue of the bonds secured thereby, and alleging that while the interest upon about \$160,000 of the bonds had been paid by the company, that upon the remainder was wholly unpaid. The cross-bill proceeds to set out the particulars of the agreements alleged to have been entered into between the

railroad company and the holders of its first-mortgage bonds, and continues with the following averments:

"And your orator therefore avers that said corporation is not in default in the payment of interest upon its said first mortgage bonds to the amount of \$1,802,000, but on the contrary your orator avers that said company has adjusted and settled with the holders of said bonds to the amount as above stated, and received an extension of payment of all such interest coupons now past due and that will mature prior to the 1st day of October, 1875. Your orator states that said corporation has paid to the holders of said certificates of indebtedness all interest coupons attached to said certificates as the same matured, and in accordance with the terms thereof, which had been presented before the appointment of the receiver as hereinafter stated.

"And your orator represents, upon information and belief, that the holders of the balance of said issue of twenty-five hundred bonds have acquiesced in said extension of payment of interest and excused such default, and have not demanded the payment of their interest coupons nor attempted to enforce the collection of the same. And your orator further states that notwithstanding said agreement of the holders of said first mortgage bonds to extend the payment of said interest warrants as hereinbefore stated, and the payment of the interest at maturity by said company upon said certificates of indebtedness, yet your orator is informed and believes, and so charges the fact to be, that by reason of divers persons claiming and pretending to be in the interest of a part of said first mortgage bondholders combining and confederating to wrong and injure your orator and the holders of said second or convertible mortgage bonds and other creditors of said corporation, said company was by the action of the circuit court of Will county in said state of Illinois, on the 22d of February last past, wrongfully and unlawfully dispossessed of all its property so conveyed to your orator by said deed of trust; that all of said property, together with the rights, privileges and franchises of said company, were, on said 22d of February, wrongfully and fraudulently taken from the custody and control of said company, and without the knowledge or consent of said corporation, your orator or of the defendants herein, placed in the charge and under the custody of strangers to said company, and to each of said deeds of trust; that said parties still wrongfully retain the possession of said property and control the revenue and income thereof, thereby preventing said company and your orator from providing funds for the payment of the interest warrants to mature upon the bonds secured by said trust deed so made to your orator, thereby endangering such property and materially depreciating the value of such securities.

"Your orator further states that he is advised and believes, and charges the fact to be, that the property conveyed to the defendants Fosdick and Fish, by the trust deed so made to them, greatly exceeds in value the amount of bonds so issued under their said deed of trust; and that the net income or revenue derived from a proper and economical use of said property is and will continue to be more than sufficient to pay all of the interest warrants as they may become due and payable on all the bonds issued under the said deed of trust. And your orator further states, upon information and belief, that certain holders of bonds issued under the deed of trust so made to the defendants Fosdick and Fish, trustees as aforesaid, whose names your orator will furnish if required by this honorable court, have resolved and determined to demand and require of them that they shall without delay declare the principal of all of their said bonds

presently due and payable, and that they shall prosecute said action to a speedy decree of foreclosure of said trust mortgage, and shall enforce sale of all the property and franchises of said railroad company under said decree, thereby rendering the security of the bonds issued under the deed to your orator utterly valueless.

"And your orator avers that such action will be grossly unjust and inequitable towards the *cestuis que trust* of your orator and other creditors of said company, especially as about eighty per cent. of all of said bondholders have extended the payment of their said interest warrants as hereinbefore stated, and waived and excused the default of said company in the payment of said interest. And your orator further represents, upon information and belief, that none of the holders of the bonds issued under the said trust deed executed to the defendants, except a very inconsiderable number thereof, have presented to and demanded of said railroad company payment of any of the past-due interest warrants or coupons of said bonds, as required by the eighth article or condition of said trust deed, and, therefore, your orator says that the said trustees, Fosdick and Fish, have no authority under said trust deed to proceed to collect the principal of said bonds by foreclosure and sale or otherwise."

The amended bill of Fosdick and Fish, of which an abstract has already been given, was filed September 14, 1875. Its prayer for relief is that the said Chicago, Danville & Vincennes Railroad Company, and the said James W. Elwell, whose appearance has already been entered in this cause as parties defendant thereto, may be required to answer this, your orators', amended bill, but without oath, which is hereby expressly waived, and that the said R. Biddle Roberts may be made party defendant hereto, and summoned to answer this, your orators', bill, but without oath, which is hereby expressly waived; and that the receiver heretofore appointed upon the prayer of the original bill in this cause may still hold the said railroad, its equipment and appurtenances, and operate the same under the order and direction of this honorable court; and that an account be taken of the amount due by the said railroad company upon the said Illinois division bonds, and upon the said Indiana division bonds separately, and that the said railroad company be ordered to pay the amount so found due upon said bonds, severally, within a short time, to be limited by this honorable court, and that upon default thereof the said Illinois division of the said railroad, together with all of the franchises, equipment and appurtenances thereof, may be sold by the master in chancery of this court, for the payment, first, of the said two thousand five hundred Illinois division bonds; and, secondly, of the one thousand five hundred Indiana division bonds, which are the first and second liens upon the said Illinois division of said railroad, its equipments, franchise and property, as hereinbefore set forth, or for such other and further relief as to your honors shall seem meet, and to equity shall appertain. On October 23, 1875, the Chicago, Danville & Vincennes Railroad Company filed a demurrer to so much of the amended bill of Fosdick and Fish as charges that it will be impossible for said company to fulfil the conditions of the funding agreements, and that the holders of said certificates have the right to rescind said agreements; and to so much of said amended bill as charges that the principal of said bonds has become due and payable.

On the same day it also filed an answer, containing, among others, the following averments: "Said respondent says that on the 22d day of February, A. D. 1875, one Stephen Osgood, without any notice whatever to this respondent, upon his *ex parte* application to the judge of the circuit court of Will county,

in the said state of Illinois, wrongfully and fraudulently procured the appointment of receivers of all the property, assets and income of the said respondent within the state of Illinois, and that such receivers forcibly took possession of the offices and all the property of said respondent on said 22d day of February, and by the aid of writs of assistance and other process issued by said court, or the judge thereof, held the possession of all said property of this respondent, its earnings and income, until the 1st day of June, 1875, at which time said receivers were removed by the order of this honorable court, and a receiver of all such property appointed under the prayer of the complainants in the said original bill of complaint contained. And this respondent says that on said 22d day of February it was not in default in the payment of any of said certificate warrants that matured February 1, 1875; that all of said warrants were paid as presented to this respondent prior to said 22d day of February, and that such balance of \$3,167.77 was not paid for the reason that the action of said state court had deprived this respondent of the power to meet such payments. But the said respondent denies that the said corporation was, on said 1st day of February, 1875, insolvent and unable to meet the payment of said certificate warrants, as charged in said amended bill of complaint, but, on the contrary, avers and charges that at all times after the maturity of said interest, and until said 22d day of February, said respondent had the pecuniary ability and was ready and willing to pay all such interest, and did in fact pay all such interest warrants when presented.

“And the said respondent further says, and charges the fact to be, that the net earnings of said company, during the year 1874, and the months of January, February, April and May of the present year, were more than sufficient to pay all the interest accruing upon the bonds issued under the trust deed to the complainants, and also the interest upon said certificates of indebtedness, and upon all other mortgage bonds that had been negotiated and sold by said respondent. And the said respondent says that the said company is not in default in the payment of any certificate interest coupons, after proper demand, and that, therefore, none of the holders of said certificates are lawfully entitled to the return from the said Fosdick, special trustee as aforesaid, of the bond interest warrants so funded and deposited with the said Fosdick. Your respondent admits that the contracts for funding said interest warrants are substantially set forth in said complainants' amended bill, and the holders of about four-fifths of the said four thousand first mortgage bonds then, and about three-fourths of all now outstanding, entered into said agreement, and so funded their said interest warrants.

“Your respondent, further answering, says that it has no knowledge, information or belief of the number of said bondholders, under said deeds of trust, that have made demand upon said complainants that they should execute their said trust; but respondent says that said company is not, and was not at the commencement of this action, in default to one-half of such interest, and, therefore, respondent says that said bondholders had no right to make such demand, and neither were the complainants nor respondent required to accede to such demands, by the terms of said trust deed. And the said respondent, further answering, says that it has no means of knowledge of the per cent. of the holders of said interest warrants that matured October 1, 1873, that presented such warrants to the company and demanded payment thereof; but respondent says, if it is true, as charged, that at least ninety per cent. made such demand,

at least eighty per cent. of the entire number afterwards waived such payment, and consented to an extension thereof, as hereinbefore stated, and that as to such eighty per cent. said company is in no default whatever.

"And as to the holders of said six hundred and ninety-eight of said bonds who did not fund their interest, the said respondent says, upon information and belief, and so charges, that a large majority thereof have consented to such default in the payment of said interest, and have assented to such extension; that many of the holders of such bonds have expressed to the officers of said company their assent to such extension, and promised and agreed (but not in writing) that they would in no manner interfere with, or by their adverse action defeat, the plans of said company for the extension of payment of said interest. And respondent further says that it has no knowledge that any holder of said bonds ever elected to declare the principal due on account of a default of said company, with the exception of the said Osgood, who only claimed to hold nine of said bonds. And as to the said Osgood, the respondent says that, to the best of its knowledge and belief, the said Osgood never has, nor has any one at his request, ever demanded of said company, or of any of its officers or agents, payment of any of the coupons attached to any of the nine bonds of which he claims to be the owner, and that the only notice the respondent has ever had that the said Osgood had so elected, or that he demanded payment of either principal or interest, was derived from his said bill of complaint filed in said circuit court of Will county, as aforesaid, on said 22d day of February. And the said respondent further avers that on the 23d day of February, 1875, the said defendant offered and tendered the attorney of record of said Osgood, in open court, in said county of Will, full payment, principal and interest, of all the bonds held by the said Osgood, which was refused by said attorney. And that respondent at the same time offered to deposit in court the full amount of said principal and interest, upon condition that said receivers should be discharged, and said property restored to said respondent, which offer was refused."

On January 6, 1876, a petition was filed by Stephen Osgood, who had commenced the original proceeding in the state court on February 22, 1875, and seven others, claiming to be holders of bonds and coupons secured by the mortgages to Fosdick and Fish, in which they recite the previous proceedings in respect to the bill filed by the latter, and allege, among other things, that on October 1, 1873, the railroad company had made default in the payment of interest on its bonds, and that large numbers of coupons maturing on that day were presented at the office of the corporation in the city of New York, payment thereof duly demanded and refused. It also rehearses the funding arrangements, and charges that as they were based on false and fraudulent statements of the company, the owners of the bonds, who funded their coupons, on the faith thereof, are entitled to rescind the agreement and to enforce their claims against the company; that Osgood had never funded his coupons; that demand was made at the office of said corporation in New York, in December, 1874, for the payment of sundry coupons due April 1, 1874, which were never funded or agreed to be so, and that payment thereof was refused; that the said presentment and non-payment were duly evidenced by a public instrument of protest by a notary public in and for said county and city of New York, and that the said coupons still remain unpaid. More than six months having expired since the demand of payment of said coupons in October, 1873, and the default thereon, and more than six months having also expired since the demand of payment of such coupons in December, 1874, and the de-

fault thereupon, the petitioners claim that by the conditions of said conveyances the said principal of all and singular the said bonds has also become due, and that there is now due and owing by the said corporation the full sum of \$4,700,000 upon said first mortgage indebtedness. The petition prays for an account of the sums due on account of the said bonds, and that the mortgaged property be sold to satisfy the same, etc.

An answer was filed by R. Biddle Roberts, setting up his rights as trustee under the chattel mortgage; and James W. Elwell also answers the amended bill, repeating substantially the allegations of his cross-bill. Fosdick and Fish filed an answer to the cross-bill of Elwell on March 10, 1876, and filed general replications to all the answers to their amended bill. Their answer to the cross-bill contains the following averments:

"These respondents, further answering, upon information and belief, admit that certain holders of bonds under the deed of trust to these respondents have determined to demand and require of these respondents that they shall without delay declare the principal of all of said bonds presently due and payable, and will insist that these respondents proceed to prosecute their original bill in this behalf to speedy foreclosure, and procure the sale of the property and franchises of said railroad company to satisfy said bonds. These respondents, further answering, say that they are also informed and believe, and therefore charge the fact to be, that other holders of said bonds are in favor of and propose to demand that no such foreclosure and sale shall be had for the present, but what number of bondholders are in the one class or in the other these respondents are not advised and cannot state; but in that regard they say that they will endeavor to faithfully perform all their duties as trustees in this behalf, and submit all such questions as may arise to the determination of this honorable court.

"Further answering, respondents say that they are not advised, and cannot state, what precise number the holders of past-due coupons of bonds issued under the trust deed to these respondents have presented for payment, but they allege that it is immaterial whether one or more of said coupons have been so presented; that inasmuch as the said coupons have not been paid, and a large amount thereof as hereinbefore stated have long since become due and payable, and these respondents have been by some of the holders of said coupons called upon as trustees to foreclose the said mortgage, they are thereby vested with full authority to proceed to such foreclosure."

An exhibit is filed with the amended bill, being a declaration, signed by Fosdick and Fish, as trustees, which, after reciting the issue of the bonds of March 10, 1869, and the mortgage given to them to secure the payment of the same, and the provision thereof that the principal should become due, in case of the specified default in the payment of interest, continues as follows: "And whereas default has been made by said company in the payment of the half-year's interest on all of said bonds which fell due on the 1st day of October, A. D. 1873. And whereas the coupons for such interest have been presented and payment demanded, and whereas such default has continued for more than six months after such demand, and whereas the holders of said bonds have never consented thereto, and in consequence thereof the principal of all of the said bonds has become due and payable: Now, therefore, the said Chicago, Danville & Vincennes Railroad Company are hereby notified that we, William R. Fosdick and James D. Fish, as trustees as aforesaid, and under and by virtue of the provisions of said trust deed and the authority conferred upon

us thereby, do hereby declare the principal of all of said bonds to be due and payable."

Service of this declaration and notice upon the railroad company is acknowledged to have been made February 26, 1875. Upon the issues thus made by the pleadings, an order of reference was made to a master to take testimony, and report the same with his findings, and a large amount of evidence taken before him is contained in the record. On June 24, 1876, the master filed his report. In it, he reported, among other findings, that, on October 1, 1873, the said corporation did not pay any of the interest falling due on that day on the issue of bonds dated March 10, 1869, or upon the issue dated March 12, 1872; nor has the said corporation paid any of the subsequent instalments on any of said \$4,000,000 bonds falling due at either of the following named days: April 1, 1874, October 1, 1874, April 1, 1875, October 1, 1875, and April 1, 1876; and that demand was duly made for the payment of divers of such coupons on October 1, 1873, and one of such coupons was protested for such non-payment more than six months prior to the institution of this action, or the written notice of such trustees declaring the principal of such bonds to be due and payable, and there is, consequently, now due to the divers holders of bonds dated March 10, 1869, the sum of \$3,505,500. This sum includes the principal of the bonds of the issue of March 10, 1869, the several coupons thereon of the dates mentioned, with interest to July 1, 1876, and the additional sum of \$389,500, being twelve and one-half per cent. premium on the nominal amount due for payment in gold, according to the stipulation in the bonds and mortgage to that effect.

The master further reported that, as to all matters relating to the funding scheme, referred to in the pleadings, and the effect of the surrender of the funded coupons, and of the failure of the company to pay the coupons due October 1, 1875, he was not required to examine or report upon, and, therefore, made no finding, nor as to any allegations of fraud set up in the pleadings, no testimony having been taken before or submitted to him upon either matter. The railroad company filed exceptions to this report, of which the sixth is as follows: "For that whereas the said master has decided, and in his said report stated, that on the 12th day of October, 1873, said company did not pay any of its interest falling due on that day; that demand was duly made, and that one of said coupons was duly protested for such non-payment more than six months prior to the institution of this action, and to the date of the written notice of the trustees, and therefore the said master assumes, and so decides, that the principal and interest of all of said bonds has become due; when the fact is, as shown by the proof offered by the complainants and intervening petitioners, that no coupon was protested until the 19th day of December, A. D. 1874, less than three months prior to the date of said notice, and the commencement of this action, and there is no proof that there was ever any other demand upon said company for the payment of said coupons."

On the hearing a decree was rendered, in which, among other findings, it is declared: That the railroad company had paid all the coupons on the bonds both on the Illinois and Indiana divisions, which fell due April 1, 1873, and that none of the coupons which had matured since that date had been paid; that, under the two proposals of the company for funding, there had been deposited coupons due October 1, 1873, to April 1, 1875, inclusive, on all the \$2,500,000 of Illinois division bonds, except \$698,500 thereof, which coupons still remained in the hands of Fosdick, as trustee under the agreements; that the

semi-annual interest upon the convertible bonds and certificates of indebtedness, issued in exchange therefor, which fell due August 1, 1874, was paid in full, and that the instalment of interest thereon, which became due February 1, 1875, was duly paid by said company upon all of the same which were presented for payment, which was the great bulk thereof, and that no interest has been paid on any part of the same since that time; that no payment of interest had been made upon the \$698,500 of Illinois division bonds, which had not been funded, since payment of the coupon due April 1, 1873.

The decree then recites as follows: "That heretofore, and on the 26th day of February, A. D. 1875, the said complainants, as trustees under the said mortgage or trust deed to them, dated March 10, 1869, did declare the principal of the said twenty-five hundred Illinois division bonds to be due and payable by reason of the default of said railroad company in the payment of certain of the coupons of said bonds which fell due October 1, 1873, payment of which had been duly demanded, and the continuance of such default for more than six months after such demand." The decree then proceeds to declare that there is due and owing from the railroad company to the complainants, as trustees under the mortgage deed of March 10, 1869, the several sums of \$87,500 in gold coin, for the coupons on the \$2,500,000 of bonds secured thereby, falling due respectively semi-annually from October 1, 1873, to October 1, 1876, inclusive, less the payments made on account of the four coupons on the convertible bonds and certificates of indebtedness, with interest on said sums at the rate of six per cent. per annum, and, as the decree reads: "In the further sum of \$2,500,000 in gold coin, for the principal of the said Illinois division bonds so declared to be due as aforesaid, together with interest thereon from and after the 1st day of October, A. D. 1876, at the rate of seven per cent. per annum in gold."

It was then "ordered, adjudged and decreed that the said defendant, the Chicago, Danville & Vincennes Railroad Company, pay, or cause to be paid, to the said complainants, as trustees, for the holders of the said Illinois division bonds and coupons, the said several sums of money, with interest thereon, as hereinbefore found to be due and owing, within twenty (20) days from and after the entry of this decree, and, in default thereof, that all of the said railroad, premises, property and franchises described in the said trust deed, dated March 10, A. D. 1869, and hereinbefore described as the Illinois division of said railroad, etc., and all the right, title, interest and equity of redemption of the said Chicago, Danville & Vincennes Railroad Company therein, shall be sold as an entirety by Henry W. Bishop, the master in chancery of this court, at public auction, to the highest and best bidder for cash therefor, payable as herein-after provided, at the west door of the Republic Life Insurance Company building, in the city of Chicago, in the state of Illinois, after having first given notice of the time and place and terms of sale, and a description of the property to be sold, by advertisement thereof in some public newspaper published in the city of Chicago for the space of thirty days prior to such day of sale."

The decree also contains the usual declaration that a conveyance of the title to the property sold, after confirmation of the sale, shall be a perpetual bar in law and equity against every claim of the railroad company or other person claiming under it. Under this decree a sale was had and reported to the court, and confirmed by a subsequent decree of the mortgaged property to F. W. Huidekoper, T. W. Shannon and J. M. Denison for \$1,450,000, and the purchase money having been paid, \$362,500 in cash, and by the surrender of

\$2,328,000 of the Illinois division bonds with the coupons and certificates of indebtedness or convertible bonds thereto attached and belonging, a conveyance of the title to the mortgaged property was made to the purchasers.

It is assigned for error upon the decree of foreclosure and sale: *First*, That the court below required from the mortgagor payment of the principal of the debt secured by the mortgage, as then due, and on non-payment thereof, within twenty days, that the mortgaged property should be sold; and, *second*, That it decreed foreclosure and sale on this condition, without proof of the written request of the holders of the majority of the bonds.

§ 1474. *Circumstances under which payment, within twenty days after a decree, of principal mortgage debt should not be required.*

It is undeniable that at the date of the filing of the bill, which was February 27, 1875, the defendant, the Chicago, Danville & Vincennes Railroad Company, was in default for non-payment of the coupons on \$698,500 of the issue of \$2,500,000 of the Illinois division bonds which matured October 1, 1873. The holders of that amount of these bonds did not fund their coupons and none of them were paid. This failure on the part of the mortgagor constituted a breach of one of the conditions of the mortgage; and continuing for six months, entitled the trustees under the fifth article to take possession of the mortgaged premises, on being so required by the holders of not less than one-half the outstanding bonds, and collect the net income, until the default should have been satisfied; or, to sell the mortgaged premises under the power conferred by the sixth article of the conditions. In the latter event, the mortgaged premises would be sold as an entirety, free from the incumbrance of the mortgage, and the proceeds of the sale applied, first, to the payment of the amount due and in arrears, and then to the mortgage debt not then due, and any surplus to the mortgagor. But, inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal on any of the bonds, we are of opinion that, independently of the provisions of the other articles, the trustees, or, on their failure to do so, any bondholder, on non-payment of any instalment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others or of the trustees. It is properly and strictly enforceable by and in the name of the latter; but, if necessary, may be prosecuted without and even against them. It follows from the nature of the security, and arises upon its face, unless restrained by its terms. And in case the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor and all holders of junior incumbrances, if made parties to the suit, and is of the whole premises, when necessary to the payment of the amount due or when the property is not properly divisible; it conveys a clear and absolute title as against all parties to the suit or their privies, and the proceeds of the sale are distributed, after payment of the amount due, for non-payment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not. *Olcott v. Bynum*, 17 Wall., 44; *Burrowes v. Molloy*, 2 Jo. & Lat., 521. This doctrine is stated by this court in *Howell v. Western R. Co.*, 94 U. S., 463, 466 (§§ 1241-42, *supra*), where an authoritative rule of practice in such cases is prescribed.

"We are of opinion, then," say the court, speaking by Mr. Justice Miller, "that there is due from the railroad company to plaintiff the amount of his overdue and unpaid coupons. For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice,—a decree which will ascertain the sum so due and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal."

The decree *nisi*, mentioned in this extract, like that in a suit against an infant, in which a day is given him to show cause against it, after he attains full age, and like that where the bill is ordered to be taken *pro confesso*, is preliminary in its nature, requiring a further order to complete it. According to the practice of the English chancery, a decree of this nature in a foreclosure suit, after directing an account to be taken of the principal and interest due to the complainant upon the mortgage, orders that upon the defendant's paying the amount ascertained and certified or found to be due, within six months, at such time and place as are appointed, the complainant shall reconvey the mortgaged premises; but that in default of such payment the defendant shall thenceforth be absolutely debarred and foreclosed of his equity of redemption. It is necessary, however, for the complainant, in order to complete his title, to procure a final order confirming it; otherwise the decree of foreclosure will not be pleadable. This order of confirmation is procured on proof to the court of non-payment according to the terms of the decree. 2 Daniell, Ch. Pr., 997.

The time usually allowed by the decree to pay the mortgage debt, whether on a bill to redeem or to foreclose, was six months. But that was not regarded as an absolutely fixed period, but might be varied so as to be reasonable, according to the discretion of the court and the particular circumstances of the case. The courts, however, were very liberal in cases of foreclosure in extending and enlarging, from time to time, this period of redemption, though not in cases of bills to redeem, where the mortgagor came into court professing his readiness to pay the amount due, when ascertained, nor in cases of sales, where the mortgagor was not subjected to the severe and absolute forfeiture of his right. *Perine v. Dunn*, 4 Johns. Ch. (N. Y.), 140; *Harkins v. Forsyth*, 11 Leigh (Va.), 294.

Where, according to the English practice, a sale instead of foreclosure was ordered, the form of the decree was the same, directing the sale, in the event of a default being made in payment of the amount found due, within the usual time of six months, or within a shorter period, or even immediately, if by consent, or where it was considered to be for the benefit of all parties. 2 Daniell, Ch. Pr., 1266.

In the early practice in Kentucky, the preliminary decree, finding the amount due and giving day for payment, was interlocutory merely and separate from the subsequent decree, finding the default in not performing the former decree and directing a sale in consequence thereof. *Downing v. Palmateer*, 1 Mon. (Ky.), 64; *Oldham v. Halley*, 2 J. J. Marsh. (Ky.), 113; *Hanks v. Greenwade*,

5 id., 250; *Champlin v. Foster*, 7 B. Mon. (Ky.), 104. The ground of this practice seems to have been that the mortgagor had the right to have the record show that he had failed to pay according to the decree *nisi* before a sale of his property was ordered. But there seems to us to be no sufficient reason why, as it was according to the English practice, and generally in this country, all these matters may not be embraced in a single decree. What is indispensable in such a decree is, that there should be declared the fact, nature and extent of the default which constituted the breach of the condition of the mortgage and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay, within a reasonable time, to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed. *Woodard v. Fitzpatrick*, 2 id., 61.

This is that final decree of foreclosure and sale which determines and fixes the rights of the parties, and from which, on that account, an appeal lies. *Ray v. Law*, 3 Cranch, 179; *Whiting v. Bank of United States*, 13 Pet., 6; *Forgay v. Conrad*, 6 How., 201; *Railroad Co. v. Swasey*, 23 Wall., 403. But as in cases of strict foreclosure, so in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirms it; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest and costs, he will be allowed to redeem. It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption. *Brine v. Insurance Co.*, 96 U. S., 627 (§§ 800-804, *supra*).

It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment, which may be cured by a *remittitur*, it is otherwise incurable; for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away, except upon a strict compliance with the steps necessary to divest it. *Bigler v. Waller*, 14 Wall., 297 (§§ 1149-52, *supra*); *Shillaber v. Robinson*, 97 U. S., 69 (§§ 1146-48, *supra*). In *Clark v. Reyburn*, 8 Wall., 318 (§§ 1047-49, *supra*), a decree of strict foreclosure, which contained no finding, either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or redeem, was reversed on these grounds, although the bill was taken *pro confesso* as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences undoubtedly would have followed, if it had been a decree of foreclosure and sale, instead of a strict foreclosure; and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due.

It becomes, then, of the first importance to ascertain whether the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due.

The errors alleged in the amount are two. The first is, that there was de-

clared to be payable \$252,220, the amount of the several coupons maturing from October 1, 1873, to April 1, 1875, both inclusive, the payment of which, it is claimed, as to all the bonds of the Illinois division, except \$698,500 thereof, had been, by the funding agreements, extended until February 1, 1879. The second is that the principal sum of \$2,500,000 of these bonds, contrary to the agreement between the parties, was also declared to be due and payable. The appellants insist that the only indebtedness of the railroad company to the bondholders, represented by the complainants at the time of the filing of their bill, was the past-due interest on six hundred and ninety-nine bonds, the interest warrants of which had not been funded, amounting to about the sum of \$147,000.

It appears from a statement in the record, admitted to be correct, that there had been deposited and exchanged for convertible bonds the four coupons maturing on and from October 1, 1873, to April 1, 1875, on \$271,500 of the Illinois division bonds, and that by the terms of the agreement under which that exchange was effected, dated November 11, 1873, it was not to be binding unless assented to in writing by a majority in interest of the bondholders. In point of fact, such majority did not assent to it; but under the second proposition, dated November 20, 1873, the four corresponding coupons on \$1,530,000 of the bonds were deposited and exchanged for certificates of indebtedness. It appears further that the railroad company paid the accruing interest on the convertible bonds and certificates of indebtedness, issued under these arrangements, which became due prior to the filing of the bill, except \$3,167.77, which was not presented. The default in respect to the coupons surrendered was, by the terms of the funding agreements, waived as long as the interest upon the securities substituted for them was punctually paid, so that at the date of the filing of the bill there was no subsisting default in the payment of interest, except upon the \$698,500 of bonds which had not been funded.

The master finds — and his report in that respect is the predicate of the decree — that divers coupons falling due October 1, 1873, were presented on that day, and that payment thereof was demanded and refused, and that one of such coupons was protested for such non-payment more than six months prior to the institution of the suit, and the written declaration of the trustees, that the principal of the bonds had thereby become due.

There are some statements in the answers, and in the testimony of some of the witnesses, that coupons due October 1, 1873, were presented for payment and were not paid; but there is no proof of the fact as to any particular coupon identified for that purpose, and we have carefully searched the record in vain for any evidence whatever that any coupon, not afterwards funded, was presented and payment thereof refused. The master himself does not report any such. It is entirely consistent with his finding, and with the evidence on which it professes to be founded, that the payment of every coupon falling due October 1, 1873, presented for payment on or after that day, and payment whereof was refused, was extended by the subsequent agreements to fund them. The intervening petition of Osgood and others, if it be considered as a pleading whereby they were allowed to become co-complainants, does not allege that any one of the coupons held by them was presented for payment. It is averred that large numbers of the coupons maturing on October 1, 1873, were presented, and payment thereof was demanded and refused on that day, but the allegation that any such coupon was held by either of the petitioners seems to have been studiously avoided; and stress is laid on averments of fraudulent

misrepresentations which induced bondholders to fund their coupons, in support of which the master reported that no testimony was offered, and upon the insolvency of the company, which is entirely immaterial upon the question of an actual default. It is averred in the petition that coupons were presented and payment demanded in December, 1874, which had become due the previous April, and the master so reports as to one; but the only evidence that appears in the record is an admission of the railroad company in its sixth exception to the master's report, where it is accompanied by the statement that such demand and refusal was less than six months before the filing of the bill, and could not, therefore, have been the foundation of the declaration that the principal of the mortgage debt had become payable, which, in fact, was not predicated upon that default, but rested solely on the non-payment of the coupons due October 1, 1873.

There is nothing in the record to show that any one of the bondholders, who had funded his coupons, claimed the right to rescind the funding agreements, or that any step to do so had been taken or authorized.

It is true that after the filing of the bill, and the appointment of a receiver, the company ceased to pay interest upon its securities. That was but the natural consequence of the litigation; and in taking a decree for foreclosure and sale, it might have been in strict accordance with the equitable rights of bondholders who had funded their coupons, to have rescinded the funding agreements, as incapable of execution. But the legal effect of this would have been merely to find as the true amount of the mortgage debt then due, necessary to be paid to avoid a sale, the whole amount of interest unpaid on all the coupons. It would not, however, have put the company in default as to the funded coupons from the beginning, nor deprived it of the benefit of the waiver of that default, arising from the fact of funding. It would have canceled the arrangement only as and from the date of the decree itself, without impairing its antecedent effect by retroaction. It is true that where a mortgage has been given to secure a debt payable in instalments, and a bill has been filed for foreclosure and sale, upon a default as to one, the decree may require payment of all instalments then due, though maturing since the institution of the suit; but that principle does not suffice to bring the case of the appellees within the meaning of the eighth article of the conditions of the mortgage, so as to justify the decree requiring payment of the principal of the debt, as presently due. For by the terms of that provision the entire debt does not become absolutely due, on the default of the company, continued for six months, without the consent of the holder, to pay an interest coupon; but only at the election of the trustees, as declared by them and notified to the mortgagor. And the forfeiture of the time of payment to be established in a given case must stand or fall upon the fact of such declaration and notice, as it may be justified or not by the circumstances existing when they were made. It cannot be supported by subsequent occurrences. It follows, therefore, that the claim in support of the finding that the whole debt had become due must rest exclusively upon the alleged default of October 1, 1873, and that, as we have seen, is not sufficient.

It does not affect this conclusion, that by the terms of the sixth article of the conditions of the mortgage it is provided that upon the exercise of the power thereby conferred, resulting in a sale of the mortgaged premises, for a single default in the payment of interest (it may be one coupon merely), the property is to be sold as an entirety, and free of the incumbrance of the mortgage, so as

to pass all the title, both of mortgagor and mortgagee, and that the proceeds of the sale are to be applied, after payment of overdue interest, to the payment of the principal of the debt, though not yet due. This provision does not, either in terms or in effect, make the whole debt due before the stipulated day of payment. It is simply the application to the case of a sale by the trustees under the power, of the practice of courts of equity in cases of judicial sales upon foreclosure. In either case the right of the mortgagee to redeem, and thus prevent the sale, is preserved, on payment, not of the unmatured principal sum of the debt, but merely of the interest then actually due and in arrears,—the very right which, by the decree now in question, was denied. If authority is needed on such a proposition, it will be found in *Holden v. Gilbert*, 7 Paige (N. Y.), 208, and *Olcott v. Bynum*, 17 Wall., 44.

This right cannot be regarded as other than important and valuable. Its denial in the present case was a substantial and serious wrong. This is manifest from the bare statement that the decree required payment, within twenty days, of \$2,500,000, which we find was not due, as a condition of preventing the sale of property, which, it is admitted, was worth more than this debt, and which, according to the testimony in the case, was earning more than enough to pay the current interest on this mortgage. The receiver states the net earnings for the year 1874 at \$330,615.75, and adds, speaking July 31, 1875, that "the present year, like the preceding, is of almost unexampled depression in most branches of business upon which the consumption of coal depends," the transportation of which was the main traffic of the road; and adds that he believes, on the reasons he states, that "it is practicable, in a year of fair prosperity, to increase the earnings from fifty to eighty per cent. over those of 1874." Upon such a showing, it is immaterial to say that the railroad company was commercially insolvent, not being able to pay all its obligations as they matured; for the fact, if admitted, would not affect its legal or equitable rights, much less be allowed to deprive its other creditors, junior incumbrancers and lienholders, of their right to prevent a sale and sacrifice of the property by paying the comparatively small amount of the interest, justly due, upon the first mortgage bonds, and thus preserving their own estates and interests as well as those of the mortgagor.

§ 1475. *Circumstances under which a foreclosure and sale of mortgaged railway property should not be ordered without the written request of a majority of the bondholders.*

The second assignment of error which we have noted is, in our opinion, also well founded. The eighth article of the conditions of the mortgage, which relates to this subject, contains the provision that, after the principal of the bonds has been declared by the trustees to have become due, by reason of the default therein described, and the mortgagor notified thereof, the trustees, "upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided." It is contended, on behalf of the appellees, that without the last clause the trustees have the sole right to act, according to their discretion and upon their own motion, in declaring the principal sum due on account of the default; and that upon such declaration and notice by the trustees the whole sum becomes due irrevocably for all the purposes of the mortgage; so that thereafter the trustees, at their option, may file a bill for foreclosure and sale, or may intervene, in case such a bill is filed by any bondholder, and thereupon the amount decreed must

be the amount thus declared to be, and hence actually, due; and that the office of the clause in reference to the written request of a majority of the bondholders is merely to make the obligation of the trustees imperative, instead of optional.

We cannot agree to that construction of the provision. The whole article must be taken together. It is, in fact, a unit, and is directed to a single end. And the nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation. It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy. And while it is in the nature of a forfeiture, it is one against which, when it has taken place according to the fair meaning of the parties, courts of equity will not relieve. It was so held in *Noyes v. Clark*, 7 Paige (N. Y.), 179; *Noonan v. Lee*, 2 Black, 499; *Olcott v. Bynum*, 17 Wall., 44.

The stipulation, nevertheless, is in the nature of a penalty, and may be regarded as *stricti juris*, to be construed fairly and reasonably, according to the meaning of the parties, but leaning, if need be, in any case of ambiguity, in favor of the debtor. And the construction, in the present instance at least, which favors him, does not discriminate against the bondholders as a class, but rather between the interests of the whole number, represented by the trustees and controlled by a majority, and those of a single creditor, or a minority, associated in the like case, pursuing their remedy as individuals. For while, as we have seen, one or any number of bondholders may prosecute a bill to foreclose the mortgage, upon default as to payment of a single coupon, or the trustees may intervene on behalf of all for the same purpose, because the failure to pay a single instalment of interest is made a breach of the condition of the mortgage, yet it is apparent that one purpose at least of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests.

In declaring the principal sum due before the date fixed by the credit, upon a default in the payment of interest, the trustee is acting for the whole number of bondholders, and the provision that subjects his action in enforcing the stipulation to the wishes of a majority is meant, as we think, for the protection of the class. Many cases may be mentioned to illustrate the importance in their interests of such a control, rather than to put it in the power of one or a minority to require all to accept what the majority might consider to be a premature and less valuable satisfaction for their existing security. The larger number might think it to their advantage even to defer the collection of their overdue interest, much less not to anticipate the payment of the principal, even when the security was ample to meet both; for they might esteem the ultimate investment higher than present payment. While they could not and ought not to prevent others, even a single individual, from exacting the promptest payment of what is due and may be important as current income, by legal process, they may nevertheless rightfully object to an anticipation of payment that may, in their opinion, prove to be a sacrifice. And this becomes especially important when the present value of the security is insufficient to prepay the incumbrance, but contains the solid promise of future indemnity as an investment. It is that interest, we think, that dictated the clause in question, and can be satisfied only by the construction which secures to the majority of bondholders the right to veto the proceeding of the trustees.

Indeed, the other construction contended for, which gives to the majority only the right to make the obligation of the trustees to proceed imperative, renders it nugatory. For upon that supposition, the debt having become fully due, by the declaration and notice of the trustees, for all the purposes of the mortgage, if they should delay or refuse to file a bill for foreclosure and sale, it would still be in the power of a single bondholder to proceed for himself and associates directly for the same object, and to procure the same relief. It is, therefore, our opinion that, even had the trustees rightfully declared the principal sum of the mortgage debt due, and given the proper notice thereof, nevertheless the foundation for proceeding to foreclose for that cause, and of the decree requiring payment of that amount, would fail, without proof that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds then outstanding. It is not disputed that no such proof is to be found in this record.

Other errors than those already discussed have been assigned upon both appeals, which, as in the further progress of the cause they may not arise again, we have not considered and do not therefore pass upon. For the reasons already given, both decrees will be reversed, and the cause remanded with instructions to proceed in conformity with this opinion.

Dissenting opinion by WAITE, C. J., HARLAN, J., concurring.

I am unable to agree to the judgment in this case. In my opinion default had been made in the payment of the interest on some of the bonds within the meaning of the eighth clause of the mortgage. The company having given notice that the coupons due October 1, 1873, would not be paid if presented, no presentation was necessary in order to create the default. This notice was a waiver of a presentation in form. Coupon holders were in effect told it was useless to make a demand, because if made it would not be met. Confessedly this default as to the coupons on \$698,000 of the bonds continued more than six months. Holders of bonds to this amount declined to enter into the scheme for extension. They kept their coupons, hoping some plan might be devised for payment, but retaining all their rights under the mortgage if their hopes were not realized.

This default having happened, and having continued more than six months without the consent of the holders of the coupons, by the express terms of the eighth clause, the principal of all the bonds secured by the mortgage became immediately due and payable. If after that the holders of a majority of the outstanding bonds had requested the trustees in writing to foreclose the mortgage, it would have become the imperative duty of the trustees to institute the necessary proceedings for that purpose. But if no such request was made, it seems to me that the trustees were not precluded from commencing such proceedings on their own motion, in case the safety of the trust made it necessary. It is possible, if a majority of the bondholders had, in an appropriate way, interfered to prevent the trustees from going on, some relief might have been afforded them; but when all came in and availed themselves of what had been done, the corporation was in no position to defend because a request had not been formally made in advance. As to the corporation, the principal of the bonds became due and payable when a default occurred which continued the requisite length of time. Whether a foreclosure should be had because of the default rested alone with the bondholders and trustees. The provision in the mortgage for the written request was, as it seems to me, not for the pro-

tection of the company but the bondholders. If the bondholders are satisfied with what the trustees have done, the corporation is in no condition to complain.

That the trustees were justified in commencing proceedings on their own motions seems to me clear. Some of the bondholders having coupons and bonds, as to which default had been made, began a suit for foreclosure in a state court and secured the appointment of a receiver. The company was very much embarrassed financially, and so long as the receivership continued could do nothing to extricate itself from its difficulties. It was a necessity, therefore, for the trustees to interfere. When they did, the company did not relieve itself from the consequences of its default in the payment of coupons on the \$698,000 of bonds. All the bondholders seem to have been satisfied with what was done, and they united with the trustees in pressing the foreclosure. Under these circumstances, in my opinion, the court properly treated the principal of all the bonds as due and decreed accordingly.

ON PETITION FOR REHEARING.

§ 1476. *An appeal will lie from a decree in an equity cause although it is only in execution of a prior decree. Vacation of decrees.*

Opinion by MR. JUSTICE MATTHEWS.

Since the announcement of our former opinion, the appellees, having filed a petition for rehearing, have suggested that the decree brought up by the appeal in the second case is not what it is recited to be in the prayer for appeal in the circuit court, viz.—the decree confirming the sale of the mortgaged property under that of foreclosure and sale,—but one rendered subsequently thereto, and merely in execution of it, and that it is therefore not the subject of an appeal, and claim that the present appeal should be dismissed for want of jurisdiction.

The appeal prayed for and allowed in the circuit court is recited in the petition therefor filed March 26, 1879, to be as follows: "From the decree entered April 12, 1877, confirming the report of the sale of the property of the defendant railroad company. From the decree of April 16, 1877, ordering the delivery of the deed and possession of the property to the purchasers, Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison. From the decree entered in said cause on the 19th day of November, 1877, in favor of Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison, and against the said Chicago, Danville & Vincennes Railroad Company for the sum of \$1,808,646.46."

The two decrees last named, of April 16, 1877, and of November 19, 1877, do not appear in the record. An examination of the terms of the decree of April 12, 1877, shows that it is a decree, confirming the report of the master upon a petition of the purchasers, Huidekoper, Shannon and Dennison, asking that their bid may be satisfied by a surrender of bonds and coupons without further cash payment, and upon that surrender for a conveyance of the title to the property, and to be let into possession. What prior action of the court, upon a report of the sale, had taken place, the transcript of the record before us does not disclose. Counsel for the appellees state that there was in fact a prior decree confirming the sale rendered on February 26, 1877, from which no appeal was perfected, and produce in support of their statement what is called a supplemental transcript of the record containing such a decree. This, however, we cannot at present consider or act upon further than to say that, in

view of the suggestions made, and to enable the parties to present whatever questions arise upon the record as it is now before us, or upon a complete record when supplied upon the appeal prayed for and perfected on March 26, 1879, the application for a rehearing is granted; and the decree of this court rendered at the present term, so far only as it reverses any of the decrees embraced in this appeal, is to that extent and for that purpose set aside.

Opinion by MR. JUSTICE MATTHEWS.

This appeal, heard during the last term with that from the decree of foreclosure and sale in the same case, was taken from three decrees rendered after the sale had taken place. Huidekoper, Shannon and Dennison, the purchasers of the mortgaged property sold under the decree of foreclosure, who are appellees in this appeal, were not parties to the former appeal. All the decrees appealed from, including those now in question, were included in the order of reversal made at the former hearing; but on a petition for rehearing it was called to the attention of the court that the transcript of the record was imperfect and incomplete, the decree confirming the sale having been omitted, and that the petition for the present appeal contained a misrecital, that the decree entered April 12, 1877, was the decree "confirming the report of the sale of the property of the defendant railroad company." The order of reversal was, therefore, set aside as to the decrees embraced in the present appeal and a rehearing granted. The cause on that rehearing has now been heard at the present term upon the whole record as amended and perfected.

From that it now appears that on February 17, 1877, the master filed his report of the sale, and the purchasers their petition for its confirmation and for other relief; and it was on that day, on motion of the complainants' solicitors, ordered that the report and sale be confirmed, unless objections thereto should be filed on or before the Friday next following, for which day it was set for hearing. And exceptions having been in the mean time filed by one Slaughter, on February 26, 1877, the court overruled the exceptions, and as the order reads, "does in all things confirm the sale" to the purchasers. From this decree an appeal was prayed by Slaughter, but was not perfected or prosecuted. The petition of the purchasers, filed February 17, 1877, in which they also asked for the immediate discharge and payment of their bid, had been referred to the master, whose report subsequently filed was confirmed by the decretal order of April 12, 1877, by which he was directed, on the surrender to him of two thousand three hundred and twenty-eight first mortgage Illinois division bonds of the defendant railroad company, to execute and deliver to the purchasers a deed of the property sold, and thereupon the receiver was directed to let them into possession. On April 16, 1877, the master having reported the execution of the decree of April 12th by the delivery of the deed and the acceptance of the bonds, a further decree was entered approving and confirming the same. These are the two decrees first named in the prayer for the present appeal.

It is now contended by the appellees that these decrees are merely orders in execution of the previous decrees of the court; are, therefore, not final in the sense necessary to authorize an appeal; and that consequently, as to them, the present appeal must be dismissed for want of jurisdiction. But according to the rule sanctioned and adopted in *Forgay v. Conrad*, 6 How., 201, and *Blossom v. Railroad Co.*, 1 Wall., 655, an appeal will lie from such decrees according to the nature of their subject-matter and the rights of the parties affected. In the

present case the decree of April 12, 1877, in effect, distributes the proceeds of the sale upon the basis of the finding and declaration in the decree for foreclosure, that the principal of the bonds had become overdue; for it authorized the purchasers, to the extent of the proportion in which the bid, if treated as cash, would, when applied, extinguish the bonds held by them, to use their bonds as cash in payment of their bid. It is manifest that a substantial error, to the prejudice of one of the parties, may originate in a decree distributing the proceeds of a sale under a decree of foreclosure; and no question can be successfully raised against the right to appeal from such a decree. We cannot, therefore, dismiss the present appeal upon the ground alleged.

It is then urged by the appellees that the decrees in question, having simply followed the directions of previous decrees, originated no error, and that the only alternative is to affirm them. But the decrees involved in this appeal now under consideration are dependent upon the decree of foreclosure and sale; and the latter having been reversed, the decrees in question are left without support, and fall of themselves, by reason of that reversal, vitiated by the common error. As they are already annulled by operation of law, the subject-matter of the appeal is withdrawn, and the appeal itself must be dismissed for lack of anything on which it can operate.

§ 1477. *A decree in personam, dependent on a decree of foreclosure and sale, will be reversed if the latter shall be.*

The other decree involved in this appeal was entered November 19, 1877, and is a personal judgment in favor of Huidekoper, Shannon and Dennison, as trustees for themselves and other bondholders, for the deficiency arising from the excess of the amount found due by the decree of foreclosure and sale over the credit, given of the proceeds of the sale of the mortgaged property. This deficiency is ascertained to be \$1,823,573.84, and execution is awarded therefor against the railroad company in favor of the above named parties. It would seem that the reasons given for dismissing the appeal as to the other decrees apply with equal force to the one now under consideration; and such, we think, would be the rule in ordinary cases; for the existence and amount of the deficiency must usually be dependent on the findings of the decree of foreclosure and sale, as to the amount due, and the extent to which that may have been reduced by the proceeds of the sale. But the present judgment is not in the customary form. Instead of finding the amount due to the complainants in whose behalf the sale was decreed, the judgment is rendered in favor of Huidekoper, Shannon and Dennison, as trustees for the bondholders. They claim not to have been parties to the suit at the time the decree of foreclosure and sale was rendered; and as we do not consider it proper to investigate or pass upon that claim in the present proceeding, we entertain the appeal, as to the deficiency decree, and reverse it, for the error which required the reversal of the decree of foreclosure and sale.

The argument of the present appeal on both sides seems to have been influenced by the consideration that it possibly involved a present adjudication of the effect its determination might have upon the rights of the purchasers at the sale and the present title of the property sold. But no question of that character is involved. Whether the purchasers were parties to the litigation, either by name upon the record or in interest and by representation so as to be affected by the error in the proceeding for which the decrees have been reversed, or whether they or their assigns are protected by the principle and policy that uphold the titles of *bona fide* purchasers without notice at judicial sales,

and any other that may be mooted touching the point, are questions which do not arise upon the present appeal, and are left for further consideration in case they should be presented in a subsequent stage of this or by virtue of proceedings in some other suit.

For the reasons announced, it is, therefore, ordered that the appeal from the decrees of April 12, 1877, and of April 16, 1877, respectively, be dismissed upon the ground that the decrees were vacated by the reversal of the prior decree of foreclosure and sale rendered December 5, 1876, and that the decree entered November 19, 1877, in favor of Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison, trustees, be reversed, and that the cause be remanded with directions to proceed therein as may be just and equitable. The appellants are entitled to their costs on this appeal.

§ 1478. A single bondholder has the right to maintain an action to foreclose the mortgage in behalf of himself and all other bondholders secured by that mortgage; and under some circumstances in behalf of bondholders secured by other mortgages of the same property. *Galveston Railroad v. Cowdrey*, 11 Wall., 459 (§§ 1297-1804).

§ 1479. All bondholders need not join.—Where bondholders secured by mortgage of a railroad file a bill in behalf of themselves and others who might come in, for the foreclosure of the mortgage, it is not necessary that all the bondholders should join in the suit; other bondholders may come in as complainants, or they may be allowed to present and prove their claims before the master. *Wilmer v. Atlanta & Richmond Air Line R'y Co.*, 2 Woods, 447 (§§ 1405-1409).

§ 1480. Distribution among all bondholders.—A holder of part of the bonds secured by a mortgage of property insufficient to satisfy the entire mortgage debt has no right to appropriate to his sole benefit, by execution and sale, the property mortgaged to secure all the bonds. The bondholders have a common interest in the security, and are equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, a distribution must be made in equity among all the holders of bonds *pro rata*. *Pernock v. Coe*, 23 How., 117 (§§ 1805-1809).

§ 1481. Trustees may come in.—After individual bondholders have filed a bill to foreclose a mortgage in behalf of themselves and all others in like interest, the trustees to whom the mortgage was made may come in and ask to become complainants instead of defendants, and their request will generally be allowed, unless it appear that they have adverse interests and are not in good faith fulfilling their trust. So soon as they are admitted as complainants, however, they have control of the suit, and are charged with the conduct of it. The trustees in such case may be allowed, in the discretion of the court, to dismiss the proceedings commenced by the bondholders and proceed in another court. *Richards v. Chesapeake & Ohio R. Co.*, 1 Hughes, 84.

§ 1482. The trustees in a railroad mortgage are the only necessary and proper parties to represent all the bondholders secured by the mortgage. Individual bondholders will not be made parties to the suit, unless they allege some malfeasance or incompetency on the part of the trustees. The fact that the trustees have approved a plan of reorganization proposed by one set of bondholders is no ground for allowing another set to become parties to the suit. *Skiddy v. Atlantic, Miss. & Ohio R. Co.*, 3 Hughes, 320 (§§ 1559-67).

§ 1483. A prior mortgagee is a proper party to a foreclosure suit when a receiver is prayed for. If in such case a receiver is appointed without special notice to the prior mortgagee, but the order appointing the receiver is immediately served upon him, he should protect his interests promptly, or he will be bound by such appointment by the subsequent authorized acts of the receiver. *Miltenberger v. Logansport R'y Co.*, 16 Otto, 286 (§§ 1520-34).

§ 1484. Default in interest on divisional mortgage.—In a suit to foreclose a mortgage made by a railroad company formed by consolidating several separate companies which had already mortgaged their separate roads, it was held that no decree could be granted in respect of a default in the payment of interest on the divisional mortgages which the complainant had not paid, and the holders of which mortgages were not made parties to the suit; although the mortgage in suit contained, among other things, a covenant for the payment of such interest. *Union Trust Co. v. Railway Co.*,* 5 Dill., 1.

§ 1485. Stockholders represented by the corporation.—The stockholders of a corporation need not be individually made parties to a suit by its creditors to obtain satisfaction out of surplus proceeds of a foreclosure sale, where the stockholders are represented both by the

corporation and by a committee of their own. *Railroad Co. v. Howard*, 7 Wall., 393 (§§ 1848-54).

§ 1486. Where a void sale of corporate property has been made under a deed of trust, and the property has been delivered to the purchaser, the trustees and the purchaser are liable to the corporation for the proceeds; yet a decree against them will not be made in a proceeding by two stockholders holding small interests, to which the corporation is not a party, though the suit be brought by these stockholders on behalf of themselves and all similarly situated who may come in to prosecute, when, after a long period, no other shareholder comes forward to join in the suit. *Samuel v. Holladay*,* 1 Woolw., 400.

§ 1487. A question of title as between the defendant company and third parties cannot be litigated in the foreclosure suit. *Farmers' Loan & Trust Co. v. Green Bay, etc., R. Co.*, 6 Fed. R., 100 (§§ 1468-73).

§ 1488. When a right of priority is in dispute it ought to be settled before a sale, so that the party holding the first incumbrance can bid upon the property up to the amount of his claim. *Campbell v. Texas & New Orleans R. Co.*, 2 Woods, 263 (§§ 1245-50).

§ 1489. *Defenses.*—In a bill to foreclose a mortgage given to secure negotiable railroad bonds, as against *bona fide* purchasers of the bonds for value, no other or further defenses to the mortgage are allowed than would be allowed were the action brought in a court of law upon the bonds. Such bondholders, in this respect, stand in the same position as *bona fide* assignees for value and before maturity of negotiable promissory notes. *Kenicott v. Supervisors*, 16 Wall., 452.

§ 1490. *Filing bill when road already in hands of receiver.*—Objection that a junior mortgagee cannot file a bill of foreclosure of property in the hands of a receiver appointed in a suit brought to foreclose a prior mortgage in the same court will not be sustained when not made until a year and a half after the filing of the bill. *Jerome v. McCarter*, 4 Otto, 734 (§§ 1453-56).

§ 1491. A decree of sale of a railroad situate in two states may be made by a court sitting in one of those states, under a mortgage of the entire line of road executed by one corporate body. The execution of the mortgage in this way estops the corporation from setting up a separate existence in the two states. Moreover a corporation chartered in two states may constitute one and the same corporate body. *Wilmer v. Atlanta & Richmond Air Line R'y Co.*, 2 Woods, 447 (§§ 1405-1409).

§ 1492. *Decree amended at subsequent term.*—A decree of sale under a railroad mortgage may be amended at a subsequent term of the court so as to make the sale subject to certain judgments and taxes which are liens upon the property, and to a certain lease and debts due from a receiver, instead of requiring the payment of a sum of money sufficient to pay all these claims in cash. *Turner v. I. B. & W. R'y Co.*, 8 Biss., 380 (§§ 1609-20).

§ 1493. *When decree not final.*—A decree of foreclosure which does not fix the amount due upon the mortgage, nor ascertain and define the property to be sold under the decree, is not final in the sense which allows an appeal from it. *Railroad Co. v. Swasey*, 23 Wall., 403.

§ 1494. A decree in a foreclosure suit which ascertains the amount due and directs a sale is a final decree from which an appeal lies. *Bronson v. La Crosse & Milwaukee R. Co.*, 2 Black, 524 (§§ 1457-59).

XI. APPOINTMENT AND JURISDICTION OF RECEIVERS.

[See RECEIVERS.]

SUMMARY—Receiver appointed to save earnings and land grant. §§ 1495, 1496.—Not appointed against wishes of great majority of bondholders, § 1497.—Default must be shown, §§ 1498, 1499.—And something more than default, § 1500.—Prosecution of actions against the receiver or against the property, § 1501.

§ 1495. It is the right of bondholders, after default of payment, to have a receiver appointed in cases where there is a stipulation in the mortgage that the mortgagee shall receive the income. *Allen v. Dallas & Wichita R. Co.*, §§ 1502-1508.

§ 1496. Where prompt action is necessary to save a corporation from forfeiture and a valuable land grant from lapsing, it is competent for a court, at the instance of bondholders, to appoint a receiver. *Ibid.*

§ 1497. A receiver will not be appointed against the wishes and interests of a great majority of the bondholders, upon the application of a very small minority of bondholders, so long as the property is honestly and successfully managed. In such case the equities of the great body of the creditors and stockholders of a railroad company, whose interests would be imperiled by the appointment of a receiver, will be respected in the exercise of the discretion-

ary power of the court to interfere by taking possession of the property, and the complainants will be left to their technical right of foreclosure in the usual course of proceedings. *Tysen v. Wabash R'y Co.*, §§ 1509-1511.

§ 1498. Where a mortgage of a canal company, including its tolls and revenues, provided that the company should retain possession so long as it should not make default from any cause, except a deficiency of revenue arising from a failure of business, the court will refuse an application for a receiver filed by one bondholder in behalf of all, when it is not shown that the default did not arise from the excepted case. *Stewart v. Chesapeake & Ohio Canal Co.*, §§ 1512, 1513.

§ 1499. But under the circumstances of the case the court retained the bill so as to require the company to render account and to enable it to grant such relief as the bondholders might petition for. *Ibid.*

§ 1500. The court will exercise an equitable discretion as to appointment of a receiver, although by the terms of the mortgage a default has occurred. There must generally be more than a default; as, for instance, proof that ultimate loss is likely to happen to the bondholders unless possession of the property be taken in their interest. A single and recent failure to pay the semi-annual interest due on a mortgage, where the income of the road had been appropriated to completing and operating the road, was not deemed sufficient ground for the appointment of a receiver, though the court took control of the company so far as to require it to pay a certain portion of its income into court every month for the use of the bondholders. *Williamson v. New Albany R. Co.*, §§ 1514-1518.

§ 1501. Where a receiver has been discharged, the property remaining in the jurisdiction of the court, causes of action against him either by contract or tort must be prosecuted by proceedings *in rem*. It is competent for the court in such case to establish and enforce a lien on the property. *Farmers' L. & T. Co. v. Central R. Co. of Iowa*, §§ 1519, 1520.

[NOTES.—See §§ 1521-1523.]

ALLEN v. DALLAS & WICHITA RAILROAD COMPANY.

(Circuit Court for Texas: 8 Woods, 316-334. 1878.)

STATEMENT OF FACTS.—This bill was filed by Allen and Nettleton, trustees, under a deed of trust executed by the defendant railroad company, to foreclose the deed of trust and sell the property conveyed by it, to pay the debts which it was given to secure. After it was filed a receiver was appointed, the defendant appearing by counsel and making no opposition. The receiver took charge of the railroad and managed it under the orders of the court for something over a month, when a motion was made to vacate the order appointing a receiver, and upon this motion the case was heard.

§ 1502. *Service of notice upon the proper officer of a corporation is good, although he fraudulently withholds such notice from the company.*

Opinion by Woods, J.

1. The facts concerning notice to this company, of the motion for the appointment of a receiver, were these:

A notice was served on J. W. Calder, the vice-president of the company, on May 18, 1878, in the city of Dallas, Texas, where the principal office of the defendant railroad company was, during the absence from the city of W. H. Gaston, the president, and Calder authorized counsel to appear for the railroad company. The service of a notice upon the vice-president of the company, under these circumstances, was a good service upon the company, according to the statutes of Texas and the by-laws of the company. No objection was made by Calder to the form of the notice or the manner in which it was served on him. Neither the complainants nor their counsel were responsible for what Calder did after this notice was served on him. He was the representative of the company appointed by it, and if he was an unfaithful agent, the principal of the agent, according to the general law, and not other parties, must suffer by his neglect or misconduct. There is no proof and no claim that either the com-

plainants or their counsel were in any complicity with Calder to prevent notice of the motion for a receiver from coming to the knowledge of other officers of the company.

§ 1503. *Failure to notify company of motion to appoint a receiver.*

The proof shows that Calder was acting as agent for one of the bondholders, and that he did not communicate the fact that a motion was to be made for a receiver to any other officer of the company. There is no doubt, also, that if the president and other agents of the company had received notice of the motion, the company would have resisted it, and there is little doubt that Calder purposely kept them in ignorance of the fact that the motion was to be made. This is the conviction left on my mind by all the evidence. Waiving for the present any consideration of the delay of the defendants in giving notice of their purpose to make the present motion, under the circumstances of the case, if now any of the defendants in interest can make it appear that the appointment of a receiver by the court was an invasion of their rights, that the facts did not justify such an appointment, and that the same was unadvisedly and improvidently made, I think they ought to be heard and the appointment revoked, and the condition of things before the appointment, as far as possible, restored.

The question, therefore, is presented whether, in view of all the facts now made to appear, the court should in the first instance have appointed a receiver. To sustain its side of this issue, the railroad company has filed its own answer, sworn to by W. H. Gaston, its president, the answers of Silas Reed, A. T. Obenhain and Jules Schneider, and the affidavits of W. H. Gaston, president, and Geo. Shields, secretary of the railroad company, and W. M. Johnson, engineer. The complainants, to sustain the appointment of the receiver, offer the bill verified, as before stated, by one of the complainants, and the affidavits of Wallace Pratt, C. W. Blair, J. W. Calder, Ira Harris, W. L. Doane, J. Brumback, J. B. J. Fenton and C. F. Stevens. They also again produce two hundred and fifty coupons due January 1, 1878, cut from the first mortgage bonds of the railroad company, with evidence of their presentation for payment and of their non-payment.

2. The claim that the railroad company has never issued its bonds and that no default has been made in the payment of the coupons is entirely unsustained. On the contrary, the proof is conclusive not only that the bonds were issued by the company, but that it received full value for every bond issued. The facts, as shown by the testimony, are as follows: One Alexander Calder was a creditor of the railroad company to the amount of \$20,000, for which he held the obligation of the company, secured by a mortgage duly recorded on February 12, 1876, on the company's road and property; and that, to secure a release and cancellation of this mortgage, the railroad company caused to be transferred to him sixty of the first mortgage bonds in suit, to be held by him as collateral security for the payment of his claim. The stipulation was carried into effect. The sixty bonds were delivered to W. E. Hughes, as trustee for Alexander Calder, who thereupon dismissed a suit which he (Calder) had commenced in this court to foreclose his mortgage, and entered a release of the mortgage on record. Afterwards, about April 1, 1878, the railroad company having failed to comply with the stipulations which said bonds were pledged to secure, the same were, in strict conformity with the terms of the contract of pledge, sold in New York city, after due notice, by an auctioneer, and bought in by said Alexander Calder, who thereupon became their absolute owner.

As to the remaining one hundred and ninety bonds, the proof shows that they were delivered by the railroad company to Malcolm Henderson, the contractor for the construction of the railroad, in payment of the work done and to be done by him, and to enable him to procure materials to carry on and complete his contract for the construction of the railroad, and that by the assent of Henderson and of the railroad company, the one hundred and ninety bonds were transferred to Ira Harris, the agent of the Kansas Rolling Mill, as trustee, to hold as collateral security for the payment of certain notes given by Henderson to the Kansas Rolling Mill Company, for iron furnished for the railroad, and which had been laid down in the track, and with power to sell said bonds at public or private sale in the event the said notes of Henderson were not paid at maturity, the proceeds of the sale to be applied to the payment of Henderson's notes. In fact, all the iron used in laying the track of the railroad was furnished by the Kansas Rolling Mill Company, and it has received nothing therefor except the notes of Henderson, secured by the transfer of the said one hundred and ninety bonds. Henderson paid nothing on his notes to the Kansas Rolling Mill Company, and on May 3, 1878, the one hundred and ninety bonds were sold to one W. L. Doane, who claimed to be the holder and in possession of the same.

§ 1504. *Those who hold railroad bonds as collateral security are bona fide holders for value.*

There is nothing in the record to show that, while Alexander Calder and the Kansas Rolling Mill Company held these bonds, they were not holders for value without notice, nor is there anything in the record tending to show that there are any defenses whatever which the railroad company could set up, even as against Henderson, the first transferee of the bonds. On this state of facts, which is clearly shown by the proof, and which there is no satisfactory evidence to contradict, it is hard to conceive on what grounds the railroad company can claim that it never issued or negotiated its bonds. Even if the bonds were still held by Alexander Calder and the Kansas Rolling Mill Company as collateral security, they would be *bona fide* holders for value and entitled to enforce the payment of the bonds, as long as the debts for which they were hypothecated were unsatisfied. *Wheeler v. Newbould*, 16 N. Y., 392; *Alexandria, etc., R. Co. v. Burke*, 22 Gratt., 254; *Goodman v. Simonds*, 20 How., 343 (BILLS AND NOTES, §§ 420-425).

The claim is further interposed by the railroad company that there was an understanding that the coupons due January 1, 1878, were to be cut from said bonds delivered to the Kansas Rolling Mill Company before the same were so delivered. The proof utterly fails to sustain this claim. The agent of the Kansas Rolling Mill, who was engaged in transacting this business, swears that they never heard of any such understanding until it was set up in the answer of the railroad company, and the joint written order of Henderson and Gaston, the president of the railroad company, dated November 2, 1877, is produced, directing the trustees of the trust deed to deliver to Harris, trustee for the Kansas Rolling Mill Company, the one hundred and ninety bonds in question, "to be held by him as collateral security for the payment of iron delivered in Dallas to the said company, pursuant to contract." In this order nothing is said about detaching the coupons due January 1, 1878, and the proof shows that the Rolling Mill Company was entitled to the possession of one hundred and twenty-five of these bonds as early as May, 1877. As to the sixty bonds held by Alexander Calder, it is not claimed that the coupons due January 1,

1878, were not properly transferred with them. I conclude, therefore, that the two hundred and fifty bonds of the railroad company were issued and put in circulation, that they are held *bona fide* and for value by either Alexander Calder and the Kansas City Rolling Mill Company or those to whom they have been transferred, and that default has been made by the company in the payment of the interest due January 1, 1878.

§ 1505. *A receiver will be appointed after default where the mortgagee is entitled to the income.*

3. It remains to consider whether there was any necessity for the appointment of a receiver, and whether, under all the circumstances as they now appear, a receiver should have been appointed. In my judgment, independent of any necessity for the appointment of a receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to have a receiver appointed to take possession of the trust property. The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property are not to be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee. In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal or interest on the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the trustees to enter upon and take possession of the trust property, and upon the written request of one-tenth of the holders of the bonds, it should be the duty of the trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment, *pro rata*, of the principal and interest due on the bonds. In short, it was made the duty of the trustees, in the contingency named, to exercise the rights and perform the duties of receivers appointed by the court.

These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. They constituted a part of the consideration which the railroad company offered to purchasers of its bonds. *State of Maryland v. Northern Central R. W. Co.*, 18 Md., 193; *Dumville v. Ashbrook*, 3 Russ., 99 (3 Eng. Ch.), note c. A mere default in the payment of the debt is no ground for the appointment of a receiver, but this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents. *Whitehead v. Wooten*, 43 Miss., 523; *Morrison v. Buckner*, 1 Hemp., 442 (§ 1040, *supra*). Are all these provisions of the deed of trust to be disregarded? If not, are the rights of the bondholders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right and it was their duty to do, have applied to this court to assist them in the execution of the trust whose duties they had assumed? These trustees might, as is sometimes done, have first taken possession of the trust property under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any

bondholder has lost any right, and it is the clear duty of the court to give them all the rights conferred by the deed of trust. By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession the bondholders are in danger of losing their right to the income and profits. *American Bridge Co. v. Heidelberg*, 94 U. S., 798.

§ 1506. *Difference between an ordinary mortgage and one in which the income is hypothecated with the corpus of the property.*

It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver, because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagee is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute, etc. For instance, are the rights of Alexander Calder to proceed on his sixty bonds, no part of which are in dispute, to be affected because some unfounded claim is set up that some of the coupons due January 1, 1878, held by the Kansas Rolling Mill Company, are not justly due? The rights of one holder of bonds are not to be impaired because some dispute may be started affecting the rights of another holder. High on Receivers, sec. 387. The value of railroad bonds, as commercial paper, depends in large degree upon the punctual payment of the interest as it falls due. The trust deed has therefore provided not only a pledge of the income and profits of the trust property to pay the interest and principal of the bonds, but has pointed out the method by which, in default of the company to pay the interest, the bondholders may compel the application of the issues and profits to its payment as it matures. Therefore, under the terms of the trust deed, I should feel compelled, upon demand made upon the trustees by one-tenth of the bondholders, to appoint, upon a bill filed for that purpose, a receiver, through whose agency the bondholders could enjoy all their rights, and it would be no answer to such an application to say that the trust property was sufficient to pay all the bonds, or that some of the bonds were in dispute, or that the *corpus* of the trust property was in no danger. Regarding, therefore, only the terms of the trust deed upon proof of a three months' default in the payment of interest, and of a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it would be the duty of the court, without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured.

§ 1507. *When the situation of the trust property alone requires the appointment of a receiver.*

But independent of the peculiar terms of the trust deed, the situation of the trust property, as shown by the evidence, was such as, in my judgment, to justify and require the appointment of a receiver at the time when the application was first made. It sufficiently appears that the main reliance of the railroad company for means to construct its road was on the sale of its first mortgage bonds. It is true, it had a land grant from the state, but this could only be secured as the sections of the road were completed, and could only be used as a means of affording additional security and value to the bonds. The condition of the railroad company on May 24, 1878, the date at which the receiver was appointed, appears by the proof to have been as follows: The

company had issued its bonds to the amount of \$250,000, on which the coupons due January 1, 1878, were unpaid, and the bonds held as collateral security had been sold in New York city at fifty cents on the dollar. The company had allowed judgments to be recovered against itself, on which executions had been issued and the company's property advertised for sale, and on one judgment a sale had been actually made. In short, the company was insolvent, and without means either to pay the interest on its bonds or to construct its road.

Malcolm Henderson, with whom the railroad company had contracted for the construction of its road, had failed, and had abandoned the work of construction. Reed, who appears to have been a subcontractor under Henderson, or in some way connected with him, was in possession of the railroad, about eighteen miles of which had been completed, and was receiving its issues and profits. As already stated, if twenty miles of the railroad were not completed by July 1, 1878, the charter of the railroad company and its land grant would become forfeited, and the security of the bondholders be entirely lost. There was not sufficient iron on hand to complete the road for the remaining two miles, necessary to be completed to save the charter and land grant. This was the condition of affairs when the application for the appointment of a receiver was made and granted. It is true, that after the appointment of the receiver, and before the order of appointment had reached the city of Dallas, the defendant Reed, who, according to the answer of the railroad company, was engaged in the construction of the railroad under a contract with Henderson, had, as he alleges, entered into a contract with a competent engineer to complete said railroad a distance of nineteen and a half miles by June 7th. But by the showing of the railroad company and of Reed, no such contract had been made when the receiver was appointed. The significant and unexplained fact remains, however, that even this contract did not provide for the completion of the road for the distance of twenty miles in due time to avoid the forfeiture of the charter and the land grant. It is true that the railroad company, speaking by Gaston, its president, says that it had no doubt that Reed would have completed the road for the distance of nineteen and one-half miles by June 10th, and upon information and belief that he could have completed the road for the distance of twenty miles by July 1st, and that the president of the railroad company had received assurance and ample indemnity from Reed that he would have finished the road the distance of twenty miles by July 1st, and Reed declares in his answer his purpose to have finished the road the distance, and within the time, necessary to save a forfeiture of the charter.

In what shape the assurances were received by the president from Reed, whether verbal or in writing, is not shown. What the ample guaranty was is not stated. Could it be expected that a court, where interests amounting to more than \$250,000 were depending, should be satisfied with such a showing as that? If Reed intended, in good faith and without seeking any undue advantage, to construct the twenty miles of road by July 1st, why did he not contract with competent engineers to construct the road to the twenty-mile point, and not to the nineteen and a half mile point? If he intended to allow the use of the road which was in his possession to carry the iron necessary to lay the last half mile, why did he decline to enter into a contract to that effect, as required by the city council of Dallas? Stevens, who was the engineer with whom Reed contracted to build the road to a point nineteen and one-half miles distant from Dallas, swears that Reed would not contract for laying the track to the twenty-mile post, and refused to provide the necessary material for that purpose.

§ 1508. *Conditions of the property which justify the appointment of a receiver.*

The condition, in short, was this: the railroad was insolvent and its property under execution; it was unable to furnish means to complete the twenty miles of its road in time to save the forfeiture of its land grant and charter. Henderson, the person with whom the company had contracted for the construction of its road, was insolvent and had abandoned the work. When the receiver was appointed there was no provision made by contract for completing the twenty miles, and it was three days after the appointment of a receiver that Reed, a subcontractor under Henderson, entered into a contract with Stevens for the completion of the road for the distance of nineteen and one-half miles. It seems to me that, under this state of facts, when such fatal consequences to the interests of the railroad and bondholders were threatened, it was the duty of the court to interfere by the appointment of a receiver, and that it would have been an indefensible trifling with the rights of others if the court had refused the application, relying on the assurance, fairly presumed to be verbal, which Gaston says he received from Reed, that the latter would complete the road twenty miles by July 1st, and on the guaranties which Gaston says he received from Reed but whose nature he does not reveal.

It is urged in behalf of the possession of Reed, which was displaced by the receiver, that Henderson's contract for construction antedated the deed of trust and provided that Henderson should retain the possession of the road and receive its issues and profits until the completion of the contract of construction, and that Reed had all the rights of Henderson, and his right to possession and use and enjoyment of the railroad under the construction contract was older and better than the rights of the trustees named in the trust deed. Conceding that Reed stands in the shoes of Henderson, what were Henderson's rights under the facts? He transferred, as collateral security to the Rolling Mill Company, one hundred and ninety bonds, secured by a deed of trust, which, on a certain default, gave the trustees the right to take possession of the railroad company's property and receive its rents and profits. As between him, therefore, and the trustees, he would be estopped from asserting his right of possession under his contract for construction. The transfer of the bonds, secured by such a deed of trust, was a clear waiver of his rights under his contract. So that neither Henderson nor Reed can be heard to claim possession as against the trustees of the deed of trust.

It has been urged by counsel for the railroad company that the plaintiff is never entitled to a receiver when the equities of the case are fully and fairly denied by the sworn answers of the defendant. This is true when the motion for a receiver is heard on bill and answer only. But when there is other evidence besides the bill to support the application, the court will consider whether the evidence adduced in support of the bill does not overcome the denials of the answer, and if it does the receiver will be appointed, notwithstanding the denials of the answer. *Thompssen v. Diffenderfer*, 1 Md. Ch., 489; *Simmons v. Henderson*, Freem. Ch. (Miss.), 493; *Henn v. Walsh*, 2 Edw. Ch., 129; *Buchanan v. Comstock*, 57 Barb., 568; *Fairbairn v. Fisher*, 4 Jones Eq. (N. C.), 390; *Callanan v. Shaw*, 19 Ia., 183; *Rhodes v. Lee*, 32 Ga., 470.

It is in all cases a question of evidence. If, on a consideration of all the proof, the court thinks a case is made for the appointment, a receiver will be appointed, notwithstanding the denials of the answer. In this case it seems to me that the proof to justify the appointment was ample. But in the view I

have taken of the case, the answer does not deny the equities of the bill. On the contrary, enough is admitted fully to warrant the appointment, namely, the terms of the trust deed, the issue of at least \$125,000 in bonds with all coupons attached, for a valuable consideration, default in the payment of the interest for three months, and the demand of the bondholders on the trustees that they should execute the powers conferred by the trust deed.

It has been ably insisted that the interests of the railroad company and of the people of a large part of the state of Texas will be injured by the action of the court, and that these considerations ought to aid the discretion of the court in coming to a conclusion adverse to the appointment of the receiver. These considerations cannot weigh when the rights of creditors are involved. But so far as the railroad corporation is concerned, it cannot justly complain. And as to the people of Texas, it seems clear to me that they are interested only in the railroad, and are not at all concerned about the railroad company. The appointment of a receiver does not put an end to the construction of the railroad. It only takes it from the hands of an incompetent and insolvent corporation and gives it to other and more vigorous agencies.

My conclusion upon the whole subject is, that if, on May 24th, when the receiver was appointed, the same evidence had been presented and the same arguments made as have been on this hearing, I should have felt constrained to appoint a receiver according to the prayer of the bill. Finally, a sufficient reason why the order appointing the receiver should not be revoked is, that the motion for that purpose comes too late. The receiver appointed by the court went forward promptly and vigorously in the discharge of his duties, and within the time limited he completed the railroad to the twenty-mile point, and thus saved the forfeiture of both the railroad charter and land grant. In doing this he expended the sum of \$5,000. The iron necessary to complete the track was furnished by the Kansas Rolling Mill Company. The receiver took possession of the railroad on May 29th, of course with the full knowledge of the railroad company and of Silas Reed, who, up to that time, had been in possession. It was not until June 26th that notice of the present motion was given. The officers of the railroad company, as soon as the receiver took possession of the road, learned how the notice of the motion to appoint the receiver had been served, to wit, on Calder, the vice-president. If they intended to claim that the notice was insufficient and defective, it was their duty to move at once. The delay of nearly a month, while the receiver was going on with the construction of the road and expending money and materials, furnished certainly not by the railroad company, but by others interested in its prosecution, was an acquiescence in the action of the court, and they are estopped now from making objection. It was not until the receiver had completed the railroad to the twenty-mile post and secured the railroad charter and land grant from forfeiture that notice of this motion was given.

On the whole case, I am well settled in the opinion that the motion to vacate the appointment of the receiver should be overruled, and it is so ordered.

TYSEN v. WABASH RAILWAY COMPANY.

(Circuit Court for Illinois: 8 Bissell, 247-259. 1878.)

Opinion by HARLAN, J.

STATEMENT OF FACTS.—The lines of railway now controlled by the Wabash Railway Company were formerly owned by different corporations, which re-

spectively executed mortgages for large amounts at different times. It may be well to recall the history of those mortgages, and some of the material facts connected with the organization, at a subsequent date, of the present company. The different corporations referred to, executed first mortgages to secure the following amounts of bonds: In 1853 the Toledo & Illinois Railway Company, owning seventy-five and one-half miles of railway in Ohio, executed a first mortgage for \$900,000. In the same year the Lake Erie, Wabash & St. Louis Railroad Company, owning one hundred and sixteen and one-half miles of railway in Indiana, executed a first mortgage for \$2,500,000. In 1862 the Illinois & Southern Iowa Railroad Company, owning twenty-nine and one-half miles of railway in Illinois, executed a first mortgage for \$300,000. In 1863 the Great Western Railway Company of 1859, owning one hundred and eighty and two-tenths miles of railway in Illinois, executed a first mortgage of \$2,500,000. In 1865 the Quincy & Toledo Railroad Company, owning thirty-three and six-tenths miles of railway in Illinois, executed a first mortgage for \$500,000. In 1869 the Decatur & St. Louis Railroad Company, owning one hundred and eight and one-half miles of railway in Illinois, executed a first mortgage of \$2,700,000, making an aggregate of first mortgages on these different roads of \$9,400,000.

Second mortgages were executed as follows: In 1858 the Toledo & Wabash Railroad Company, owning seventy-five and one-half miles of railway in Ohio, gave a second mortgage of \$1,000,000. In the same year the Wabash & Western Railroad Company, owning one hundred and sixty-six and one-tenth miles of railway in Indiana, gave a second mortgage of \$1,500,000. In 1865 the Great Western Railroad Company of 1859, owning one hundred and eighty and two-tenths miles of railroad in Illinois, gave a second mortgage of \$2,500,000, making an aggregate of second mortgages of \$5,000,000.

In 1867 the Toledo, Wabash & Western Railroad Company, a corporation formed by consolidation and then owning all the lines of railway now operated by the Wabash Railway Company, except the St. Louis division, executed what is styled in the record the "Consolidated Mortgage." In 1873 the consolidated Toledo, Wabash & Western Railroad Company, then owning and operating the entire line of railway now owned and operated by the Wabash Railway Company, executed what is known as the "Gold-bond Mortgage."

In February, 1875, the Metropolitan Bank of New York, and others, holding bonds secured by the "Gold-bond Mortgage," filed a bill of complaint in the court of common pleas in Lucas county, Ohio, seeking a foreclosure and sale upon the ground of default in paying interest. A receiver was appointed, and by him the line of railway was operated for nearly two years. Similar proceedings were had in the courts of other states as to the portions of the road in those states. In June, 1876, the property covered by the "Gold-bond Mortgage" — which was the last one — was sold under a decree at public auction, when John W. Ellis and others became the purchasers at \$2,500,000. That sale and purchase were subject, by agreement, to all mortgages prior in time to the "Gold-bond Mortgage," the priority and continuance of all prior mortgage liens being expressly reserved in the decree and declared unaffected by the sale. So that that sale was exclusively for the interest covered by the "Gold-bond Mortgage." The purchase by Ellis and others was made in pursuance of an understanding previously had among those interested in the property, but whose rights were subordinate to those created by the first mortgages. Had the foreclosure taken place under the prior mortgages, or any

of them, or if a forced sale had then been ordered for cash, it is entirely clear, in view of the condition of the country at that time, and in view especially of the depressed value of railroad property, that the rights of all the parties would have been seriously endangered, if not ruinously sacrificed. Hence the arrangement to sell under the gold mortgage alone. One of the avowed purposes of that arrangement was, if possible, to save something for the stockholders, who, as a general rule, in railroad foreclosures lose all. To that end the purchasing committee organized a new company with a capital of \$16,000,000—that is, the present Wabash Railway Company. The stockholders of the old company were invited to put up \$1,600,000 with which to buy the entire capital stock of the new company, receiving new stock at the rate of ten for one on the subscription. Of the one hundred and sixty thousand shares of new stock, all were subscribed for by the old stockholders, except eight hundred shares, and that amount was subsequently taken by the bondholders' committee in accordance with the plan proposed.

After the purchase, the new company, on the 13th of January, 1877, executed what is called the Seney mortgage upon the road for \$1,026,555.22, to secure certain indebtedness which the new company agreed to pay at the time, and as a condition of its purchase, and also, perhaps, to raise funds needed by the new organization for the operation of the road.

In January, 1877, and after the execution of the Seney mortgage, a funding scheme was proposed to the bondholders for the purpose, as the company declared, of restoring the property and placing it on a substantial and interest-paying basis. The main feature of this scheme was to give the holders of past-due and unpaid coupons of prior mortgages and coupons maturing as far ahead as November 1, 1878, scrip certificates, to run until the maturity of the bonds from which the coupons were detached, bearing seven per cent. interest, payable annually, the coupons to be returned to the holders whenever there was any default in paying the interest on the certificates; such arrangement in no wise to impair the liens on the portions of the road by which the respective bonds and coupons were secured. The holders of scrip certificates were given the option of funding the same into bonds of \$500 or \$1,000 each, with coupons at seven per cent. semi-annually, maturing in 1907, when the consolidated bonds mature, and to be called the funded debt bonds. In order to provide for the extinguishment of the funded bonds and the scrip certificates, the company, as a part of the funding scheme, proposed to set apart from its earnings after the year 1882, annually the sum of \$100,000, to be invested in the purchase and the cancellation of the scrip certificates or of the funded bonds, at not exceeding the par value thereof; those pertaining to the first mortgages to be retired first, the second mortgages second, and the consolidated mortgage last.

The company, in its funding proposition, said: "The directors of the Wabash Railway Company, having in mind the fact that all the bonds cover only portions of the road, none being secured by the entire property, have endeavored to give due consideration to each class, and to treat each with the utmost liberality that the prospective earnings of the road will admit of, and at the same time keep it in a condition to enable it to earn sufficient revenue to accomplish the result proposed."

Modifications of the funding scheme were subsequently proposed, but these modifications need not be noticed here, since they do not materially affect the determination of the present motion. On the 30th of April, 1878, the funding scheme had been expressly agreed to by over ninety-six per cent. of the bond-

holders holding under first mortgages, by more than eighty-four per cent. of those holding under second mortgages, and by seventy per cent. of those holding under the consolidated mortgages. These figures are as nearly accurate as I have been able to make them. It is thus seen that over eighty per cent. of all the bondholders have agreed to this scheme. Those who have indicated their dissent in express terms are less than one per cent. of all the bondholders. The holders of nearly \$100,000 of bonds, who declined to assent to the funding scheme, have, notwithstanding, filed affidavits opposing the present suit and motion. The remaining bondholders are silent so far as the record shows. Without notice to or demand upon the trustees, this suit was instituted by Tysen, he holding some of the second mortgage and consolidated or third mortgage bonds, by comparatively recent purchases made in the New York market, for the purpose of having the mortgage foreclosed, and the road sold to pay past-due interest and the mortgage debt. He sues on behalf of himself and all others in community of interest with him, and who may unite in this proceeding. Some of the bondholders have united with him, the aggregate of bonds represented on that side of the case being a little over \$100,000.

§ 1509. *The appointment of a receiver pending foreclosure proceedings is a matter resting in the sound discretion of the court.*

The matter now before the court for its determination is the application of complainant, and those standing with him, for the appointment of a receiver, pending the proceedings for foreclosure. That motion is opposed, although the right of complainant, and those united with him in these proceedings, to a decree of foreclosure, whenever the case is ripe for such a decree, is conceded. At the threshold of this contest, the inquiry arises as to the nature and extent of the discretion which the court may exercise in determining applications for a receiver of a railroad. Judge Story, in his *Equity Jurisprudence*, second volume, section 831, says: "The appointment of a receiver is a matter resting in the sound discretion of the court." In *High on Receivers*, section 365, the author says: "While the jurisdiction of equity over railway corporations, as enlarged by the statutes and practice of the various states, is based upon and exercised in accordance with substantially the same principles which govern its jurisdiction over other corporations, the courts are more reluctant to lend their extraordinary aid by the appointment of receivers over railways than in almost any other class of corporate bodies. The importance of these corporations as being *quasi*-public bodies, and the peculiar nature of their property and franchises, sufficiently explain the reluctance with which equity interferes with their management, and, in general, the courts proceed with extreme caution in placing them in the hands of receivers. And wherever the ordinary remedies provided by law are open to the creditors of such corporations for the enforcement of their demands, the appointment and continuance of a receiver in office for a long period of years is the exercise of a judicial power which can only be justified by the pressure of an absolute necessity."

§ 1510. *Mere default of payment will not justify the appointment of a receiver.*

In "*Jones on Mortgages*," volume 2, section 1516, the author says: "The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents." There is no such stipulation in these mortgages.

The supreme court of the United States, in the case of *Railroad Co. v. Sout-*

ter, 2 Wall., 523, says: "Sebre Howard objects to the discharge of a receiver because he has a judgment of \$16,000 against the La Crosse & Milwaukee Railroad Company, which he claims to be a lien on the road; and as the present receiver has also been appointed receiver in his suit, he claims that his debt must first be paid before he can be discharged. The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of \$800,000 per annum, to enforce the payment of a judgment of \$16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars' worth of property — of such peculiar character as railroad property is — from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court."

Further on in the same opinion, page 524, the court says: "In reference to all these parties, we remark again that the court deprives them of none of their rights to proceed in the courts in the ordinary mode to collect their debts, and that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers the exercise of which can only be justified by the pressure of an absolute necessity."

§ 1511. *A court will not appoint a receiver when such action would imperil the interests of others whose rights are entitled to as much consideration as those of the applicants.*

Upon examination of these and other authorities cited, it will be found that the action of the courts has depended largely upon the peculiar circumstances of each case. In no instance has the action of the court, in appointing or refusing to appoint a receiver, rested exclusively upon the technical, legal rights of the parties. The rule deducible from the cases, and which commends itself to my judgment as sound, especially in suits to foreclose railroad mortgages, is well stated in the case of *Vose v. Reed*, 1 Woods, 650, where this language is used by Mr. Justice Bradley: "The next question is whether the court will appoint a receiver. This is a matter always in the discretion of the court, but as a general rule a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court. But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed."

Applying these principles to the case in hand, what do we find? On the side of the complainant it appears that he is the owner of certain bonds, for the security of which mortgages were executed. In the payment of interest upon those bonds there has been a default. The present managers in execution of the funding scheme have been paying interest to those bondholders who have given their assent to that scheme, and decline to pay interest to complainant and those standing with him who refuse to become parties to the funding scheme. More than that, the present managers are not applying all of the net

revenue arising from the operation of the road to the payment of interest in the order of priority of mortgages, but are applying a portion to the discharge of obligations created by the Seney mortgage, which is the last mortgage upon the property. Complainant claims that this is a misapplication of the income, and of itself, in connection with the present supposed inadequacy of the security for all the bonds, would make it the duty of the court to take charge of the property by a receiver. Tysen and his colleagues insist that the duty of the managers is to keep down the interest on the first mortgage to the extent of the entire net income of the company; since that course, they contend, will increase the value of the subsequent incumbrances; that the company have no right, as a condition precedent to the performance of their duty, according to the legal rights of the parties, to require the complainant and his colleagues to submit to a funding scheme which they do not approve.

Upon the other hand, we find the vast majority of the bondholders, under all the mortgages, insisting that the funding scheme is the best arrangement for all concerned, and that under that arrangement, faithfully and honestly carried out, the rights of all parties will be best secured. The company invites complainant and those now standing with him to join in that scheme with the large majority of those who have the same character of rights with them. That that scheme is being honestly adhered to, and will be carried out in good faith, the evidence does not permit me to doubt. I will not stop to state in detail all the reasons arising out of the evidence for the conclusion I have reached. But I cannot doubt that the appointment of a receiver, at this time, would not only break up this line of railway into its original fragments, but would overturn the funding scheme, thereby destroying a large present income for the great majority of bondholders. It would, in addition, work the financial ruin of all the interests involved in this railroad enterprise, subordinate to the first mortgage bondholders, including the interests of the complainant and those united with him in this suit. Those who will certainly suffer, and who will suffer first, will be the stockholders of the old company, and who became the stockholders in this new organization by advancing \$1,600,000. None of the bondholders who were such when that \$1,600,000 was advanced by the stockholders are here actively seeking the appointment of a receiver.

Some of those who are conspicuously moving in that direction became, according to their evidence, the owners of bonds quite recently, and, as we may infer from the evidence, for merely speculative purposes. The present company did not get possession of the property until January 1, 1877. It has not yet had a fair chance to test the question whether this vast railroad enterprise in its charge may not be saved for the benefit of all concerned in its success. It did not fairly get to work for some months after January 1, 1877, and during that time they had much to contend with. Such is the testimony of its officers. Nevertheless, we find that while the net revenue from the business of 1875 is computed at \$660,385.21, and from the business of 1876 at \$984,646.73, such revenue from the business of 1877 is computed at \$1,384,094.37. During the first four months of 1878, the increase in the net revenue as compared with the net revenue of the corresponding four months of 1877 is computed at \$156,897.99. The same increase, if it continue throughout the year, will give a net revenue in 1878 of \$2,021,686.33. These are the computations of the treasurer of the company, a witness accredited to the court by both parties, and they seem to be fairly made. That officer says:

"That, in pursuance of said agreement of 1876, large amounts of money

were paid for the stock of the new company, a large sum expended in organizing and establishing a thorough management and improvement of the property and increase of equipment; that every possible effort has been made to increase the earnings and decrease the expenses and to increase its capacity; that the present company did not get possession of the property till January 1, 1877, and did not get fairly to work for three or four months after, and then had much to contend with in heavy storms of snow, and the strikes, which diminished earnings in the months when they are never large, say the first three or four months of the year. They are known among railroad men as unprofitable months usually. But after four or five months had elapsed the earnings began to increase and expenses to diminish, and from thence hitherto have so continued. That the net earnings, over and above operating and renewal expenses, are so steadily increasing that there is the best prospect that said road will, during the current year, be able to pay all its current interest, and also that the company will be able to pay all the suspended indebtedness under the funding scheme. That said funding scheme has already saved millions of dollars of capital, *bona fide* invested in the road, from utter cancellation; and that all classes of the securities of said road have been enhanced in value thereby."

Under such circumstances, and with a probability, recognized by sagacious men, that the country will soon pass from the era of hard times into an era of general prosperity for all, including those holding railroad securities, the court cannot, in deference to the mere technical rights of a very small minority of bondholders, lay its hand upon a railroad, over six hundred miles in length, running through three great states, and thereby imperil, if not destroy, the interests of others whose rights are entitled to equal consideration with those of the complainant and his colleagues. If the present management of the road were guilty of any fraud or dishonest practices in their control of this property, I should feel differently. While there are differences between them and some of the bondholders as to certain matters connected with the discharge of the company's obligations, those differences do not involve the integrity of those operating the railroad. The court is disposed to recognize the absolute necessity of large discretion in the management of such vast property and in the distribution of the net income arising therefrom, and it is unwilling, for the present at least, to make honest differences as to such matters the basis for its interference by the appointment of a receiver. It will leave the parties to the ordinary remedies for the enforcement of their rights. Let the complainant proceed with the foreclosure suit and take a decree for sale whenever it is proper to do so under the law and practice of this court. In the exercise of the broad discretion which the court has in the matter of appointing a receiver, it will not make such appointment in this case, under the present showing, for the reason that a much greater injury would result from so doing, to all interested in this railroad, including even the complainant and his colleagues, than by leaving the property in the hands now holding it pending the foreclosure suit.

The motion for the appointment of a receiver is denied, and counsel will prepare the necessary orders.

STEWART v. CHESAPEAKE & OHIO CANAL COMPANY.

(Circuit Court for Maryland: 4 Hughes, 47-57. 1881.)

Opinion by MORRIS, J.

STATEMENT OF FACTS.—This is an application for the appointment of a receiver to take possession of and operate the Chesapeake & Ohio Canal. The

complainant, an alien, is the holder of \$150,000 of the preferred construction bonds issued by the canal company under the Maryland act of 1844, ch. 281. By this act, the state of Maryland, which held \$5,000,000 of the stock of the corporation,—about five-eighths of the whole capital,—and which had also loaned to the corporation about \$5,000,000 on a first mortgage of all the property, including tolls and revenues, agreed to waive and postpone its first lien in favor of the bonds to be issued under the above-mentioned act, and authorized the corporation to issue a first mortgage of its tolls and revenues to secure them. Accordingly the corporation did execute such a mortgage, dated June 1, 1848, and issued about \$1,700,000 of bonds thus secured. This mortgage conveyed to certain trustees the revenues and tolls of the canal, to secure, after paying the repairs of the canal and the salaries of officers, the payment of interest on all the bonds so issued, and a sinking fund for their ultimate redemption. By the terms of the mortgage, in case of failure of the corporation to fulfil its obligations hereafter mentioned, the trustees were given power and authority to collect the tolls and revenue of the canal, and, after applying sufficient to put and keep the canal in good condition and repair, and to provide the requisite supply of water, and to pay the salaries of the officers and agents of the corporation, and its current expenses, they were to apply the remainder in satisfaction of the bonds and interest. It is further provided that the corporation should retain possession of the canal so long as it should comply with the agreements in the mortgage, and if it should fail to comply with these agreements from any cause except a deficiency of revenue arising from a failure of business, without fault on its part,—the default to be made to appear by the trustees,—then the trustees might demand and should receive possession, and should appropriate the tolls and revenue in the manner aforesaid.

§ 1512. *Circumstances under which the court will refuse to appoint a receiver of the property of an insolvent corporation at the instance of a single bondholder suing for all.*

The bill alleges and the proof shows that the last payment of interest on complainant's bonds, and on all bonds issued under this mortgage, was made in the month of December, 1876, when the coupon which had fallen due July 1, 1864, was paid, and no payment has since been made. This default, however, by the express terms of the mortgage, gives the complainant no ground to ask to have possession of the canal, either through the trustees or by the appointment of a receiver, unless he has made it appear that the default in the payment of interest has been caused by some misappropriation or mismanagement on the part of the corporation, and not by a failure of business without its fault, or else has shown to the court such corporate misconduct injurious to the bondholders or demonstrates the necessity of taking the property out of the hands of the corporation for the protection of their rights. The complainant alleges, and has endeavored to show, by testimony, that he is entitled to relief on both of these grounds.

The first of the causes charged in the bill for the deficiency of revenue is that the present management under President Gorman, who was elected in 1872, has been so entirely political that the canal has been and now is used primarily and mainly in the interest of partisan political objects, without regard to the rights of its creditors, and that the president and those with him who control the management of the canal, have, during the last three years, under *pretense* of employing persons to perform service for the company, kept their political agents in its pay when not performing any service for the canal, and

have employed large numbers of unnecessary and useless employees for the purpose of promoting their own political schemes. Undoubtedly the fact that the state of Maryland is the owner of a majority of the capital stock, and does, through her board of public works, appoint the president and directors, has always connected the management of the canal with the political changes in the state government. This has always been a subject of regret to those interested in the financial success of the work, and to the consequent lack of a fixed and stable policy in its management has been attributed the disappointment of the expectations of its projectors. The evils arising from the control of the state over the management of the canal have been the frequent theme of comment in the reports of its officers, and the ground of applications to the legislature for relief. But this is not an evil which the courts can remedy. It existed at the time when complainant purchased his bonds, and has always been an element in the estimate of their value.

If, however, the complainant had produced proof to establish the abuses alleged in his bill to have grown out of this political connection, and had shown, as alleged, that the revenues of the corporation were being squandered in paying persons kept in its service for political reasons, and not really necessary for its business, we should have no doubt of the duty of the court to interpose to prevent so gross an abuse of a trust. For, the corporation being insolvent to the extent that for years at a time its revenues had barely met its working expenses, it is manifest that the property is held by the corporation as trustee for its creditors, and the utmost good faith, economy and prudence are to be exercised in its management. So that, if the allegation of paying useless employees had been proved, such an abuse of this trust would have been made apparent as would have required the intervention of the court, as the only protection left to the bondholders against a faithless trustee of a property which is their only security. But we do not find this allegation established by the proof. The complainant has urged upon the attention of the court the falling off in the net income of the canal, and the increase of expenditure in proportion to receipts since 1875, and charges that these are evidences of extravagance and mismanagement. The fact that the net income of the canal, which, in the years 1871, '72, '73, '74 and '75, had been over \$200,000 in each of those years, fell in 1876 to \$67,144, and that in 1877, '78 and '79 the canal earned no income at all, is a matter which, as trustee, the corporation was bound to explain and account for.

The explanation given in its answer, and supported, as we think, by the proof, is that in those years the canal so suffered from hostile competition, compelling great reductions in tolls, from the general depression of the business of the country, from the great flood of 1877, and from interruptions caused by strikes of the boatmen, that it was not possible to make the canal yield the revenue of the preceding years. Obligated, as it was, to contend with these obstacles to profitable business, some of which, it is a matter of general notoriety, did interfere with the prosperity of all the great works of the country, the complainant has failed to satisfy us that any better results were possible, or that the deficiency of revenues is necessarily to be attributed to the extravagance or mismanagement of the officers of the corporation. Nor would it seem to so appear to the trustees of the mortgage which secures these bonds, nor to the great majority of the bondholders themselves; for, although the bill has been a year on the files of the court, only one bondholder besides the complainant, and he holding but a small amount of bonds, has united in the suit.

It is but a very small minority of the bondholders who are asking for the relief prayed for in the bill, and it does not appear that any others believe that the remedy now sought would be beneficial to their interests; and the trustees of the mortgage, who are in no way connected with or committed to the present management, or who are as individuals owners of considerable amounts of the bonds, are here in court strenuously opposing the present application. This attitude of these trustees having a large pecuniary interest, having also an important duty and obligation as trustees, and who are familiar with the affairs of the canal, and their apparent indifference to this application on the part of the great majority of the bondholders, is, we think, to be considered by the court in determining whether, under all the facts of the case, results more beneficial to the bondholders might reasonably be expected from the management of a receiver. It is also to be considered that if a receiver were appointed it would not be for any merely temporary purpose, to keep the canal going pending litigation, and looking to a sale or other termination of his duties, but it would be to operate the canal until, from the net income, these bonds, with fifteen years of accumulated interest, should be paid off. For some forty years of its existence the canal earned nothing beyond its current expenses, and it was not until after 1868 that it made any payment of interest on these bonds. Many of the difficulties and disasters which in former years have stood in the way of the pecuniary success of the canal may at any time again occur; so that it is manifest that the court, by its receiver, if it took possession of the canal, might have to manage this artificial water highway, in need of continual repairs, subject to freshets, strikes and the difficulties of competition, through a period of time which this century might not see the end of. To lead the court to pass such a decree, the case should be free of every question as to the mismanagement of the corporation, and as to the absolute right of the complainant to have such relief, and there should be no doubt that the appointment of a receiver would be an effectual relief.

The complainant has shown and has pressed upon the attention of the court several considerable expenditures of tolls and income, which, it is alleged, are in violation of the terms of the mortgage, and are wilful misappropriations of money which should have been applied to the payment of interest on the bonds. These are the expenditures for (1) the outlet locks above Georgetown; (2) the leasing and purchasing of wharves at Cumberland; (3) the telephone; and (4) the payments of directors and their hotel bills.

With regard to the outlet locks at Georgetown, and the wharf property at Cumberland, the respondent corporation has produced a great deal of testimony to show that the acquisition of these terminal conveniences was absolutely necessary to enable the canal to maintain itself against competition which threatened its existence, and that the possession of them has put the canal in a position of independence from adverse control, and of ability to economically manage its business and earn a revenue, such as it has not heretofore enjoyed, and from which the bondholders will reap immediate benefit. Without now considering these questions in all their bearings, it is sufficient for the purposes of this motion to consider the standing of the complainant with regard to these expenditures. These acquisitions have not been undertaken secretly. They have been considered and discussed in the published reports made by the president and directors to the stockholders for some ten years past, and committees have been appointed who have reported on them. It may be fairly said that the complainant, through his representatives and agents at stock-

holders' meetings and otherwise, has had full notice of the intention of the corporation to acquire these terminal facilities, and of the reasons for so doing. He never raised his voice in protest before these acquisitions were consummated, and it does not seem to us that he can now be heard to say, with any force, that they were such a wrong upon his rights under the mortgage, and evince such a reckless disregard of them, that the court should, in consequence, oust the corporation from possession and management.

The construction of the telephone along the line of the canal, the cost of which, it is charged, was an unlawful diversion of the revenue which should have been paid to the bondholders, was, it appears to us from the testimony, a reasonable expenditure for a very great convenience, tending directly to preserve the existence of the land by affording means of giving immediate notice of breaks and leaks, which, if not quickly repaired, would result in great damage and interruption of business. The proof fully explains the dangerous delays and difficulties attending the former practice of sending notice of leaks by messengers to the nearest superintendent, and the saving which is accomplished by the speedier method; and the proof also shows that with the use of the telephone a less number of superintendents is required, which results in a considerable saving of annual expense.

We come now to consider a misappropriation of income which the proof does fully sustain, and that is the payment from the earnings of the canal of extravagant hotel bills, incurred by the president and directors, and charged by them to the corporation without warrant or authority. These bills, so far as ascertained and proved, amount, for the said years from 1874 to 1878, to over \$12,000. The items show that the charges are for personal expenses and extravagant entertainments of these officers, and indicate certainly a disposition on their part to use their official position for personal gratification in disregard of the creditors they were appointed to protect—conduct in the managers of an insolvent corporation well calculated to excite suspicion and distrust with regard to the fidelity of their general management of its concerns. The excuse offered—that it had been for years the custom of the directors to extend such “hospitalities” at the expense of the canal—is, of course, no defense of so unwarrantable an expenditure of creditors' money, and is some proof of the averment made by the complainant that years of abuse have sanctioned methods of conducting the affairs of the canal which waste its revenue and deprive them of money which should be paid to them. But while it is true that these proven bills do tend to excite distrust, they do not actually prove anything but themselves, and are not in themselves sufficient to justify the costly machinery of a receivership.

The complainant further charges that the conduct of the president and directors in obtaining the passage by the legislature of Maryland of the act of 1878, authorizing the corporation to issue \$500,000 of repair bonds, was without actual necessity, and, as it endangered the security of the complainant, was a serious breach of trust committed by the corporation. The passage of this act was procured by representing to the legislature the dismantled condition of the canal, caused by the extraordinary flood of 1877, and the impossibility of raising money on the repair bonds authorized by the act of 1844. Attorneys who were the representatives and agents of the complainant, acting in his behalf before the same legislature, and in respect to the bonds he now sues upon, were also at that time attorneys of the corporation employed to assist in procuring the passage of the act of 1878. That any deceit was practiced upon

them by officers of the corporation, as to the real condition of the canal or its finances, we have no reason to believe; and if, with knowledge of all they now know, the agents of the complainant were satisfied themselves and endeavored to convince others that the act of 1878, and the issuing of the bonds authorized by it, was a wise, necessary and beneficial measure, surely the complainant's present claim to be protected from the corporation because of its acceptance of that act is not an argument which adds any strength to his case. Without a more particular statement of the reasons which have brought us to the conclusion, it suffices to say that, after a full consideration of the able presentation of the whole case, we find most of the material averments of the bill unsupported by the testimony, and those which are proved are not, in our judgment, such as to justify the exercise of that judicial power which would put into the hands of an officer of the court for an indefinite time the management of a *quasi* public work, attended with unusual risks and uncertainties.

§ 1513. *Circumstances under which a court, while refusing the prayer of a bill, will retain the case in court to meet future contingencies.*

We do, however, find that the complainant, and those who hold bonds similar to his, are in a position of great difficulty. They have a first lien on the revenues of a canal, which, it would appear, in years of reasonable business prosperity, when it has a fair show of business, and meets with no extraordinary interruptions from freshets or strikes, can earn sufficient of surplus revenue to pay them the interest on their bonds. This margin of surplus revenue over the working expenses, on which the ability to make these payments of interest depends, is so small that it is easily absorbed, unless there is exercised the most careful management and economy. In this management these bondholders have no voice whatever. The state, as the owner of the majority of the utterly worthless stock, appoints the managers, and unless the bondholders can sustain the burden of proof of showing that they are not paid because of mismanagement, they have no remedy under their mortgage. It seems to us that under these circumstances the bondholders should be afforded some convenient method of scrutinizing these expenditures, which so vitally affect them and them alone, and we think that, without appointing a receiver, it would be within the power of this court to retain the bill for the purpose of having the corporation, at stated intervals, render an account of its receipts and disbursements for the information and protection of the bondholders. The motion for a receiver is denied.

We incline to the opinion that the bill in this cause was filed in good faith for the benefit of the whole body of bondholders, and has resulted in a decree which will be for their benefit, and that the costs, the bill having been filed for the benefit of all, should be borne equally by them all. We do not think it equitable, though it is shown in the cause that some of the bondholders refused to unite in the suit, that they should be allowed to reap the benefit of complainant's action and bear no proportion of its costs; and these we think should be refunded to him out of the first funds which, in the hands of the canal company, would be applicable to the payment of interest on the bonds. It appeared to the court that the corporation held the position of a trustee, and therefore the court retained the bill to afford such relief as it is usual for courts of equity to give in matters of trust. It implies no imputation of fraudulent conduct on the part of a trustee to require him to make frequent reports of his acts to the court. We think the defendant company should be required to make its reports quarterly. This will secure to the bond-

holders every opportunity of inspection, and of scrutinizing the conduct of the canal management. If either party think it necessary hereafter to invoke the assistance of the court in any future matter coming within the scope of the bill, he can come into court and do so by petition in the cause. We will sign the decree drawn by the counsel for the canal company, modified as we have indicated.

WILLIAMSON v. NEW ALBANY, ETC., RAILROAD COMPANY.

(Circuit Court for Indiana: 1 Bissell, 198-209. 1857.)

STATEMENT OF FACTS.—Proceeding in equity for the appointment of a receiver by the trustee in a deed of trust for \$500,000, given by the defendant to secure the payment of a like amount of bonds issued by it. Default has been made in the payment of the interest. After these bonds were issued defendant found itself in further need of funds, and with the consent and advice of the bondholders, of whom complainant is the trustee, made other loans, for which it is liable, as also for a large amount of current expenses. The bill also states that under the deed of trust complainant is entitled to take possession of defendant's road, upon default being made in the payment of its bonds, and also at the written request of the bondholders, and to proceed to sell the same; but that though he has been so requested to act by the bondholders, he has deemed it inexpedient to do so because the defendant is much embarrassed in its affairs, largely insolvent and owing a large floating and unsecured debt, for which judgments are now outstanding.

§ 1514. *A power under a deed of trust may be waived.*

Opinion by McLEAN, J.

It is objected that as the complainant, under the trust deed, has power to take possession of the property, this proceeding in chancery is unnecessary and ought not to be sustained. If this exercise of power under the deed be admitted, it is not perceived that it may not be waived. To strengthen the application for a receiver, the affidavits of Mr. Lane, the counsel, and Mr. Williamson, the trustee, are filed, and the last report of the railroad company. Mr. Lane states that he lately visited New Albany, in Indiana, where the principal office of the company is established, and he found the financial condition of the company exceedingly poor; that the laborers on the road had not been paid their wages for a long time, and that there had been a strike, etc., and he proposed to the company that the laborers should be paid out of the first net earnings, and that the property of the road should be given up to the trustee, etc.; but the president of the company rejected the proposal.

The affidavit of the complainant corroborates, in some degree, the facts stated by Mr. Lane in regard to the embarrassed condition of the company, founded upon the representations made to him; he says that the interest has not been paid, as alleged in the bill, and that the bill is true. And he says that the company, in his opinion, are by no means able to pay the amounts due and to fall due on their various issues of bonds; that the property of the company is jeopardized by a large and constantly increasing floating debt, and that a very large number of those holding bonds of the company, issued under the various mortgages, of which this deponent is trustee, have served on him a written request, according to the conditions of the mortgages, requiring him to cause the said road and its various appurtenances to be sold according to the terms of the mortgage. In the deed of trust it was required that at "the

written request of the holders of at least one-half of the bonds then unpaid, he shall cause the premises to be sold." The words used in the above affidavit are not equivalent to the requirement of the deed. But the bill alleges in the words of the deed that the request was made by at least one-half of the bondholders, and the complainant swears to the truth of the bill.

James Brooks, president of the railroad company, filed an affidavit which admits the execution of the mortgages and the issue of the bonds as stated by the complainant; but he says the proceeds of the sale of the bonds, the stock subscriptions and other means of said company, were insufficient to finish and equip the road for business; and it became necessary to have other means to finish the road and put it in such condition as would enable the managers to earn the necessary amount of money to pay the principal and interest of its debt.

At that time the railroad securities had got in such bad repute that it was impossible to borrow on the sale of bonds, except at such a sacrifice as would be ruinous to the company. The company was reduced to the alternative of abandoning the road in an unfinished state, which would have caused an almost total sacrifice to the bondholders, or, to state the difficulty frankly, to such of the bondholders as could be seen, and go on and use the net earnings of the road, with such other means as the company could command, and finish and equip it. He further says that he saw a large number of the bondholders from time to time, in his visits to New York, and with whom he was in correspondence, who were fully advised of these difficulties; and they uniformly advised him to go on by all means and finish the road, and relay the flat bar track in good order for running, so as to pay the debts of the company. The deponent believes, and the complainant and bondholders expressed to him the belief, that, but for an unlooked for loss, by the failure of the crops of 1854 and 1856, the road could not only have been finished and put in good order, but the floating debt paid off, and the interest paid on the bonds. He denies that there has been the misapplication of a dollar of the funds of the road.

There are some judgments against the road for claims of damages for right of way, where the parties refused to abide by the awards made; but with the exception of this class of claims, there are few, if any, judgments against the company; and there never has been \$200 worth of property of the road sold on execution. The net earnings of the road for the present year have been expended in paying for labor and materials, and in constructing and operating said road, and repayment of money thus expended. He says and believes that the road and appurtenances are more than sufficient to pay all of its debts, and that the security in the bonds has been increased nearly fifty per cent. since the first three millions of its bonds were negotiated. The deponent states that many of the bondholders and others competent to judge, who have examined the work, expressed the opinion that more work had been done in the construction of this road than on any other road for the amount of money.

The United States engineers and the engineers of the state of Indiana estimated the cost of this road from New Albany to Crawfordsville, a distance of one hundred and sixty miles, at \$16,000,000, which has been built by the company for less than five millions. And the entire road from New Albany to Michigan City, two hundred and eighty-eight miles, has been constructed for about \$7,500,000. The managers of the road felt safe in assuring the laborers on it that they would be paid, as the work was not only done with the knowledge, but at the repeated and urgent request of the complainant, as well as a

large number of the bondholders, with whom deponent from time to time came in contact.

The floating debt of the company on the 1st of October, 1857, was about the sum of \$235,000; which shows a reduction of \$45,000 since the 1st of July last. In the year 1855 the net earnings of the road amounted to the sum of \$372,402.25. This paid \$315,256.59, the interest on bonds, and left a surplus of \$56,125.36. The gross earnings of the six months preceding the 1st of January, 1857, amounted to the sum of \$413,666.66, which left a balance, after deducting all expenses during the same time, of \$190,531.70.

The gross earning of the road ending June 30, 1857, amounted to the sum of \$686,818.72, which, after deducting the expenditure for the same time, left the net earnings \$268,090.95; and this the president of the road says is \$200,000 less than the sum estimated, which was caused by the failure of all the great staples of the country in the year 1856, reducing the amount of transportation, as is supposed, to that amount. The interest now due is about \$273,000, which sum, together with the floating debt and the accruing interest, may be provided for and paid, under prosperous circumstances, in a reasonably short time. After the payment of the floating debt, it is not doubted that the accruing interest will be punctually discharged if no untoward circumstance should occur. The case made in the bill is, the failure to pay the interest on the bonds in February last and the embarrassed condition of the railroad company. It seems to be considered that a receiver will be appointed, as a matter of course, under the mortgage where a default has occurred in the payment of any part of the interest or principal. If this be so, the chancellor, in such a case, can exercise no discretion. He can do nothing less than carry into effect the conditions of the bond.

§ 1515. *Equity will not enforce the payment of a penalty greatly disproportionate to the default.*

It is not the province of chancery to enforce penalties but to relieve against them. It is asked, may the court disregard the contract of the parties? Certainly not. But where there is a hard and an unconscionable contract, a court of equity will withhold its aid and leave the party to his remedy at law. An individual promises to pay, on a certain day, \$1,000, and in default thereof to pay \$2,000. Would not a court of chancery relieve from this penalty? And the payment of the penalty is the contract of the party. What penalty could be more disproportionate to the default than the one under consideration? A failure to pay any part of the instalment of interest subjects the company to the immediate payment of several millions of dollars, not payable except under the default for many years; and the same default subjects property to the amount of several millions to a sale at auction on a short notice.

§ 1516. *Appointment of a receiver in the discretion of the court.*

The appointment of a receiver, when directed, is made for the benefit of all the parties interested and not for the benefit of the plaintiff or of one defendant only. 2 Story's Eq. Jur., § 829. It is a matter resting in the sound discretion of the court.

§ 1517. *Bona fide possessors will not be displaced from their just rights by the appointment of a receiver, unless there be some equitable ground for interference.*

In such cases courts of equity will pay a just respect to such legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver unless the facts averred and estab-

lished in proof show that there has been an abuse or a danger of abuse on his part. For the rule of such courts is not to displace a *bona fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference. *Tyson v. Fairclough*, 2 Sim. & Stu., 141; 2 Story's Eq. Jur., § 835.

§ 1518. *The court will not appoint a receiver unless the best interests of all parties concerned require it.*

It is true the parties in the contract under consideration agreed that a default in the payment of any part of the interest or principal, when payable and demanded, should incur the penalty sought to be enforced. Yet, when the aid of a court of equity is invoked it will look into the facts and exercise an equitable discretion. And if the party claims and attempts to exercise the powers given him in the contract, which, under the circumstances, are unjust and ruinous, he may be enjoined. Has there been any abuse of their powers, or a misapplication of their funds by this company, which authorizes the appointment of a receiver? This step is to be taken by the bill, with the view of selling the entire road and all its appurtenances for the benefit of the bondholders. The interest due in February last has not been paid, and since that time another instalment of interest has become due which has not been paid. All previously accruing instalments of interest were paid or satisfactorily arranged. And the late large outlay for the completion of the road and its equipment was not only approved by the complainant and many of the bondholders, but they urged the president of the company to go on with the work by all means and finish and equip the road so as to increase the revenue, and they agreed to receive bonds in payment of the interest then due.

Under the influence of this encouragement it seems the company prosecuted the work and completed the road, which is now in successful operation. In this way, as appears from the affidavits, was every dollar of the floating debt, complained of, created. It went to increase the securities of the bondholders by adding to the value of the road, and increasing the tolls for the payment of the interest and principal. But this is now insisted on as a misapplication of the funds of the road, which not only authorizes but requires the appointment of a receiver. But this does not, in my judgment, evince bad faith on the part of the company, but, on the contrary, showed a laudable desire to save the bondholders and all the parties interested from loss.

Had the road been in the hands of a receiver, no chancellor fit to deal with these subjects, it appears to me, could have hesitated to order the receiver to do, in this respect, what the company has done. In the deed of trust it is specially provided that the trustee, if he take possession of the road, shall make repairs, additions, etc., and an offer is now made to pay this floating debt, so far, at least, as laborers are concerned, if the road be given up by the company. Whether the debt be due to laborers on the road or to others is not material, seeing it was incurred under the urgent request of the trustee and several of the bondholders, and for the preservation and life of the road. When property is purchased and placed upon the road, no lien being taken by the seller, it becomes subject to the mortgage lien on the road, so that it is not liable to an execution, except under the mortgage; and existing liens on the road, under the mortgages, can only be adjusted by a court of equity. But it is said the complainant and a part of the bondholders had no power to authorize the new expenditure in the completion of the road. Such an authority as was exercised will be respected and sustained by any chancellor, at least so far as to

relieve the company from any penalty or charge of misapplication of the funds of the road.

By what authority does the complainant sue in this case and claim a right to have equities adjusted between parties who claim conflicting interests? But in a matter of this kind, so essential to the interests of the bondholders, there can be no difficulty in sustaining the company, as above stated. But still the default is admitted, and the failure to pay occurred under the circumstances stated; and the question now is whether this default requires the appointment of a receiver and a discontinuance of the agency which now controls the road; and this is to be done preparatory to the sale of the entire property of the road. The bonds will not be due and payable for many years. They who made the loans looked to the interest, and the ultimate payment of the principal. This procedure involves some fourteen or fifteen millions of property; the property of the railroad and of the bondholders. Care should be taken in this case, as in all others, to administer equity without, if possible, a sacrifice of property. From the exhibits in this case, there is a reasonable probability that, in the course of a short period, a vigorous operation of this road may enable its directors to pay the deferred interest and their floating debt; and the discharge of these will make the payment of the current interest on its bonds easy out of the net profits.

If there were no other interests involved than that of the bondholders, such a course is so strongly recommended by equitable considerations that no intelligent holder of such securities could object to it. The floating debt has accrued under circumstances which give a strong claim to the company for some indulgence in the payment of the deferred interest, seeing the completion has added so much value to the security of the bondholders, and increased the profits of the road; and, especially, as the work was done on the recommendation of the complainant and a part of the bondholders. So far as the conduct of the company has been developed in this somewhat informal examination, it is entitled to the highest commendation for its firmness, energy and success, in the accomplishment of this great work. There is a strong probability that, in a very short time, the road will be in a condition to meet its engagements under the mortgages, which is all the bond creditors have a right to demand. No change of agency could increase, I am convinced, the efficiency of that already employed on the road. A sale of the property would in all probability sacrifice the stock of the road, amounting to between two and three millions of dollars, and more than half, if not two-thirds, of the property of the bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right, enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so, under the facts above stated.

But I will afford to the bondholders every reasonable assurance that can be required. I will admit an order to be entered that the motion of the complainant for the appointment of a receiver be denied, and that the said company, from and after the 1st day of January next, set aside one-half of the net earnings of the road, for the payment of the interest of the bonded debt of said company,—the other half to be applied to the payment of the floating debt of the company, a report of the gross and net earnings to be made to the court monthly by the secretary of the company; that is for the month of

January, and at the close of the succeeding months, so soon as the returns can be received and made out, half of the net earnings to be paid into court for the bondholders. The company will report, also, in the court how the net earnings have been expended from the 1st of November to the 1st of January aforesaid. But nothing in this order is to be understood as preventing the plaintiff from renewing his motion for a receiver at any time prior or subsequent to said 1st of January, upon any new statement of facts which he may be able to present. The interest is payable on demand. If the bringing of the action be considered a sufficient demand, the coupons must be presented and filed, if payable to bearer, before payment will be ordered.

FARMERS' LOAN AND TRUST COMPANY v. CENTRAL RAILROAD OF IOWA.

(Circuit Court for Iowa: 2 McCrary, 181-186. 1881.)

Opinion by LOVE, D. J.

STATEMENT OF FACTS.—This case is now before the court upon a motion by H. L. Morrill, late receiver, and the Central Railroad Company of Iowa, to rescind an order made at the May term, 1880, granting permission to Mahala Clear, as next friend of Edward Sloan, to sue said receiver Morrill for personal injuries received by said Edward Sloan during the receivership of said Morrill. The order granting leave was made after receiver Morrill had been discharged and subsequent to the final decree of May 20, 1879, by which the railway property and all funds in the custody of the court had been turned over to the new railway company, called the Central Iowa Railway Company.

§ 1519. *Prosecution of claims against a receiver after his discharge.*

This motion raises a very difficult and embarrassing question. It is this: When in a foreclosure suit a receiver appointed by the court has been discharged, and the property by the order of the court turned over to the purchaser, how are unsatisfied claims against the receiver, upon torts committed and contracts made by him, to be prosecuted and satisfied? Who are to be made defendants to actions upon such claims? How are such cases to be tried? What is the nature of the judgment or decree to be entered, and how is satisfaction to be obtained? So long as the receiver is in office, and the fund or property is under the control of the court, there is no difficulty, for the court will in all proper cases permit actions to be brought against the receiver, and will order satisfaction to be made out of the fund or property. But it is obvious that such actions are, strictly speaking, rather in the nature of proceedings *in rem* than *in personam*. No receiver could be made individually liable in a personal action upon a contract made in his official capacity or for torts committed by his subordinates. If receivers could be exposed to such individual responsibility, no prudent man would accept such trusts in cases where vast numbers of subordinates must needs be employed, exposing him to the hazard of ruinous liabilities for their misconduct. In this respect receivers are like public officers, who are not individually responsible upon their official contracts, nor for torts committed by their subordinates, but only for torts committed by themselves, or contracts in which they assume to bind themselves personally.

It is therefore obvious that suits against receivers are really and substantially suits against the fund or property of which they are the custodians. They represent the property or fund. If judgment be obtained against them the court orders it to be satisfied out of the fund or property. This view will be made evident by the supposition that the receiver should be removed or dis-

charged, while the property or fund should remain in the custody of the court. In such case it cannot be doubted that the court would entertain an intervening petition in the nature of a proceeding *in rem* against the fund or property at the suit of any one entitled to a lien upon it, or having a claim in law or equity to satisfaction out of it. Doubtless in such case the court would have power to appoint counsel to represent the fund or property in the litigation concerning it, and would require notice to parties interested in its sale or distribution. But what would be the remedy of the claimant if the court should discharge the receiver and place the fund or property beyond its control by turning it over without reservation to a purchaser? I confess that, if the fund or property should be turned over to a purchaser without reservation, I am at a loss to see what the remedy of the claimant would be — as, for example, the old railroad company — in this case. How could he found a personal action of tort or contract against a party who would be a stranger to the tort or contract? How could he count upon or prove the tort or contract against a party who never committed the one nor made the other?

It has been suggested by an eminent judge that the receiver might be treated as the agent of the defendant railway company, and the action thus maintained directly against the company. But it seems to me that this position is untenable. There is not the slightest analogy between the relation of a receiver to the railway company and the relation of an agent to his principal. An agent acts and contracts for and in the name of his principal and by his authority. He is appointed by his principal and he is subject to his principal's control. The principal can dissolve the relation between them and annul the agent's authority at his will and pleasure. Hence the principal is liable and the agent is not liable. Hence the action should be against the principal and not the agent. It is needless to say that in all these respects there is a radical difference between the character and legal functions of an agent and a receiver appointed by a court of equity. To make a railway company responsible for the acts and contracts of an officer whom they can neither appoint nor control, direct nor remove, on the ground of agency, would be to violate the fundamental principles of the law of agency. If no action could be maintained upon the torts or contracts of the receiver against the old railway company, *a fortiori* none could be supported against the new or purchasing company. Doubtless, if the claimant had a legal or an established equitable *lien* against the property, he could enforce it by a proper proceeding at law or in equity in any court of competent jurisdiction; but we are now considering not legal or established equitable liens, but claims of a personal nature, founded upon contract or tort, which are yet to be established by some form of legal proceeding.

§ 1520. — *the court may establish and enforce a lien against the property under its jurisdiction.*

I repeat that if the receiver had been discharged and the property turned over to the new company unconditionally and without reservation, I am at a loss to see what legal remedy claimants, without established liens, would have. But the court did not in this case so turn over the property. It would have been a most unwise and unjust proceeding to have done so, leaving just claims and liabilities incurred by a receiver of its own appointment, without any provision whatever to enforce them. On the contrary, this court in the final decree of May 20, 1879, retained here the case of the Farmers' Loan and Trust Company against the Central Railroad Company of Iowa and others, and in express terms reserved its jurisdiction of said cause to enforce the payment of

debts and liabilities incurred by its receivers. For this purpose at least that suit has never been dismissed. It is still pending, and any claimant with a demand against the receiver, which he has a right by law to have established as a lien against the railway property, may, by leave of the court, intervene in the foreclosure cause and assert his claim. It is not necessary that the claimant should make new parties to his petition. He intervenes in the old chancery case which is still pending. He asserts his right to a lien upon the property which the court turned over with a reservation of jurisdiction to hear and determine his cause.

That this view of the decree is correct will be made manifest by the following provisions of the decree of May 20, 1879: "And since it is not desirable to further continue said property under the control of the receiver, for the purpose of making net earnings for the payment of said debts, costs and expenses, etc., it is further ordered and decreed that all said claims and all claims pending in this court, debts and liabilities, etc., shall be presented to said Central Iowa Railway Company for adjustment and settlement, and said company are ordered to pay the said debts, costs and expenses, etc., and for the purpose of enforcing the payment thereof, if need be, this court will and does retain jurisdiction of said cause, for the purpose of enforcing said payment and the lien herein provided for, without other action or independent proceeding."

The proceeding by which the claimant asserts his rights is analogous, at least, to an action *in rem*. Now, it is familiar law, that in order to give a court full and complete jurisdiction *in rem*, some form of notice must be given to parties whose rights and interests may be affected by the decree; and where no form of notice is prescribed by law, the court is empowered to direct the notice to be given. This notice is sometimes personal, and in some cases by publication, depending upon the situation of the parties. In the present case the new railway company, the Iowa Central Railway Company, is the party whose interest would be affected by a decree establishing a lien upon the property. The petitioner must therefore give that company notice, and since it exists within the jurisdiction of the court, the notice must be personal. All this proceeds, of course, upon the condition that the claim has been presented to the company for payment and adjustment, according to the express terms of the final decree, and rejected.

These preliminaries having been satisfied, it is competent for the court, if the plaintiff is by law entitled to a lien, to establish the same against the property, and to fix a time for the payment of the sum found to be due; and in default of payment at the time prescribed, a proper order of sale will be awarded. It is obvious that the plaintiff's claim may be legal or equitable. If it be an equitable demand, the court will hear and determine it without the intervention of a jury. If, on the contrary, it be the subject-matter of a common law action, the court will direct that it be tried by jury; and if the claimant shall thus succeed in establishing his demand, he will be compelled to bring his verdict or judgment into the equity suit to have it made a lien against the property. As a matter of course, either party would be entitled to a trial by jury of an action for personal injuries, or for any other common law demand. This right is constitutional and cannot be denied.

The result is that this motion must be sustained as to receiver Morrill. He in no sense now represents the property upon which a lien is sought to be established. He has no interest in defending the property, and no fund with which to make a defense good. No personal action, as we have seen, can be

maintained against him. But we see no reason to rescind the order so far as it affects the property in the hands of the new company. That company took the property under the final order of this court *cum onere*. The court reserved its jurisdiction to enforce liabilities incurred in the management of the property by its receivers, and to enforce them as liens upon the property. The case of the petitioner is a claim for personal injuries; she has a right, if her claim be well founded, to have it established as a lien upon the railway property. Such is the provision of section 1309 of the code of Iowa.

We can see no good reason to deny this petitioner the right to assert her claim in the only way that seems open to her. The order made at the last term will be so far modified as to require the service of personal notice upon the Central Iowa Railway Company, and rescinded as to receiver Morrill.

McCrary, J., concurs.

§ 1521. The appointment of a receiver is a matter within the sound discretion of the court, and the power is exercised in behalf of railway bondholders only in strong cases, and only upon its appearing that the property is insufficient to pay the debt, and that the mortgage creditors are in danger of suffering irreparable loss. *Pullan v. Cincinnati & Chicago Air Line R. Co.*, 4 Biss., 85 (§§ 1208-11).

§ 1522. When earnings not applied to the mortgage and security inadequate.—A receiver may be appointed in case of a mortgage of tolls and income, if the earnings are being so applied as not to reduce or benefit the incumbrance. Inadequacy of security in connection with insolvency is good ground for the interposition of the court. *Ruggles v. Southern Minnesota Railroad*,* 17 Int. Rev. Rec., 29.

§ 1523. Moneys in the hands of the receiver are not subject to the demands of the company, or any one whose claim is based on the company's rights. *North Carolina R. Co. v. Drew*,* 3 Woods, 691.

XII. RECEIVERS' DEBTS AND CERTIFICATES.

[See RECEIVERS.]

SUMMARY — To complete a road, § 1524.—Debts may be given precedence of mortgage through receivers, § 1525.

§ 1524. A court of equity ought not to authorize a receiver to borrow money to complete an unfinished road, if this can possibly be avoided. Where it was necessary to complete a road before a certain date, in order to prevent a forfeiture of the company's franchises and its land grant, the court, while refusing to allow the receiver to issue debentures, authorized him to complete the road with moneys to be advanced by the parties interested, and afterwards to issue debentures for such moneys. *Kennedy v. St. Paul & Pacific R. Co.*, §§ 1526-1528.

§ 1525. The court has power through receivers to create claims which take precedence of mortgage liens. Under some circumstances, debts existing at the time of creating the receivership may be given such precedence; such, for instance, as arrears for recent operating expenses, debts due to connecting roads and rents due for leased roads. *Miltnerberger v. Logansport R'y Co.*, §§ 1529-1534.

[NOTES.—See §§ 1535-1537.]

KENNEDY v. ST. PAUL & PACIFIC RAILROAD COMPANY.

(Circuit Court for Minnesota: 5 Dillon, 519-526. 1878.)

STATEMENT OF FACTS.—Application of the receiver for authority to construct unfinished portions of the road, and to issue debentures to raise money for that purpose. A suit was originally instituted by bondholders against the railroad company and others. Afterwards the original trustees were removed, and Wetmore and others were appointed in their place. The new trustees brought a bill to foreclose the mortgage for \$15,000,000, dated April 1, 1871. Under a

former order the receiver expended in repairs \$100,000. Meanwhile the receiver has preserved the property and operated the road without loss. The completed portions of the road are fragments, and of little value unless the road is finished. The legislature of Minnesota, March 9, 1878, passed an act providing for the forfeiture of the company's franchises and lands, as respects the unfinished lines of road, unless a specific number of miles should be built by August 1, 1878, another part by December 1, 1878, and to St. Vincent by January 1, 1880. The foreclosure cause is not ready for final hearing, and no decree can be made in time to enable purchasers to complete the road and save a forfeiture. The other facts appear in the opinion.

Opinion by DILLON, J.

An application is made by the receiver for authority to complete the unfinished portions of the said railroad, and to issue debentures to raise the means of construction. The situation of the case is peculiar, and even extraordinary. The cause in which the receiver was appointed, as well as the foreclosure cause by the new trustees, is still pending, and it is certain that a final decree cannot be rendered in time to save the forfeitures provided for in the act of the legislature of Minnesota of March 9, 1878. Unless the road is constructed as required by that act, the rights of the railroad company, as respects the unfinished road, and as respects the lands appertaining thereto, will be forfeited, and the principal security of the bondholders secured by the mortgage will be wholly lost. The fragments of road already completed would, in that event, be comparatively of little value. If the line of the railway is completed, it is clear that the effect will be to make the parts already completed more valuable. The mortgage bonds outstanding greatly exceed the value of the property. Four-fifths of all the bondholders apply for the order. Not a single bondholder has appeared to oppose it. The trustees in the mortgage, representing all the bondholders, ask that the order be made. A commission appointed by the court has examined the railroad and the lands, and ascertained the wishes of the bondholders, and recommend that the desired authority be given by the court. The only parties not consenting are the holders of stock in the St. Paul & Pacific Company and the First Division Company. But the interests of the stockholders and of the bondholders of the St. Paul & Pacific Company are, in the actual situation of the case, antagonistic, and the stock is of no value. Even the mortgage bonds are worth, in the market, but a few cents on the dollar. The First Division Company, itself hopelessly insolvent, and whose road is in the hands of trustees under mortgages, has no substantial interest of value in the matter. The opposition to the order asked for is not of a nature to defeat the application if the order is one which ought otherwise to be made.

§ 1526. *A court of equity ought not to enter upon the work of building or operating a railroad except in case of irresistible necessity.*

I assent, in the fullest manner, to the proposition that a court of equity ought not to enter upon the work of either operating or building a railway, if this can possibly be avoided without the certain and great sacrifice of the rights and securities of the parties in interest. The original order in this case was made upon this principle and upon the exceptional case which the record presented (*Kennedy v. St. Paul & Pac. R. Co.*, 2 Dill., 448). It is not to be inferred from the report of that case that authority even to complete the building of an unfinished line of railway, and to issue debentures for that purpose, is to be conferred without an overwhelming and irresistible necessity. When such authority is conferred, it ought to be guarded with the utmost care. I have

given to the present application great and even anxious consideration. It is the first step that costs. The work of constructing the unfinished lines had better not be entered upon than to enter upon it and fail, leaving the road still unfinished. That would not improve the security, and would greatly add to the existing embarrassments and complications.

§ 1527. *Permission to receiver to issue debentures refused.*

Although the commission has recommended debentures as a means of raising the money necessary to complete the road, I have, on consideration, concluded not to authorize their issue, or to permit the receiver to incur any indebtedness whatever for this purpose. What I am willing to authorize the receiver to do, on the conditions and restrictions to be specified in the order, is: Out of moneys to be furnished him by the parties in interest, and not otherwise, to proceed to construct and equip the unfinished portions of the road at the lowest cost in cash; the receiver to be prohibited from contracting any debt or liability under this order in excess of the money actually furnished to and received by him. The parties in interest asking for the order must execute an instrument agreeing to furnish money sufficient to complete the road; and the trustees, for the bondholders, and the bondholders' committee, must also formally assent to this order.

§ 1528. *Moneys having been advanced by parties in interest and the road finished, the court will direct the receiver to issue debentures for such sums.*

When the receiver shall fully complete the road in such a manner as to be accepted by the state of Minnesota, and in accordance with the acts of congress and of the state, so as to secure to the company the lands granted by congress and the state, then the court will direct the receiver to issue debentures for all sums of money advanced to and used by the receiver for the construction and equipment of the road, which debentures, unless the court shall hereafter otherwise order, shall be a first lien on all the lines of road not now completed, and on all lands which the road constructed under this order shall be the means of earning and acquiring. The order must also contain a provision by which any bondholder, at any time before the issue of debentures, or, if the court shall so order, at any time before the sale of the property under the decree, may place himself on the footing of those bondholders who shall advance the money to the receiver under this order. The court will pass an order drawn up in conformity with this opinion.

Ordered accordingly.

MILTENBERGER v. LOGANSPOUT RAILWAY COMPANY.

(16 Otto, 286-314. 1882.)

APPEAL from U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE BLATCHFORD.

STATEMENT OF FACTS.—On the 1st of August, 1870, the Logansport, Crawfordsville & Southwestern Railway Company, an Indiana corporation, executed to the Fidelity Insurance, Trust & Safe Deposit Company, a Pennsylvania corporation, located at Philadelphia, as trustee, a mortgage to secure the payment of bonds to the amount of \$1,500,000, covering the railway of the mortgagor from Logansport to Rockville, in length about ninety-two miles, with all its franchises and property used in or connected with the operation of said railway, which the mortgagor then owned or might thereafter acquire. The bonds were coupon bonds, payable in gold, in the year 1900, with interest at eight

per cent. per annum, in gold, payable quarterly, on the 1st days of November, February, May and August. The mortgage provided that, in case of default in the payment of the principal or interest of any of the bonds, the mortgagor would, within six months after the default should occur, it still continuing, surrender to the trustee, on its demand, the possession of the mortgaged property, and all management and control thereof; that if possession should be so taken, all expenses of managing and operating the property should be paid from the income, and, if the property should thereafter be sold, from the sale; that the trustee, having taken possession, might manage and operate the road and property, and receive all the income and apply it to pay the interest in default, first paying all expenses of management and all charges on the property; but that the trustee should not demand possession until required in writing to do so by the holders of at least one-half of all the said issue of bonds then unpaid and outstanding. The mortgage also provided that, in case of such default and its continuance, the trustee might, after such entry, or other entry, or without entry, sell the mortgaged property as an entirety, at public auction, having first demanded of the mortgagor payment of all money then in default, and convey title to the franchises and property to the purchaser, and first pay out of the proceeds of sale all advances or liabilities of the trustee in operating and maintaining the railway and property, and managing its business and affairs while in possession, and then apply the proceeds to paying, first, the interest on the bonds, and then the principal, such payment to be made on the bonds whether they should have become due or not at the time of the sale. The mortgage also provided that if there should be a default continuing for six months after demand for the payment of any half-year's interest, the principal of the bonds should immediately become due, and the trustee might so declare and notify the mortgagor, and, on the written request of the holders of a majority of the bonds, should proceed to collect the principal and interest of the bonds by foreclosure and sale of the property or otherwise, as therein provided. Up to and including August 1, 1873, the Logansport Company paid the interest on the bonds. On November 1, 1873, and thereafter, it failed to pay any interest.

On the 1st of January, 1873, the Logansport Company executed to the Farmers' Loan & Trust Company, a New York corporation, located at the city of New York, as trustee, a mortgage to secure the payment of bonds to the amount of \$500,000, covering the entire railroad of the mortgagor, with all the property which it had or might at any time thereafter acquire in the same, extending from Logansport to Rockville, about ninety-two miles in length, with all branch roads extending from said main line, built or to be built, with the right of way, and all the property used for operating and maintaining said road and branches, whether then owned or thereafter to be acquired, and all the corporate franchises of the mortgagor. The bonds were coupon bonds, payable in gold, in the year 1903, with interest at eight per cent. per annum, in gold, payable semi-annually, on the 1st days of July and January. The mortgage provided that, in case of default in the payment of any principal or interest, the mortgagor should, within six months after such default, the default continuing, surrender to the trustee, on its demand, the possession of the mortgaged property, and that the expense of managing the property should, if possession should be taken, be paid from the income, and, if necessary, from the sale of such personal property as the trustee might deem proper. The mortgage also contained a warrant of attorney, by which, in case of default

by the mortgagor to pay any principal or interest for six months after the same should become due, it authorized any attorney or solicitor of the state of Indiana, after notice to it as thereafter provided, to enter its appearance, without process, in any court of competent jurisdiction, to any bill filed by the trustee to foreclose and sell the mortgaged premises, and, if requested by the trustee, to consent, on behalf of the mortgagor, that a receiver be appointed forthwith, by order of said court, to take possession of said railway or any part thereof, and of all or any of the mortgaged property, on such terms as the court should prescribe, and to consent that a decree forthwith pass for the sale of the whole or any part of the mortgaged property without appraisalment, but under the direction of the court, provided that the trustee should not demand a surrender of possession, or file a bill to foreclose and sell, unless requested in writing by the holders of a majority in interest of the bonds at par. The mortgage also provided that, in case of default in the payment of any interest for six months after the demand of payment after due, the whole principal money named in the bonds should become due, and that, in case of a sale, the proceeds should be applied, first, to paying the trustee all reasonable expenses; second, to paying the principal and interest of the bonds; and, third, to paying the surplus to the stockholders. The mortgage declared that it and its lien were subordinate to the mortgage to the Fidelity Company. The mortgagor did not pay any of the interest which fell due January 1, 1874, and July 1, 1874, respectively.

On the 26th of August, 1874, the Farmers' Loan Company filed, in the circuit court of the United States for the district of Indiana, a bill for the foreclosure of the second mortgage, making as parties the mortgagor and the Fidelity Company and certain judgment creditors of the mortgagor. The bill set forth that the mortgage to the Fidelity Company covered the same property as the second mortgage, and that the latter was subordinate to the lien of the former. It alleged facts showing that, by the terms of the second mortgage, the entire indebtedness secured by it had become due; that a majority in interest of the holders of the second mortgage bonds had, in writing, requested the plaintiff to foreclose the mortgage, and it had, more than thirty days before filing the bill, given notice to the mortgagor of its purpose to file the same; that the mortgagor was insolvent and unable to pay its debts; that its entire property and franchises were not equal in value to the amount of the two series of bonds; that its earnings, after paying current expenses and necessary repairs, were inadequate to the payment of interest on the two series of bonds; that the only possibility that it would in the future be able to pay the interest on the mortgage debt depended on its, or some person's, as its representative, being permitted to operate the road untrammelled by the embarrassments under which it labored; that it had a large floating debt, partly in judgment; and that executions had been levied on the property covered by the second mortgage and used by it in the operation of the road, and such property had been carried off by the officers of the law, whereby the operations of the road had been crippled, and the expense of its management increased, whilst its revenues were diminished. The bill prayed a foreclosure of the rights of the mortgagor and of the judgment creditors, and a sale of the mortgaged property, and the application of the proceeds to the payment of the plaintiff's claims according to law. It also prayed the appointment of a receiver to take into his custody and control the mortgaged property during the pendency of the suit, to operate the railroad, receive its revenues, pay its expenses, make repairs, and manage its

entire business, and any surplus revenues, after paying said expenses, to bring into court and pay out, under the order of the court, "to such persons or corporations as shall be adjudged by the court to be entitled thereto."

On the day the bill was filed the Logansport Company put in an answer admitting all the material allegations of the bill, and that the plaintiff was entitled to the relief demanded. On the same day, on the bill and said answer, the court made an order that the Fidelity Company appear, and plead, answer or demur to the bill on or before the first Monday of November then next, and that a copy of said order be served on it not less than thirty days prior to that day, and directing that Spencer D. Schuyler be appointed receiver, on filing a bond, to take into his custody and control the mortgaged property, and all the property of the mortgagor of every kind and wherever situate, and empowering him to operate and manage said road, receive its revenues, pay its operating expenses, make repairs, and manage its entire business, and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenue over operating expenses. On the 29th of August, 1874, a copy of said order was served on the Fidelity Company, by being given to its president, and proof of such service was filed on the 31st of August, 1874. The receiver, having filed his bond and entered on his duties, the court, on his petition, made an order, on the 23d of September, 1874, giving him leave to sell an unserviceable car and buy a new one, provided that, in the purchase, no lien should arise, for the money expended, against the interest of the first mortgage creditors.

On the 9th of September, 1874, the receiver filed a petition representing that the rolling stock of the road was insufficient to meet the demands of business on the same; that the line of the road was about eighty-seven miles long; that the company owned only six locomotive engines, on one of which was a lien for its full value, and was paying a rental of \$200 a month for another; that it would be for the interest of the trust for him to purchase four more locomotive engines, and to make an adjustment in regard to the one hired and the one on which there was a lien; that the company owned only two first-class passenger cars and one second-class, and had in use one passenger car on lease; that it owned but one baggage car and had one on lease; that it needed four more passenger cars; that one of its main branches of business was transporting coal, and its rolling stock suitable to be used in transporting coal was inadequate to meet the then demands of said business; that it owned only twenty coal cars free from lien, and about one hundred and thirty on which there was a lien to their full value; that he ought to be authorized to make an adjustment respecting the latter and to purchase not over one hundred additional coal cars; that the business of the road was greatly crippled for the want of such additional rolling stock; that the company was indebted to other and connecting lines of road in about \$10,000, for materials and repairs, and for ticket and freight balances; that a part of said indebtedness was incurred more than ninety days prior to the order of the court appointing him receiver and making provision for the payment of certain claims, but the payment of that class of claims was indispensable to the business of the road, and it would suffer great detriment unless he was authorized to provide for them at once; that about five miles of the road between Clymer's Station and Logansport, including a bridge across the Wabash river at Logansport, had never been built; that the city of Logansport had recently appropriated \$80,000 to aid the railroad company to build said track and bridge, which appropriation had

been placed in the hands of a trustee, to be appropriated as the work progressed; and that, as the completion of said work would very largely increase the value of the property under his control, and materially aid the present and future business of the road, he asked for leave to expend such sums of money as might be necessary to complete the railway between the points named.

On the 30th of September, 1874, the receiver presented to the court a supplemental petition, setting forth that the \$80,000 for building the five miles of road was raised; that the bridge would cost about \$30,000; that the Detroit, Eel River & Illinois Railroad Company, with which the receiver's road would form an advantageous connection by the building of the bridge and the five miles of road, agreed to give to the Logansport Company the one-half of the \$30,000, so that that company would be the sole owner of the bridge on paying one-half of the cost of its construction; that five acres of valuable land at Logansport had been given to the Logansport Company on condition that the five miles of road should be built, said land being worth \$2,500 and suitably located for a yard and shops of the company; that the total cost of the five miles of road and the bridge would not exceed \$30,000 above the amounts given by the city of Logansport and the Detroit Company; that the necessary expenditure could be met by anticipating the earnings of the railway for a comparatively short time; that the increased business that would accrue to the railway by the connections made by completing said five miles of road would soon reimburse all moneys expended in constructing the same; that the building of the five miles and the bridge would be greatly to the advantage of the bondholders of the company and would add a large amount to their security, because the five miles and the bridge, when completed, would become part and parcel of the property and covered by its mortgages; that the road, without the completion of said five miles, had no terminus connecting it with other lines, but ended at a point where there was no business of importance; and that said five miles was a part of the original line of the railway and covered by both mortgages.

On the 3d of October, 1874, the court, on the said two petitions, made an order empowering the receiver to buy four new locomotive engines, four new passenger cars, and one hundred new coal cars, and to make an adjustment respecting the liens on, and rentals of, rolling stock, and to pay the indebtedness to other connecting lines for the purposes set forth in said petition, not exceeding \$10,000, notwithstanding said limitation of ninety days, and to expend \$30,000 in addition to said gifts and advances, to complete said five miles of road and said bridge, and to enter into the contracts required therefor. The order provided that, as to all the moneys that might be expended, and all liabilities incurred by the receiver in carrying out the provisions of the order, the earnings of the road were charged "as with a first lien prior to all incumbrances upon said road."

On the 3d of November, 1874, the Fidelity Company filed an answer to the bill, setting up the mortgage to it and its priority to the second mortgage. It admitted that the earnings of the road had been inadequate to pay current expenses and necessary repairs and the interest on the two series of bonds. It denied that the appointment of a manager or receiver to operate the road would enable the company to pay the interest on its mortgage indebtedness, and alleged that to appoint a manager or receiver of the road, with authority to incur expense and create fresh indebtedness, for which the road or its earnings could in any way be made responsible, would only perpetuate its past con-

dition of embarrassment and be unjust to the respondent and the holders of the first mortgage bonds; that the first mortgage could not rightfully, and ought not to be, affected, or its lien impaired, by any proceedings on the second mortgage; that any decree that might be made on the bill should be made expressly subject to the first mortgage; and that no order ought to be made in the cause that might or could lessen the paramount lien of the first mortgage on the property and franchises of the company, or impair the right of the holders of the first mortgage bonds to proceed against the company when entitled so to do under the mortgage.

No further proceedings in court, of any materiality, appear to have taken place for eleven months. On the 4th of October, 1875, the receiver filed a report and statement, showing that he had constructed six miles of new road from Clymer Station to Logansport, including the bridge, and had the same in running operation as a part of the main line; that the cost had been \$104,651, of which he had paid and was to pay \$29,015.64; and that he had purchased rolling stock, under said order of the court, for \$110,260.46, on which there was unpaid \$79,536.68. On the same day he filed a petition, showing that there was due from his trust \$232,000,—being \$80,000 on rolling stock, \$30,000 on the five miles of road and the bridge, \$25,000 for taxes, \$25,000 for rights of way, \$43,000 for back pay and supplies in operating the road, \$20,000 for rental due to the Evansville & Crawfordsville Railroad Company for that portion of the line extending from Rockville to Terre Haute, twenty-three miles, and \$9,000 to the Missouri Car and Foundry Company, on rolling stock and in operating the road; and that \$90,000 was required to place the road in proper running order. The petition prayed for authority to borrow \$322,000 for said purposes, on receiver's certificates, made a first lien on the property, as for the best interests of the trust property. It set forth the grounds for asking such authority. As bearing on the interests of the first mortgage bondholders, it contained the following statement: "The receiver went to New York city in May last, to consult with the first mortgage bondholders, with the view of their taking some steps for the financial relief of the road. While there he met with parties holding and representing large numbers of the bonds in Boston, New York, Baltimore, Philadelphia, and other cities and their vicinities, and, as a result of his consultations with them, a meeting was advertised and held at the Fifth Avenue Hotel, in New York city, on May 24th. At that meeting a committee was appointed to examine the road and ascertain its condition, its original cost, its present liabilities, and what amount would be necessary to place it in working order, etc., and to report at a subsequent meeting to be called by the chairman. That committee afterwards inspected the road, and, at a meeting held in New York city, September 3d, made their report. To that meeting the original holders of the first mortgage bonds were each invited by timely notice, naming the time and place of the meeting, to hear the report of the committee and to take part in the deliberations of the meeting. A large representation of the first mortgage bondholders was present. A letter from the Hon. John Baird, chairman of the meeting, to the receiver, states that from \$800,000 to \$1,000,000 were represented. A copy of the minutes of that meeting, duly certified by its president and secretary, together with a copy of the report of the committee previously appointed, is filed herewith. By reference to the report of that committee the court will observe that three propositions were suggested to the bondholders, viz: 1st. Foreclosure of first mortgage and sale of the road. 2d. An assessment of not less than twenty per cent. upon the par

value of the bonds held by them to pay off debts and repair the road. 3d. To devise some means for borrowing not less than \$300,000. These propositions were all fully discussed, and the discussions resulted in the passage of a resolution directing the receiver to obtain from the court authority to borrow, upon receiver's certificates, the sum of \$322,000. The receiver was present and heard the discussions, and but repeats what was there many times positively asserted,—that it would be impossible to collect, in time for the pressing necessities of the hour, an assessment of the requisite amount of money from the bondholders. Many of the bonds are held in small amounts by people of limited means, who must have a lengthy previous notice of an assessment to be able to meet it, if at all. He would show to the court that, as he has observed the condition of the bondholders, he believes that an immediate foreclosure of the first mortgage bonds, or any other steps requiring the early payment of any considerable sum by the holders of bonds, would result in the complete destruction of their interests, whereas, if the court will make some present provision for these pressing necessities, their interests will be preserved to them." Thereupon the court, on the same day, made an order setting forth that it appeared to its satisfaction that, under its orders, the receiver had purchased for the use of the road, and then had in use on it, as part of its property, rolling stock on which there was due \$79,536.68, and that there was danger of losing the property by reason of the forfeiture of the contract under which the same had been purchased, unless provision was made for the payment of that sum, and that under its orders he had incurred liabilities in constructing and completing the five miles of road and the bridge to the amount of \$29,015.64, and that said part of the road was a part of the line of the road and contributed materially to its value, and that there were the said amounts due for taxes and rights of way and back pay and supplies, making in all \$201,552.32; and that it appeared that those several sums could not at that time be paid or provided for out of the current receipts of the road, and then authorizing the receiver to raise money for that purpose by issuing and negotiating receiver's certificates, due in one year from that date, bearing interest not to exceed eight per cent. per annum, and payable out of the income of said road to bearer or order, "which certificates are to be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid." The order further set forth that, it appearing to the court that there were other liabilities which had accrued "in connection with the operating of said road," being the \$20,000 due for rental to the Evansville Company, and the \$9,000 due for rental to the Missouri Car Company, and that \$90,000 was required to place the road in proper running order, and the same could not be provided for out of its income, it was therefore further ordered that in case the plaintiff and the Fidelity Company, on due notice given to them of such application by the receiver, should file a memorandum therein consenting to that part of the order, or stating that they had no objections thereto, the receiver should be authorized to issue receiver's certificates and negotiate and sell them to raise money to pay said indebtedness and make said improvements, such certificates to be of like tenor and date and to be provided for in the same manner as those first authorized, and not to be sold or used at less than their par value. No certificates were ever issued under the second branch of this order.

On the 27th of November, 1875, the court, on the petition of the appellants in this appeal, filed on the part of themselves and all other holders of the first mortgage bonds, made the appellants parties defendant to said suit, and gave

them leave to file an answer and a cross-bill. On the same day their answer was filed. It contained substantially the same allegations and denials as the answer of the Fidelity Company, and, in addition, admitted that the mortgagor was insolvent and unable to pay its debts, and that its entire property and franchises were not equal in value to the amount of the two series of bonds, and that the appointment of a manager or receiver to operate and run the road was necessary.

On the same day the appellants filed a cross-bill, on their own behalf and on behalf of all holders of the first mortgage bonds who should choose to join in the prosecution of the suit, making as defendants the Logansport Company, the Farmers' Loan Company, the Fidelity Company, and sundry judgment creditors. The cross-bill set forth the filing and the contents of the original bill and the proceedings in the original suit, including the petitions of September 9, 23 and 30, 1874, the order of October 3, 1874, the report of October 4, 1875, and the petition and the order of the same date. It set forth the first mortgage, and averred that, before August 26, 1874, the mortgagor built a line of road from Rockville to Clymer's Station, a point between five and six miles southwesterly from Logansport, being a portion of the line contemplated by its charter and by said first mortgage, and acquired certain property which it used in constructing said road and in connection with operating it, and certain other property intended for the purpose of building the remainder of the road from Clymer's Station to Logansport, all of which were within the terms, and covered by the lien, of the first mortgage; that, since the appointment of said Schuyler as receiver, he had built and completed said line of road from Clymer's Station to Logansport, and said bridge, and had acquired a large amount of personal property connected therewith, including certain lands intended to be used for machine-shops at Logansport, and certain rolling stock and other property for use on said railroad, and had, in so doing, used much of the property subject to the lien of the first mortgage; and that all of said property acquired by the mortgagor, and that so acquired by the receiver, and the road built by him, were equitably subject to the lien of the first mortgage. The cross-bill set forth the failure of the mortgagor to pay the interest on the first mortgage bonds on and after November 1, 1873, and averred that on and always after October 20, 1873, it was insolvent; that its entire property had not been and was not of sufficient value to pay the first series of bonds; and that its income had not been and was not more than sufficient to pay its necessary expenses incurred in operating and managing its property, and making necessary and proper repairs. The cross-bill also set forth that a meeting of the bondholders was held May 24, 1875, at which the holders of a considerable number of the bonds of both series were present, and a committee was appointed to examine the road and ascertain its condition, original cost and present liabilities, and the amount which would be necessary to place it in working order, and to report at a subsequent meeting; and that, on the 3d of September, 1875, said committee reported to an adjourned meeting its views respecting the property, to the effect that repairs and other expenditures to put the road in fair condition for use were needed, to the amount of several hundred thousand dollars; that additional rolling stock, to the amount of \$168,000, was needed for the efficient conduct of its business; that liens to the amount of \$322,000, being the items above mentioned, superior in dignity to the bonded debt, existed; that there were claims against the road and the receiver aggregating \$25,000; that the income of the road over actual operating expenses and repairs

for 1874, was about \$20,000; and that there had been a deficit of \$79,800.87 during the same time, by reason of what were called extraordinary expenses, and, during the six months next preceding July 1, 1875, a like deficit of \$43,883.50, and an income of \$3,000, after deducting what were called extraordinary expenses. The cross-bill averred that said statistics and statements were substantially correct, but it denied that there were any prior liens to the lien of the first mortgage. It averred that the committee, in substance, recommended that the first mortgage should not be foreclosed, and that the receiver should apply to the court for leave to borrow \$322,000, payable in one year, to relieve the road from its present necessities, and said sum should be made a first lien upon said property, prior to the lien of either mortgage; that said report was made at the instance of said Schuyler, and of the holders of the second mortgage bonds; that the holders of first mortgage bonds, including the plaintiffs, to the amount of \$148,700, had not consented to said scheme for borrowing money, and had joined in the cross-bill; that the plaintiffs desired, and had for more than a year last past desired and sought, to have the first mortgage foreclosed and the property sold; that they elected that the principal and interest should be due; that the Fidelity Company had refused, after request, to take measures to foreclose the first mortgage; that, under pretense of improving the property and increasing its value and earnings and acquiring additional property, the entire property was being destroyed, and liens were being attempted to be created to take precedence of the first mortgage lien; that the Fidelity Company refused to take any means to preserve the property; that no material part of the sum of \$201,552.32, which the said receiver had been authorized to borrow, could be paid from the income of the road, and it was not probable the interest on it could be paid from said income; that the borrowing of it for one year was not in the interest of the first mortgage bondholders, and it ought not to be made a first lien upon the property; and that said Schuyler did not own any of the first mortgage bonds, but was interested only in the second mortgage bonds and the stock, and, for various reasons assigned, was not a proper person to have charge of the property. The cross-bill prayed for the sale of the mortgaged property to pay the first mortgage bonds, and for the appointment of a receiver to take possession of the property and operate the road, and for the removal of Schuyler as receiver.

On the 18th of December, 1875, the plaintiffs in the cross-bill moved for a receiver thereunder and for the discharge of Schuyler as receiver. A reference to a master was ordered to take evidence on the subject. Nothing further of importance appears to have been done in the suit until the 1st of May, 1876, when the Fidelity Company filed an answer to the cross-bill, averring that it had declined to take proceedings to foreclose the first mortgage because it had not been requested to do so by the holders of a majority of the first mortgage bonds, and that their true interests would be best subserved by an early foreclosure of said mortgage. On the same day the Farmers' Loan Company and the mortgagor filed separate answers to the cross-bill. These answers denied all allegations made against Schuyler in the cross-bill, and alleged that all improvements had been made in good faith, for the benefit of the property, and had added largely to its value.

On the 3d of May, 1876, the original suit and the cross-suit were brought to a hearing together on the bills and the answers therein and certain stipulations, and one decree was made in both suits, on the 17th of May, 1876, consolidat-

ing the suits, adjudging what was due on each mortgage, and declaring that the properties covered by the two mortgages were one and the same, and that the lien created by them respectively covered all the property held by the mortgagor at the time of the bringing of the original suit and all subsequent additions made thereto. The decree described said property as being the railroad from Logansport to Rockville, ninety-two miles, with all branch roads extending from said line, which had been built or acquired by the mortgagor, or for its use, with all its franchises and property which had been acquired for the purpose of operating said road and its branches, and all leases, contracts and agreements made with the mortgagor or for its use and benefit. It declared that the lien of the first mortgage was superior to that of the second mortgage upon all of said property. It provided for a redemption of the first mortgage lien by the second mortgagee, and, on failure, for a foreclosure of all its rights in said property except in the proceeds of a sale. It provided for the presentation before a master of claims by the holders of first mortgage bonds and coupons, and of claims to an interest in the property, and of claims against the receiver arising out of his actings and doings as such, allowing any parties interested in the funds to be derived from a sale to dispute and contest such claims. It reserved all questions concerning priority of liens, except as between persons entitled under the first and second mortgages, and declared that it should not be necessary to pass on said claims before having a sale.

On the 25th of July, 1876, the court appointed Joseph P. Claybrook joint receiver with Schuyler in the original suit, without prejudice to the right of the plaintiffs in the cross-bill and of the Fidelity Company to claim that the receivership of Schuyler was not in their interest and by their consent, as fully as they might have done if no such joint receiver had been appointed, and the order declared that it should not be held to entitle the first mortgage bondholders, or their trustee, to any of the income of the property which might be realized by the receivers, until said Claybrook should qualify as receiver, or until Schuyler should requalify, which he was ordered to do by a day named. Claybrook qualified on the 11th of August, 1876, and after that acted as sole receiver, until Schuyler requalified on the 25th of August, 1876.

Under the decree of May 17, 1876, the master made reports, from time to time, as to claims, allowing some wholly or in part and rejecting some. Various questions arise on this appeal in respect to those of said claims which were allowed. On the 20th of October, 1876, Claybrook filed a report, stating that, as receiver, he took possession, on the 12th of August, 1876, of the line of railway from Logansport to Rockville, ninety-two and eighty-seven one-hundredths miles, and a line of railway from Rockville to Terre Haute, twenty-three miles, said to belong to the Evansville & Crawfordsville Railway Company, and four and ninety one-hundredths miles of side-tracks at stations between Logansport and Rockville, and a hand railway, one and three-fourths to two miles, from Sand Creek to the coal mines, and certain station buildings and other property, and certain rolling stock, some owned by the mortgagor and some leased by it.

On the 22d of November, 1876, the court suspended Schuyler from his position as receiver. On the 1st of December, 1876, an order was made, on the consent of Schuyler and the plaintiffs in the cross-suit, vacating said order of suspension and accepting Schuyler's resignation as receiver, and allowing him \$500 for services and expenses as joint receiver, and \$15,330.29 for salary as separate receiver, without prejudice to the rights of the parties to contest any

matter connected with the accounts of Schuyler as receiver, except as therein expressed, or any claims made under said accounts and asserted against said trust estate, or the claim that the receiver's indebtedness should have priority over the first mortgage. On the 19th of February, 1877, the plaintiffs in the cross-suit filed a paper setting forth that any fund derived from the property covered by the first mortgage, or from any property acquired for the use of said railway, which was or should be subject to the lien of said mortgage, ought not to be charged with any indebtedness whatever, whether incurred by the mortgagor, or by Schuyler, as receiver, under the prayer of the original bill; also objecting to certain items in Schuyler's account, because credited or paid out without the authority of the court, or upon accounts or contracts and debts which accrued or were made and matured more than three months before Schuyler became receiver, or because for indebtedness which Schuyler, as receiver, had not lawful authority to incur or pay, or because for his personal indebtedness, or unnecessary or excessive; also alleging that the receiver's certificates and certain notes were issued improvidently and improperly and without the authority of the court. Afterwards, further objections, of like tenor, were filed to other items. The plaintiffs in the cross-suit also filed various exceptions to the reports of the master allowing various claims.

On the 22d of January, 1879, after a hearing as to the claims, on the reports, the evidence and the exceptions, the court made an order allowing certain claims, many of them not over \$5,000, specifying the names of the claimants and the amounts allowed, and referring back the claim of the Evansville Company for further evidence, and a report based on certain specified rulings then made. The order also contained this provision: "All claims allowed by the court, by this order of this day, against the receiver, are adjudged to be valid claims, to be paid out of the funds in the possession of the court, as well from the income of the road as from the proceeds of any sale hereafter made, and prior in equity to any claims of the mortgagees of the railroad, the court reserving to the mortgagees the right to object to any order hereafter to be made in distributing the whole or any part of the funds which may be in court arising from the income of the railroad, or from the sale of the same." In the order the plaintiffs in the cross-suit prayed an appeal to this court.

On the 25th of June, 1879, the master filed a special report as to the claim of the Evansville Company, to which, two days afterwards, the plaintiffs in the cross-suit filed exceptions. On the 3d of July, 1879, the court allowed the claim at \$35,318.62, in preference to the mortgage liens. On the same day it made a decree for the sale, as an entirety, by the master, of the road from Logansport to Rockville, together with all the branch roads of the mortgagor extending from said main line, which had been built or acquired by it or for its use, together with all its franchises and property owned by it, or which had been acquired for the purpose of operating said road, together with all contracts and agreements made with it or for its use or benefit, giving a particular description of the property in schedules. The decree provided that, out of the net proceeds of sale, the master should pay, *first*, the costs of suit and the allowances made to the trustees and the solicitors; *second*, the taxes; *third*, the claims against the receivership and fund in court allowed by the order of January 22, 1879, and the claim of the Evansville Company as so allowed, and all other claims against said receivership and fund which might thereafter be allowed, and which might remain unpaid after the funds in the hands of the receiver, not otherwise disposed of, should have been exhausted; *fourth*, the

surplus to be applied, first, to the payment of the first mortgage bonds and coupons *pro rata*, and the remainder, if any, to be distributed as the court might thereafter direct. The decree contained a prayer for an appeal from it to this court by the plaintiffs in the cross-suit. That appeal was perfected.

§ 1529. *Appeals in open court requiring no citation. Sufficient designation of parties.*

This chronological history of the proceedings in the case is given, because a full understanding of those proceedings conduces to an easy solution of the questions involved in the appeal herein. The appellees insist that the appeal should be dismissed for the alleged reason that the parties have not been named as either appellants or appellees on the docket of this court or in the transcript. But the order of January 22, 1879, allows the claims, specifying the persons to whom allowed and the amounts, and the body of the order states that the plaintiffs in the cross-suit pray an appeal to this court; and the decree of July 3, 1879, orders the payment of the claims allowed by the order of January 22, 1879, and contains a prayer by the plaintiffs in the cross-suit for an appeal from said decree. These were appeals in open court not requiring citations, and the order and the decree appealed from sufficiently designated all the appellees by name, and the appeals were appeals from the whole of the order and the whole of the decree. The decision in *The Protector*, 11 Wall., 82, does not apply to a case of this kind.

As a general proposition, applicable to the whole case, the appellants insist that the mortgagee under the second mortgage carried out a fraudulent scheme to obtain a priority over the lien of the first mortgage for the claims allowed, without giving the mortgagee under the first mortgage an opportunity to resist it until after the orders had been obtained and acted on. As evidence of this, the fact is urged that the first mortgagee was made a party to the original foreclosure suit without any relief being asked against him. It is contended that the first mortgagee was not a proper party to the bill. The appointment of the receiver without notice to the first mortgagee, although a party to the suit, is commented on, coupled with the fact that its day of appearance was fixed as being on or before the first Monday of November then next. It is further suggested that, under the receivership originally created, the second mortgage bondholders alone were entitled to the income from that receivership, and that the trust fund under the control of the court was only that which the second mortgagee could put there; namely, the mortgagor's right to an equity of redemption as against the second mortgagee, and not the entire property.

§ 1530. *A first mortgagee is a proper party to a bill by a second mortgagee when a receiver is prayed for.*

We see no warrant for the charge of fraud. The second mortgagee, in filing its bill, made the first mortgagee a party, though admitting the priority of the lien of the first mortgage, and not asking any direct relief against the first mortgagee, evidently because a receiver was prayed for. This was proper. Although the order of August 26, 1874, appointing the receiver, was made without notice to the first mortgagee, it was served on the first mortgagee three days after it was made; and its broad terms, as to the powers conferred on the receiver, called upon the first mortgagee to appear in the suit promptly, to protect the interests of the first mortgage bondholders, and not to wait, as it did, until the first Monday of November following. It was required by the order to appear and answer "on or before" that day. It waited until that day be-

fore appearing or answering. The original bill evinced no intention to create a receivership for the sole benefit of the second mortgage bondholders. On the contrary, it asked that the net revenue of the receivership should be paid to such persons or corporations as should be adjudged by the court to be entitled to it. This was, in substance, saying to the first mortgagee that it too had an interest in the receivership. The receiver's petitions, filed September 9th and September 30th following, respectively, were not acted on till October 3d, after the first mortgagee had had ample time to appear. These petitions showed the pressing necessity of the road. The authority conferred by the order of October 3d was intended to benefit the *res* in the hands of the court, which was the entire mortgaged property, as covered by both mortgages, and not merely the equity of redemption of the mortgagor as against the second mortgagee.

§ 1531. *Exclusive right of second mortgagee to the income of a receivership asked for by him.*

Whatever may be the rule as to the rents and profits of a mortgaged estate, under a receivership, on a bill filed by a second mortgagee, where the first mortgagee is not made a party to the suit, that rule has not been applied to such a receivership where the first mortgagee was made a party, especially on a bill such as that in this case. The authorities limit the exclusive right of the second mortgagee to the income of a receivership created under a bill filed by him, to a case where the first mortgagee is not a party to the suit. *Howell v. Ripley*, 10 Paige (N. Y.), 43; *High on Receivers*, sec. 688. It is further to be observed, that, the mortgagor having defaulted in paying its interest on the first mortgage bonds on the 1st of November, 1873, the first mortgagee was entitled, by the terms of its mortgage, to take possession of the mortgaged property and operate the road. Moreover, the cross-bill was not filed for more than a year after the receiver had been appointed, and it was, in judgment of law or in fact, fully known all the time to the first mortgage bondholders what was being done by the receiver in creating the claims now sought to be disputed; nor was it filed for more than a year after the first mortgagee had appeared and answered in the original suit. It was at all times competent for the first mortgage trustee, as a party to that suit, to have asked the court to protect the interests of the bondholders, in case the receiver was disregarding them; and the cross-bill could as well have been filed earlier as later by the plaintiffs in it or by other bondholders. On these views the charge of fraud, made by the appellants, has no basis. On the other hand, it did not comport with the principles of equity for the appellants to lie by and see the court and the receiver dealing with the property in the manner now complained of, and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert, as they did in the cross-bill, that the piece of road from Clymer's Station to Logansport, and the bridge and the land and the rolling stock, and the other property acquired by the receiver, and now alleged to have been acquired by him without authority, were subject to the lien of the first mortgage, and now claim the proceeds of all that property, without paying the debts incurred for acquiring it. A court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him. The cross-bill alleges that the

plaintiffs in it had desired for more than a year to have the first mortgage foreclosed.

The original bill set forth ample grounds for appointing a receiver promptly. The payment of interest on the second mortgage bonds ceased January 1, 1874. That mortgage gave a warrant of attorney for the appointment of a receiver forthwith, after six months' default,—a provision not in the first mortgage.

The order of August 26, 1874, is questioned by the appellants because it empowered the receiver "to pay the arrears due for operating expenses for a period in the past not exceeding ninety days." They also object to the order of October 3, 1874, because it authorized the receiver to purchase rolling stock and to adjust the liens on rolling stock, and to pay indebtedness, not exceeding \$10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before August 26, 1874, and to construct the piece of road from Clymer's Station to Logansport, and the bridge across the Wabash river, and to enter into contracts necessary therefor, and because it provided that, as to all moneys that might be expended, and all liabilities incurred by the receiver in carrying out the provisions of the order, the earnings of the road were charged "as with a first lien prior to all incumbrances upon said road." They also object to the order of October 4, 1875, because it provided that the certificates which might be issued by the receiver under that order were to be provided for by the court in its final order in the cause, unless paid by the receiver out of the income of the road. They also object to the order of January 22, 1879, because it adjudged all claims allowed by it against the receiver to be valid claims, to be paid out of the funds in the possession of the court, as well from the income of the road as from the proceeds of any sale to be thereafter made, and prior in equity to any claims of the mortgagees of the railroad. They also object to the decree of July 3, 1879, because it directed the master to pay out of the proceeds of the sale of the mortgaged property the several claims against the receivership which had been allowed by the order of January 22, 1879, in preference to the amount due by the mortgagor to the holders of the first mortgage bonds and coupons; and because it directed the master to pay the claim of the Evansville Company, and all other claims against the receivership which might thereafter be allowed, and which might remain unpaid after the funds in the hands of the receiver, not otherwise disposed of, should have been exhausted, in preference to the amount due on the first mortgage indebtedness; and because it did not order that the accounts of the receiver should be adjusted and settled before the master should pay out of the proceeds of the sale of the property any of the amounts allowed as debts against the receiver; and because it directed a sale to be made of the property covered by the first mortgage, and that acquired by the receiver, under the orders of the court, as an entire property, and did not separate the two classes of property or the funds to be realized from them respectively.

§ 1532. *The power of a court to create through a receiver claims that will take precedence of the lien of the mortgage. Cases cited.*

The question of the power of a court to create claims through receivers in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage, was considered by this court in *Wallace v. Loomis*, 97 U. S., 146. There, in a suit for the foreclosure of the first mortgage on a railroad, to which the trustees of a second mortgage were parties, the court, on notice, appointed receivers, with power to put the road in repair and operate it,

and complete any unfinished portions, and procure rolling stock, and for these purposes to raise money by loan to an amount named in the order, and to issue their certificates of indebtedness therefor, which should be a first lien on the property, payable before the first mortgage bonds. Wallace, a holder of second mortgage bonds, afterwards became a party to the suit. The final decree declared that the moneys raised by loan, or advanced by the receivers, and expended on the road, pursuant to their order of appointment, were a lien paramount to the first mortgage, and it directed them and such receivers' certificates or other indebtedness as might thereafter be ordered by the court to be paid, to be paid out of the proceeds of the sale of the road before paying any of the first mortgage bonds or coupons. On an appeal by Wallace, this court, by Mr. Justice Bradley, said: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." Wallace had not become a party to the suit until several months after the order complained of was made. This court sustained the decree.

The principle thus recognized covers most of the objections here urged. The facts set forth in the petitions of September 9 and 30, 1874, on which the order of October 3, 1874, was based, show ample reasons for making that order, in respect to the purchase of rolling stock, and the adjustment of liens thereon, and the construction of the Clymer Division and the bridge. The contents of those petitions have been set forth.

§ 1533. *Circumstances under which a receiver may be authorized to pay pre-existing debts.*

In respect to the \$10,000 due other and connecting lines of road for materials and repairs and for ticket and freight balances, a part of which, it was stated, was incurred more than ninety days before the 26th of August, 1874, the first petition stated that payment of that class of claims was indispensable to the business of the road, and that, unless the receiver was authorized to provide for them at once, the business of the road would suffer great detriment. These reasons were satisfactory to the court. In the examination by the master of the accounts of the receiver, evidence was taken as to the payment by him of items due, when he took possession, for operating expenses, and of moneys due other and connecting lines for the matters named. The report of the master shows that he disallowed several items in the receiver's accounts, claimed under the above heads, where the claims were made on the ground that the creditors threatened not to furnish any more supplies on credit unless they were paid the arrears. His action, sanctioned by the court, in allowing items within the scope of the orders of the court, appears to have been careful, discriminating and judicious, so far as the facts can be arrived at from the record. It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of cer-

tain classes out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property, in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through Mr. Justice Woods, in *Barton v. Barbour*, 104 U. S., 126. The appellants furnish no basis for questioning any specific amounts allowed in respect of the arrears referred to, but object to the allowance of anything out of the sale of the *corpus* for such expenditures. Under all the circumstances of this case we see no valid objection to the provisions of the orders complained of. The objections made to the orders of October 4, 1875, and January 22, 1879, and to certain provisions in the decree of July 3, 1879, fail, for the reasons before stated.

§ 1534. *Payment of rent of leased road in preference to the first mortgage.*

Specific objection is made to the allowance of the claim of the Evansville Company to be paid in preference to the first mortgage bonds. The Evansville road ran from Rockville to Terre Haute, twenty-three miles. The mortgagor had, in June, 1872, hired that road by a written lease, the term of which was for one year and until one year's notice of its termination should be given by either party after that term. The rent was \$2,012.50 per month, and the lessee was to maintain the road in as good condition as when received, and to permit the Evansville Company to use six miles of it at a stipulated price. Provision was made in the lease for initial and subsequent inspection of the road, to ascertain its condition, and any improvement or depreciation the lessor or the lessee was to pay the other party for, in accordance. The lessee used the road from July 1, 1872, until the receiver was appointed. He took possession of it and ran it while he was receiver, as a continuation of his road, and so did he and Claybrook afterwards, and subsequently Claybrook, as sole receiver, did the same. The rent was paid to September 1, 1874, then for a year it was not paid, then it was paid for four months, then it was unpaid to August 12, 1876, and after that Claybrook, as receiver, paid it as it accrued. During all the time from September 1, 1874, the successive receivers collected from the Evansville Company every month \$262.50 for the use of the six miles. In the winter of 1876 there was found, on inspection, a depreciation of \$19,346.82. The Evansville Company made a claim against the receiver for the unpaid rent,

the amount of the depreciation, the value of certain supplies, and the rent of an engine. The master reported as due \$56,036.21. On exceptions, the court directed the master to ascertain what would be a fair rental value for the use of the leased property by the receivers, and to take into consideration any dilapidations. On this basis a new report for \$35,318.62, was made, and this amount was allowed with a preference. We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the use of property used by the receivers, with the clear assent, under the circumstances, of all parties interested, which use the first mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the court would have done as an original question, if called on to determine whether the receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts, to have consented to treat the right to run that road and take its income as if that right were a part of the mortgaged property and subject to the same rules as the other mortgaged property. This leads to the allowance, also, of the claims for operating supplies and materials, including steel rails furnished for that road while so run.

As to the objection that the decree of July 3, 1879, was erroneous in not requiring the accounts of the receiver to be settled before any payment should be made out of the proceeds of sale of any amounts allowed as debts against the receiver, the contention is that items may yet be disallowed to the receiver, which will leave in the fund derived from income moneys applicable to pay debts incurred by the receiver, and so decrease the deficiency of income, and that the final decree of July 3, 1879, was erroneous in going beyond all prior orders, and not keeping the income separate from the proceeds of sale, and in directing the debts allowed to be paid wholly at once out of the proceeds of sale. This view rests entirely on the mistaken idea that the first mortgage bondholders and their trustee had no interest in any income of the receivership created under the original bill. If hereafter there shall arise any receiver's net fund, the court must apply it to pay, in the same order of rank as in the final decree, the four sets of creditors therein mentioned, and which is the proper order, as we hold. The creditors having these claims against the receiver were *bona fide* creditors, and have waited long to receive their due. It was very proper, under the correct view of the law taken by the court below, that it should not compel them to wait longer for the settlement of the receiver's accounts, in which they have no interest. Under the foregoing views, the objection that there was error in ordering the sale of the property as an entire property fails.

Many points were urged by the counsel for the appellant which are either disposed of under the views we have announced, or are not, though they have been considered, deemed of sufficient importance for special remark. The decree of the circuit court must be affirmed. In reaching this conclusion we have assumed that the appeal has brought before us the claims which are not over \$5,000, and have not considered the question as to whether this is or is not a case in which our jurisdiction as to those claims could be successfully challenged.

Decree affirmed.

§ 1535. *Certificates to pay interest and extend payment of divisional mortgages.*—In a foreclosure suit under a mortgage of a consolidated line the receiver was authorized to issue certificates for future interest due upon prior mortgage bonds of separate divisions of the road, to bondholders who were willing to extend the time of payment of their bonds for ten years, with the right on the part of the receiver to pay them at any time within such period of extension. This was done in order to prevent the disintegration of the consolidated line by foreclosure sales under the prior divisional mortgages. *Skiddy v. Atlantic, Miss. & Ohio R. Co.*, 3 Hughes, 820 (§§ 1559-1567).

§ 1536. *Priority of certificates.*—Neither the mortgagor nor his assignee in bankruptcy can object to the priority accorded by a decree of foreclosure to certificates issued by a receiver. *Jerome v. McCarter*, 4 Otto, 734 (§§ 1453-1456).

§ 1537. *Retainer and services of attorney for trustee.*—The funds in the hands of a receiver are chargeable with the retainer and professional services of an attorney employed by the trustees under a mortgage of a railway to foreclose the mortgage, although the suit, without the fault of the attorney, was not prosecuted with effect, and the funds in the hands of the receiver have been obtained from a new suit, prosecuted by other trustees; as, for instance, where the prosecution of the first suit was prevented by the outbreak of the civil war, and the trustees who authorized the suit having died, new trustees were appointed upon the termination of the war, who commenced a new foreclosure suit. *Cowdrey v. Galveston, etc., R. Co.*, 3 Otto, 352, 354.

XIII. EQUITIES AFFECTING PRIORITY OF RAILROAD MORTGAGES.

SUMMARY—*Rent of cars used by receiver*, §§ 1538, 1539.—*Court may make appointment of receiver conditional upon payment of claims for labor, supplies and equipment*, § 1540.—*Payment of back wages ordered to prevent stoppage of business*, § 1541.—*Claims of connecting roads*, § 1542.—*Priority of claims over mortgage*, §§ 1543, 1545.—*Recent arrearages of wages*, § 1544.—*Judgment against receiver for personal injury has no priority*, § 1546.

§ 1538. A sale of cars to a railroad company at an agreed price, payable in instalments, secured by a stipulation that the vendor shall retain the title until they are paid for, creates no equitable claim for the payment of such instalments out of the funds in the hands of the receiver. The seller has no lien for such payments or for the rent or hire of the cars. It is proper for the receiver to pay for their rent or hire for such time as he actually uses the cars; but not for any period during which the cars were used by the company before the appointment of the receiver. *Fosdick v. Schall*, §§ 1547-1549; *Myer v. Car Company*, §§ 1550-1553.

§ 1539. *Prima facie* the fund in the hands of the receiver belongs to the mortgage creditors, and the presumption remains till it is overcome by showing a superior equity in some one else. (a) *Fosdick v. Schall*, §§ 1547-1549.

§ 1540. When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. (b) *Atkins v. Petersburg R. Co.*, § 1554; *Fosdick v. Schall*, §§ 1547-1549.

§ 1541. It is competent for a court of equity, having jurisdiction of railroad property for the purpose of foreclosing a mortgage, to direct payment of money advanced to pay back wages and prevent the stopping of the business of the railroad, out of the first net earnings, and this in preference to the payment of mortgages. *Atkins v. Petersburg R. Co.*, § 1554.

§ 1542. Claims on insolvent railroad companies by connecting roads are unsecured debts. *Jessup v. Atlantic & Gulf R. Co.*, §§ 1555, 1556.

§ 1543. A contractor expending money and labor in building a railroad, under an agreement with the company that he shall have the possession of the road until he is fully paid, does not thereby acquire a priority over a prior valid mortgage. *Dunham v. Railway Co.*, §§ 1557, 1558.

§ 1544. A receiver may be authorized to pay recent arrearages of wages due to employees. *Skiddy v. Atlantic, Miss. & Ohio R. Co.*, §§ 1559-1567.

(a) *Fosdick v. Car Co.*, * 9 Otto, 256; *Huidekoper v. Locomotive Works*, * 9 Otto, 258, following *Fosdick v. Schall*, *supra*.

(b) *Hale v. Frost*, * 9 Otto, 330; *Calhoun v. St. Louis & S. E. R'y Co.*, * 9 Biss., 83; *Farmers' and Mechanics' Nat. Bank v. Bank of Philadelphia*, * 7 Fed. R., 377, following *Fosdick v. Schall*, *supra*.

§ 1545. But overdue wages assigned to third persons are not entitled to payment in priority to mortgages; nor are bills for supplies and materials furnished the railroad company before the commencement of the foreclosure proceedings, though they have been used by the receiver. *Ibid.*

§ 1546. A judgment against a receiver for personal injuries sustained by a passenger upon a road, while it is run by the receiver for the benefit of mortgage bondholders, is not entitled to priority of payment over the mortgage lien, or to payment out of the earnings of the road or the proceeds of a foreclosure sale, unless so provided by the order placing the property in the receiver's hands. *Davenport v. Receivers of Alabama, etc., R. Co.*, § 1568.

[NOTES.— See §§ 1569-1571.]

FOSDICK v. SCHALL

(9 Otto, 235-256. 1878.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.— Schall sold a lot of cars to a railroad company, stipulating that the title to them should remain in him until they were paid for. The company had at that time outstanding mortgages to secure its bonded debt on all its property then in possession or thereafter to be acquired, and upon a bill for foreclosure being filed, a receiver was appointed with whom Schall made a contract for the hire of his cars, which was paid up to October, 1874, when payments were discontinued. Schall filed an intervening petition, claiming payment for the rent of his cars after October, 1874, and the return of his cars. Under the foreclosure suit all the property of the road except these cars was sold, and by a final decree it was ordered, among other things, that the cars should be restored to Schall, and that he be paid out of the proceeds of the foreclosure sale for the rent of his cars. Further facts appear in the opinion of the court.

Opinion by WAITE, C. J.

Two questions are presented by the assignment of errors in this case: 1. Did the lien of the mortgages attach to the cars of Schall on their delivery to the company under his contract, so as to prevent their reclamation as against the mortgagees if the price was not paid according to agreement? 2. Was the order for the payment out of the fund in court of the rent of the cars, during the time they were used by the receivers appointed by the state court and for six months before, justifiable under the circumstances of this case?

§ 1547. *Mortgagees of future property are not purchasers. They take only the title of their grantor.*

As to the first question, it is contended that the mortgage created a subsisting and paramount lien on the cars as soon as they were put into the possession of the railroad company under the contract, and that the reservation of the title was void under the laws of Illinois, because the contract was not recorded. It must be conceded that contracts like this are held by the courts of Illinois to be in effect, so far as the chattel mortgage act of that state is concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the price. We had occasion to consider that question in *Hervey v. Rhode Island Locomotive Works*, 93 U. S., 664, and there held, following the Illinois decisions, that if such an instrument was not recorded in accordance with the provisions of the chattel mortgage act (R. S. Ill., 1874, 711, 712), a lien like that of Schall would have no validity as against third persons. Whatever may be the rule in other states, this is undoubtedly the effect of the Illinois statute as construed by the courts of that state. In *Green v. Van Buskirk*, 5 Wall., 307, this court also held that "where personal property is seized and

sold under an attachment, or other writ issuing from a court of the state where the property is, the question of the liability of the property to be sold under the writ must be determined by the law of that state, notwithstanding the domicile of all the claimants to the property may be in another state." *Hervey v. Rhode Island Locomotive Works, supra*, was also a case of seizure and sale under judicial process; and the language of the court, as expressed in its opinion delivered by Mr. Justice Davis, is to be construed in connection with that fact.

As between the parties, notwithstanding the Illinois statute, the transaction is just what, on its face, it purports to be, "a conditional sale, with a right of rescission on the part of the vendor, in case the purchaser shall fail in payment of his instalments,—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of his losing his lien," if it works a legal wrong to third parties. *Murch v. Wright*, 46 Ill., 488. The question, then, is whether these mortgagees occupy the position of third parties within the meaning of that term as used in this statute. They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are "after-acquired" property of the company; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were "loose property susceptible of separate ownership and separate liens," and "such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto." *United States v. New Orleans Railroad*, 12 Wall., 362 (§§ 1310-14, *supra*). The title of the mortgagees in this case, therefore, is subject to all the rights of Schall under his contract.

The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the mean time the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place. It follows that the decree ordering a return of the cars to Schall was right. Whether, if the property is worth more than is due upon the contract of purchase, the mortgagees can obtain the benefit of the overplus, is a question we are not called upon to consider.

§ 1548. *When the court is requested to appoint a receiver pending proceedings to foreclose a railroad mortgage, it may impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, etc., as shall appear reasonable.*

As to the second question, we have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the

end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. *Galveston Railroad v. Cowdrey*, 11 Wall., 459 (§§ 1297-1304, *supra*); *Gilman v. Illinois & Miss. Tel. Co.*, 91 U. S., 603 (§§ 1264-67, *supra*); *American Bridge Co. v. Heidelbach*, 94 id., 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not

because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

§ 1549. *One who sells chattels and delivers them, stipulating to hold the title till the purchase money is paid, has no lien for their rent or hire.*

In this case no special conditions were attached to the order appointing a receiver in the circuit court of the United States; and it is not contended that the intervenor has brought himself within the rule fixed by the state court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the state court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in

use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.

The decree of the circuit court will be reversed so far as it directs the payment of the sum of \$14,568.75 to Schall, the appellee, from the fund in court; but in all other respects it is affirmed, and the cause remanded with instructions to so modify the decree as to make it conform hereto. The costs of the appeal must be paid by the appellee; and it is so ordered.

MYER v. CAR COMPANY.

(12 Otto, 1-14. 1880.)

APPEAL from U. S. Circuit Court, District of Iowa.

STATEMENT OF FACTS.—A railroad company in Iowa contracted with a car company for the lease of a lot of cars, with the privilege of purchase at an agreed price. While the railroad company was in possession, the mortgagee, under a pre-existing mortgage, filed a bill to foreclose it, and claimed the cars as after-acquired property of the railroad company. The car company answered, and in a cross-bill claimed the cars and compensation for the use of them. The decree of the court was in favor of the car company, and the mortgagee appealed.

§ 1550. *An unrecorded conditional sale is valid between the parties in Illinois and in Iowa.*

Opinion by WAITE, C. J.

We consider it unnecessary to decide in this case whether a lease of personal property at a specified rent, with an option in the lessee to buy for a fixed price, is in legal effect a conditional sale; because, even if it be, the decree below is in our opinion right. In *Fosdick v. Schall*, 99 U. S., 235 (§§ 1547-49, *supra*), a case which came up from Illinois, we decided that such a contract of sale, if not recorded in accordance with the requirements of the chattel mortgage acts, was legal and valid as between the parties, and that under a mortgage reaching after-acquired property the mortgagee would take such property subject to all the conditions with which it was incumbered when it came into the hands of the mortgagor. The statute we were then considering was as follows: "That no mortgage, trust deed or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the

possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage." R. S. Ill., 1874, p. 711.

Under this statute the courts of Illinois have uniformly held that contracts of conditional sale are in effect, so far as the chattel mortgage acts are concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the purchase money. So that the question we were then called on to decide was whether one holding as a mortgagee of after-acquired property was a "third person" within the meaning of that law. The statute of Iowa which is involved in the present case is as follows: "That no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee, in actual possession, obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." Code of 1873, sec. 1922, p. 356; Acts of Fourteenth General Assembly, ch. 63, p. 69.

§ 1551. *A mortgagee of after-acquired property is in no sense a purchaser.*

It will thus be seen that the statutes of the two states are substantially alike, unless a different meaning is given the term "third person," used in the one, from that of "creditor or purchaser," found in the other. If these terms are the same in legal effect, the principal question involved in this case has already been settled here. In *Fosdick v. Schall* we held that a mortgagee whose mortgage embraced property to be acquired in the future was in no sense a purchaser of such property. His rights were not granted after the property was bought by the mortgagor. He got nothing by this provision in his mortgage except what the mortgagor himself had acquired. He paid nothing for his new security. He took as mortgagee just such title as the mortgagor had; no more, no less. The code of Iowa, section 1283, authorized mortgages of property afterwards to be acquired, and made them as valid and effectual as if the property were in possession at the time of the execution thereof; but this does not change the case. The question still is, what property has been acquired to which the mortgage can attach? We think, therefore, that the word "purchaser" in the Iowa statute gives the appellants no rights other than those to which they would be entitled under like circumstances in Illinois.

§ 1552. *A mortgagee has no rights against property held by his debtor under lease or conditional sale which his debtor himself did not possess.*

Every mortgagee is necessarily a creditor. A mortgage is in general but an incident to the debt it secures, and the mortgagee is nothing more than a creditor secured by mortgage. These appellants are mortgagees; but, as has just been seen, their mortgage gives them no rights to the property in dispute against the car company, the lessor, or conditional vendor. Their claim is only such as belongs to creditors of the railroad company, the lessee, or conditional vendee. So far as any rights they have as simple creditors are concerned, the railroad company could do with the property just what it pleased. It might have been surrendered to the car company or sold to another. The car company, too, could have taken possession under its lien, and held against any proceeding these creditors might afterwards commence as mere creditors. Unless a creditor is in a condition to prevent the vendee from controlling his property, he is powerless, and the vendor and vendee may contract with each other

as they please without consulting him. It follows that, although the word "creditor" appears in the statute, it must have been used with some limitation. This makes it necessary to inquire what that limitation was. The statute as we now find it is part of the code of Iowa adopted in 1873. This code, like the Revised Statutes of the United States, was in reality only a convenient compilation or codification of laws before that time in force. In the brief of counsel for the appellants, it is stated in terms that the particular section of the code now in question (sec. 1922) is a copy of chapter 63 of the acts of the fourteenth general assembly.

§ 1553. *What the word "creditor" means in the statutes of Iowa relating to mortgages or conditional sales.*

In relation to the Revised Statutes of the United States, we held, in *United States v. Bowen*, 100 U. S., 508, that, "when it becomes necessary to construe language in the revision which leaves a substantial doubt as to its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning." The same rule is applicable to the Iowa code, and there is a substantial doubt here as to what the word "creditor" means. Looking then to the original act, we find the text the same as the code; but the title, omitted in the codification, is as follows: "An act requiring conditional sales of personal property to be recorded like mortgages of personal property to be of any validity as against *bona fide* purchasers, execution and attaching creditors." In cases of doubt the title might always be resorted to for the purpose of ascertaining the meaning of the body of the act; but especially is this true in states like Iowa, where the constitution provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Art. 3, sec. 29. This leaves no doubt, and clearly confines the operation of the text to such creditors as have by suit perfected a right to impeach the transaction. Such has always been the rule in respect to conveyances made to hinder and delay creditors. Until suit was commenced the parties were at liberty to deal as they pleased with the property conveyed, and the rights of creditors were determined by the condition in which the property was when they interfered. It is clear, therefore, that these appellants, as creditors at large, had acquired no such special interest in the property when their bill to foreclose their mortgage was filed as would give them the right to contest the validity of the car company's title. As against them, in the condition they were, the lien created by the conditional sale was, to all intents and purposes, valid and subsisting when the receiver, on his appointment, took possession of the property; and his possession, as we said in *Fosdick v. Schall*, was for the benefit of whomsoever in the end it should be found to concern. The rights of the parties were fixed at the moment the property was taken by the court, through its receiver, into its own possession. At that time these appellants were not either execution or attaching creditors. They had not then, neither have they since, sued as any other than mortgage creditors endeavoring to enforce their mortgage lien. We conclude, therefore, that the statute of Iowa has a no more extended operation, so far as the circumstances of this case are concerned, than that of Illinois, and that, under our former decision, the appellants stand precisely where the railroad company would in a controversy with its vendor. To our minds it is unimportant that, under the railroad mortgage laws of Iowa, "the rolling

stock and personal property of the company properly belonging to the road and appertaining thereto shall be deemed a part of the road" for the purposes of a mortgage. Such personal property is still "loose property, susceptible of separate ownership and separate liens," and it is only such interest as "properly belongs" to the company that the authorized mortgage reaches. The evident purpose of the act was to do no more than prevent confusion growing out of any difference there might be between recording acts having reference to personal property and those affecting real estate. This disposes of the principal question in the case.

The money recovery below was only for the use of the cars by the receiver during the receivership, and the amount was substantially agreed on. In other words, it is in effect admitted that the use of the cars was worth to the court while operating the road under the trust created by the appointment of a receiver, at the instance of these appellants, just what has been decreed. There can be no doubt that it is the duty of a court to pay from the trust fund it has in possession all the debts it incurred in its judicial capacity while administering the trust assumed, pending the litigation, in behalf of the litigating parties. The objection here is not that the fund in hand did not incur the debt, the payment of which has been ordered, but that the railroad company, while operating the road before the receivership, paid the car company too large a sum for the use of its cars, and that the debt of the fund should be reduced by the amount of this improvident and excessive payment. There is nothing in the case as it has been brought here by the appeal which will enable us to determine whether the car company ought to contribute anything to the fund in court on this account or not. It is sufficient for our purposes on this appeal that an authorized officer of the court has in a legitimate way charged the fund in hand with the debt, the payment of which has been ordered, and that it has not been proved that the car company owes the railroad company for over-payments made before the receivership was created.

It is impossible for us to determine from anything now here whether the receiver is indebted to the car company for the use of the cars in question after the decree below, or whether the purchaser of the railroad property under the mortgage has used the cars pending the appeal, or that he can, in this suit, be required to make compensation therefor. All those questions will properly come before the court below for determination on the law and the facts when the case goes down.

Decree affirmed.

ATKINS v. PETERSBURG RAILROAD COMPANY.

(Circuit Court for Virginia: 8 Hughes, 307-320. 1879.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—The petitioners, Hiram Sibley, John B. Davis, Thomas Wilson and J. D. Evans, ask for payment, in preference to bonds held under first and second mortgages, of certain moneys advanced to the president of the Petersburg Railroad Company, after default in payment of certain coupons and before the filing of the bill for the appointment of a receiver. The advance was made on an understanding with the president and directors that they should be paid out of the first net current revenues, and that the amount advanced should be used in paying off back wages due to the employees of the company. Each of the petitioners had at the time of the advance second

mortgage bonds of the company, each of them except Davis was a stockholder, and Davis had made large advances to one Ragland, personally, on a pledge of shares owned by Ragland, who, until recently before the advances of the petitioners, had been president of the company.

Some time in the first half of the year 1875, Ragland resigned, a new board of directors were appointed, and another president was elected. Davis and Sibley were elected members of this new board in their absence, and I believe against their consent, but Sibley refused to serve, and though Davis protested against being assigned to the position, he never actually resigned. Davis held the additional relation to the company of a trustee with Thomas Branch in the deed securing the second mortgage bonds. Isaac H. Carrington was elected president. Shortly after this reorganization of the company its affairs came to a serious crisis in the form of a threatened strike of its employees for wages in arrears. The amount of the arrearage was about \$27,000, and it was necessary for the new president to raise this sum of money without delay. In his extremity he appealed to the petitioners to advance the amount needed. Although the fact is disputed by J. Wilcox Brown, trustee in the first mortgage, and by Thomas Branch, trustee in the second mortgage, who resist this petition, the evidence that that was the object of the petitioners in making the advance, and that they made it on a specific appeal from President Carrington for that particular purpose, is conclusive. Moreover the evidence shows that the advance was made for this object on an understanding between the petitioners and President Carrington, approved by all of the directors but one, who was absent from sickness, that they should be reimbursed their advance out of the first net earnings of the road. The amount advanced was \$26,500, and it was paid by the petitioners at several dates, from July 28th to August 6, 1875. This particular fund was deposited in the Planters' National Bank of Richmond, of which Davis was president; the current earnings of the company were deposited in other banks. In his letter relating to the advance, dated in New York, 26th July, 1875, Mr. Sibley said to President Carrington:

This amount is to pay the men on the road. I regard the labor on the road as the first lien on the property. Mr. Davis will give you an equal amount, which will pay, or nearly so, the arrears. I want you to send me your receipt for the ten thousand and a certificate that Mr. Davis has paid an equal amount for the purpose, with an agreement that these advances by me and Mr. Davis are to be refunded to us in equal amounts out of the first net profits of the road. It is desired that the men be paid off at once, in order that any may be discharged that are not wanted, etc.

The reply of President Carrington to this letter is not given in the evidence, and if ever sent in writing, would seem to have been lost. But letters from him to Mr. Sibley are in proof, written in November and December following. In that of November 1, 1875, Mr. Carrington says: So far as respects the \$20,000 advanced by Mr. Davis and yourself, and the \$6,500 advanced by Evans and Wilson, I look upon them as debts standing upon a different footing from all other debts of the company. They are for cash advanced to the company without security, at a time when it was necessary to the life of the company, etc.

In a long letter of November 23d, explaining his financial plans and efforts, Mr. Carrington uses similar language, and in his letter of December 29, 1875, the same officer says: Mr. John B. Davis has demanded that the first payments to be made, over and above actual running expenses, shall be, upon the four

loans, made to the company which are unsecured, viz.: \$10,000 by you, \$10,000 by J. B. Davis, \$3,250 by Thomas Wilson, and \$3,250 by Evans. I acquiesce in this. I suppose you and Mr. Davis understand each other. I expect to send you a check for \$2,000 during this week, and to pay Mr. Davis a similar amount, and my expectation is to pay you both \$3,000 more by February 1st, making \$5,000 to each in part of above loans.

Mr. Davis, in his deposition, says: The advance was for the purpose of paying off the employees of the road, and the agreement by the president, Mr. Carrington, was that it should be repaid out of the first earnings of the road.

Isaac H. Carrington says, in his testimony: I was elected president of the Petersburg Railroad Company on the 19th of July, 1875. The road at that time was in very bad condition; the iron was so much worn as to render travel unsafe; the ditches were generally filled up; there were many unsound ties in the track; the rolling stock needed repair; there were very few laborers employed as track hands; many of the employees had brought suit for their wages and recovered judgments in North Carolina. Two engines of the company had been levied on under executions on these judgments, and were in possession of the sheriff; other judgments had been obtained against the company in Virginia; the company was without credit, and its operations were suffering for want of necessary supplies of all kinds. Amounts due to the company from connecting roads had been attached at Baltimore. A few weeks before my election as president, I had made a full examination of the affairs of the road. On my election I represented to John B. Davis and Hiram Sibley in person, and to other stockholders by letter, that the condition of the road rendered an immediate advance of money necessary. There were past due wages to employees amounting to between \$27,000 and \$29,000, and I told them that it would be impossible to manage the road with any success unless payment was made to these employees. I also represented the absolute necessity for immediate outlay on the track and rolling stock; also, that there were debts due and secured by collateral, and that there was imminent danger that the collateral would be sacrificed at forced sale. Four of the stockholders responded to this appeal by making the following advances (these have been already stated). There was no written contract stipulating the terms or conditions of this loan. There was an understanding that the object of the loan was to enable me to pay wages, and my recollection is that Hiram Sibley particularly insisted that his money should take that direction. I executed the notes of the company at four months (I think), and they were renewed at maturity. I resigned the office of president in January, 1876, and do not know what was done with these notes afterwards; our distinct understanding with these gentlemen was that theirs was to be considered a debt of the highest obligation, and I stated to them that if they loaned the money, and I afterwards found that I could not get on with the road, I would devote its receipts to the payment of these notes. I file as part of my deposition three letters, etc. (describing the three letters already quoted from, written by himself to Sibley in November and December, 1875).

As tending to show that this was not the understanding on which the advances in question were made by petitioners, the defense produce the account of the company with the Planters' National Bank, of which Mr. Davis was president, from which it appears that this specific money was not all paid specifically in discharge of wages in arrear, but went in part to other purposes, and especially that \$5,000 of it were paid to the counsel of a judgment cred-

itor of the road, in part payment of his debt (paid, as the evidence shows, without the knowledge of Davis). This creditor was the one on whose bill for foreclosure this court appointed a receiver and took possession of the road in May, 1877; but under a consent decree. This matter is referred to by Mr. Carrington in his testimony in answer to a question by the defense, whether all the money advanced by Davis, Sibley, Wilson and Evans, was applied to the payment of back dues to the employees of the company. Mr. Carrington says: It was not. On the 29th of July, 1875, I paid, in part of the judgment for wages due in Weldon, \$3,777; and on the 7th of August, 1875, I paid \$6,500 on pay rolls for the months of June and July, 1875. The policy I adopted, and which I followed as long as I was president, was to pay current wages as they matured, and thus carry the payments back month by month as I was able. . . . When I received these loans I deposited them in the Planters' National Bank of Richmond. . . . Under the arrangements under which I borrowed this money I did not consider myself bound to apply this identical money to the payment of wages; but, if there was pressing necessity from other directions, I felt at liberty to use this money for that purpose, thus relieving current receipts, and looking to current receipts to replace it. I did feel bound to apply an amount equal to these loans to back wages, and continued to make such application from time to time, during my presidency. The payment of the pay rolls for June and July, and the partial payment of the judgments of Weldon, entirely restored the confidence of the employees, and they were willing to wait, I giving frequent assurances that I would continue the payment as fast as I could.

It would seem, in short, that the back wages, for which the advances were made by the petitioners, were all paid off in the course of time, but not in whole with the specific money advanced for that specific purpose, and deposited in the Planters' National Bank. A great deal of the testimony put into the case by the defense (in fact, much the greater part of it) relates to the history of the difficulties of the company subsequent to this advance of money, to transactions directly or indirectly connected with the subsequent filing of the bill in this court for the appointment of a receiver, and to the history of the bill between the time it was filed in the summer or fall of 1876 and the appointment of a receiver in May, 1877. But I do not think that this testimony at all affects the case, as it appears from the letters of Carrington and Sibley that have been referred to, and the testimony of Carrington and Davis that has been given.

The fact seems to be conclusively proved that, on the part of the petitioners, their money was advanced for the specific purpose of keeping the road running by the payment of arrears due its employees, and that, though all the money deposited in the Planters' National Bank was not specifically used for that one purpose, yet that the equivalent of any particular part of that money which was otherwise used by the president, was paid to the employees out of current receipts in time to satisfy the employees and accomplish the object for which it was advanced by the petitioners. When I further state that the net current earnings of the road for any three or four months since the petitioners advanced the money would have been sufficient to pay off the advance, I believe that I have stated all the facts of the case material to its decision. Although this suit was originally brought by a judgment creditor, yet the decree appointing a receiver was given by consent, and the trustees under the mortgage deeds at once came in by cross-bill, and took the position of *domini litis*, in the cause.

The questions presented by the petition are: 1st. Whether, under any circumstances, the advance of moneys to keep a railroad running, without the exaction of security, can entitle the creditor to payment out of the earnings of the road in priority over the claims of mortgagees, and if this can be done in any case? 2d. Whether the circumstances under which the petitioners in this case advanced the money, which they now ask the court to repay to them, are such as will justify the court in granting their petition?

The trustees who contest the claim of these petitioners rely upon the priority of their mortgages and the sanctity of their rights, as secured creditors, under solemn deeds. They vouch in support of the superiority of their rights the decision of this court in the Atlantic, Mississippi & Ohio Railroad case (see 3 Hughes, 338), upon the petition of the Pennsylvania Steel Company, of sundry creditors holding assigned labor claims, and of sundry other holders of unsecured debts against that defendant company. I concurred in the decision in that case, 1st, Because the principal part of the claims then passed upon did not present the peculiar equities about to be discussed; and, 2d, Because, as to the rest of those claims, the weight of authority seemed at that time to preponderate in favor of mortgage creditors as against unsecured creditors of every name. (See §§ 1559-67, *infra*.)

§ 1554. *Advances made to pay laborers threatening to strike may be paid by receiver in preference to mortgage.*

Since then the supreme court of the United States has had this whole subject before it in a group of suits connected with the Chicago, Danville & Vincennes Railroad Company, in which it has passed upon the rights of a variety of petitioners having claims adverse to the mortgagees of that railroad. Its decrees in the various petitions and suits referred to are the more important because they were made after a general invitation had been extended to members of the bar of that court interested in like cases, to present briefs on the questions arising in that case; and because, after a most patient hearing and the most searching and able argument from the best legal minds of the country, the court arrived at unanimous conclusions on this delicate, difficult and important subject. In the principal case before it, connected with the railroad mentioned, that of Fosdick v. Schall, 95 U. S., 235 (§§ 1547-49, *supra*), the court, through Mr. Chief Justice Waite, announced its views of the law in the following paragraphs, which, though they fall within the characterization of *dicta*, yet are in fact a careful and deliberate expression of what the court considered to be the law of this whole subject. Nor is there any reason to doubt but that it will apply the principles indicated to cases which will come before it hereafter.

In the case of Fosdick v. Schall, the court, in the course of its decision, said as follows: We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried

through to the end without some concessions, by some parties, from their strict legal rights, in order to secure advantages that could not otherwise be obtained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation. The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings which ordinarily should go to pay the daily and monthly expenses are kept from those to whom in equity they belong, and used to pay the mortgaged debt. The income out of which the mortgage is to be paid is the *net income* obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income, and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do; for, even though the mortgage may in terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken, or something equivalent, the whole earnings belong to the company, and are subject to its control.

The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and *do equity in order to get equity*. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because in a sense the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of

creditors that which properly belongs to another, the court may, on an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that in the course of the administration of the cause the court is called upon to take income, which otherwise would be applied to the payment of old debts, for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipments. In this way the value of the mortgaged property is not unfrequently materially increased.

These principles strike my mind as self-evident. I do not think they can be successfully controverted. More briefly stated they are these: The possession of a receiver is only that of the court whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the mean time the court proceeds to determine the rights of the parties upon the same principles as if no change of possession had taken place. When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. If the court should not do this in the decree appointing a receiver, it may enforce these equities against mortgagees, in proper cases, in later decrees.

The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements; and every railroad mortgagee, even of earnings, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. The mortgagee has his strict rights, which he may enforce in the ordinary way. If he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may be required to submit to the operation of the rule requiring that he shall do equity in order to get equity.

In general the opinion holds that a court may for certain purposes stand in the shoes of the company whose property it has sequestered, and satisfy equities which the company necessarily contracted for the benefit of all parties interested in keeping the railroad alive and in operation. The opinion does not go to the extent of allowing the court to touch the *corpus* of the mortgaged property for the purpose of discharging the equitable claims described; but limits it to the earnings as the fund out of which they are to be paid. It virtually requires that the court shall pay these claims out of income earned, while the road is in its custody, forbidding it to fix them as a permanent charge upon the property after it passes out of its custody. The reasoning of the opinion covers cases only of the strongest equity and clearest good faith. It does not cover any expenditures but such as were of urgent necessity, and as inured to the benefit of all parties interested in the property.

While the supreme court is thus severe as to the character of the claims which may be paid, and as to the funds out of which payment is to be made, yet it does not limit them to the payment of wages due employees. It allows the expenses of permanent improvements to be refunded where those improvements were necessary to render the road safe for public use, and when the credit for them was incurred on the faith of their being paid for out of current earnings. There was no such pledge of faith given in the case of the Pennsylvania Steel Company, nor in favor of the holders of assigned labor claims in the Atlantic, Mississippi & Ohio case, which has been referred to. The supreme court, in its opinion under consideration, makes a broad distinction between railroads (which the interests of all classes of creditors and good faith to the public who charter them for public purposes, alike require to be kept going and alive) and other property. It intimates that a court may order the payment of such debts incurred by a railroad company before the appointment of a receiver, as it may authorize a receiver to contract and pay after his appointment; provided that the *corpus* of the property be not touched.

Now it has never been questioned that a receiver may apply so much of the current *income* as may be necessary for repairing or operating the road, or may, by receiver's certificates, anticipate the future income for that purpose; and it would be difficult to draw a distinction between the principles under which a court authorizes a receiver to make necessary expenses for operating a railroad and keeping it in a safe condition, and the principles embodied in the language quoted from the opinion of the supreme court, relating to sundry expenses of the railroad companies incurred before the appointment of receivers. The cases where the power to issue receiver's certificates has been denied have been where they were to be issued, not for the *preservation*, but for the *improvement* of the property. Courts have in some instances gone even to the length of authorizing permanent improvements where the circumstances of the case called for the exercise of the power; but the opinion of the supreme court in *Fosdick v. Schall* does not go that far. It is enough for us that no court has ever refused to issue such certificates when it was necessary for repairing the road or keeping it going as a safe road; and if it may authorize such expenditures by a receiver, it may pay them if they have been made by the company before the appointment of a receiver.

Mr. Jones, who cannot be said to lean against the rights of bondholders, in his work on Railroad Securities, sec. 537, says: When it is necessary for a receiver to raise money for the purpose of repairing or operating a railroad, the court may authorize him to issue negotiable certificates of indebtedness, which shall constitute a first lien on the property or the proceeds of it, and shall be redeemable within a limited time, or when the property is sold by the court. And at section 542, he says: The court has power, while in possession of property, to protect it from loss and destruction, and to preserve it in the condition in which it was received; and for this purpose it may authorize the expenditure from the property itself of whatever is absolutely necessary for its preservation, and may do this as against any and all parties interested.

These propositions are fully sustained by the cases of *Kennedy v. St. Paul*, etc., R. Co., 2 Dill., 448; *Meger v. Johnston*, 53 Ala., 237; *Hoover v. Mortclair*, etc., R. Co., 29 N. J. Eq., 4; *Jerome v. McCarter*, 94 U. S., 734 (§§ 1453-56, *supra*); *Vermont & Can. R. Co. v. Vermont Central R. Co.*, stated in Jones' Railroad Securities, sec. 536; *Stanton v. Alabama & Chattanooga R. Co.*, 2 Woods, 506. It seems to me that the equity of the petitioners, Sibley, Davis,

Wilson and Evans, falls within the reasoning of the supreme court. In consequence of the non-payment of their wages the employees of the Petersburg Railroad Company were greatly dissatisfied, and it was found that in order to retain their services some provision must be made to satisfy their just claims. Many of them had instituted suits and recovered judgments for their wages. In these suits they had attached property of the company and garnished debts due to it. The officers of the company recognized that, for the efficient operation of the road, it was absolutely essential that these claims should be satisfied. But the company had neither money nor credit.

In this state of things the petitioners made these advances, at the request of the president of the company. For it they received no consideration, and from it they derived no peculiar or private benefit apart from the general advantage accruing to the railroad. The advance enabled the company to continue its operations, and it inured to the general advantage of all concerned in its success. In July, 1875, the alternative presented was, that these advances should be made or the road be judicially sequestered. The petitioners believed it could be extricated from its difficulties, and most probably it could have been but for the discredit and embarrassment of the company produced by subsequent legal proceedings against it. The petitioners did not desire a receiver, and proved their *bona fides* by this advance of their money. But even if a receiver had been appointed in July, 1875, the first thing that would have confronted him would have been these wages. To run the road it would have been necessary to pay them. They had a claim on the road which the court would have provided for; and the company having no money, the first thing necessary for the court to do would have been to authorize the receiver to issue certificates to raise money to pay these wages, *i. e.*, to raise the money which was supplied by these very advances.

As equity regards the substance and not the form, these advances must be treated as preferred debts. The employees had a claim on the road which it was absolutely essential to the interests of all should be satisfied. These petitioners came forward on an appeal from the president, and advanced their private means, as one of the witnesses said, to save the life of the company. They were not speculators, but persons acting for the benefit of a concern in which they had a deep interest. The right of the mortgagees to have the fund realized by the receiver applied to their debts is equitable only; and should not be so enforced as to produce inequity. The court in a proper case is bound to attach to its enjoyment such conditions as are right and just. It would be highly inequitable to refuse to pay advances made for the benefit of mortgagees by men whom the servants of the mortgagees promised to refund out of current earnings.

This court, when it appointed a receiver, might have done so upon the just and reasonable condition that those claims were to be provided for; and, according to the opinion of the supreme court, it may equally do so by an order subsequently made, operating by way of modification of the original order. See, also, *Douglass v. Cline*, 12 Bush, 608. I will therefore make an order granting the prayer of these petitioners.

JESSUP v. ATLANTIC & GULF RAILROAD COMPANY.

(Circuit Court for Georgia: 3 Woods, 441-443. 1879.)

STATEMENT OF FACTS.—Claims were filed in this case by various intervenors for services, materials, etc., performed and furnished before the appointment of

a receiver. The liability of funds in the hands of the receiver for these claims determined.

Opinion by BRADLEY, J.

The trust deeds in this case authorize the trustees, when default is made in the payment of interest on the bonds secured thereby, to enter upon and take possession of the mortgaged property, consisting of the railroad, built or to be built, with all its appurtenances and equipments and machinery connected therewith, and to operate the same and receive all tolls, income and profits thereof for the benefit of the bondholders, after deducting all proper expenses, and in due time, and after proper notice, to sell the road and property.

§ 1555. *The liens of material-men, laborers and the like must be perfected according to state law in order to obtain preference of payment.*

The laws of Georgia give no liens upon mortgaged property superior to the mortgage lien, except for the taxes due on the property and to laborers, mechanics and material-men who take the proper steps to protect their liens. We think that we should follow the law and practice of the state in this respect. But in requiring the liens to be perfected, we do not mean that the parties should have taken any judicial steps in order to enforce their liens, but that they should have performed those preliminary requirements which entitle them to a judicial enforcement of the liens. If the statute requires the lien to be recorded, that should have been done in the time required by law. If it requires an oath to be taken verifying the lien, that should have been done within the time required. Having done this, then application to this court may stand in lieu of proceedings in the county courts or otherwise.

§ 1556. *Claims on insolvent railroad companies by connecting roads are unsecured debts.*

We think, also, that the claims for moneys received by the Atlantic & Gulf Railroad Company on through fares and freight, for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts which stand on the same footing as other unsecured debts of the company. A general clause may be inserted in the decree declarative of the views which we have expressed, and the liquidation and ascertainment of the claims themselves which, according to our views, are entitled to a lien, may be reserved for further order upon the foot of the decree now to be made. In drawing the decree the directions for a sale of the property should provide for payment into court of a sufficient sum to meet the liens that are prior to the mortgages and to defray all expenses and charges of litigation. The counsel in the cause will be able to approximate the amount required for this purpose. If the amount specified should be insufficient, the deficiency would have to be made up by the purchasers of the road in case they are allowed to pay their bids in bonds of the company. The bonds can remain uncanceled until the matter is determined.

DUNHAM v. RAILWAY COMPANY.

(1 Wallace, 254-269. 1863.)

APPEAL from U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—The mortgage in this case was executed by the railway company to Dunham as trustee, to secure certain bonds. The company was empowered by the laws of the state to borrow money and issue bonds for the purpose of completing and operating its road, and, also, to mortgage its property and franchises for such purpose. It was decided to construct the road

by sections, but only one section, a distance of twenty-eight miles, was built. The loan was apportioned upon the several sections, the sum of \$300,000 being apportioned to the section built. The mortgage purported to convey the whole road, built and to be built, together with superstructures, tracks, bridges, appurtenances, etc. The only bonds issued were for the \$300,000 on the section of the road built. It was alleged in the bill that the company had made default and that it had made another mortgage to Dunham to secure another sum of \$1,000,000. It seems that the bonds for this latter sum had not been issued. A decree *pro confesso* was taken against the company, and Walker, a builder of the road, and Ludlow, the assignee of Walker under the state insolvent laws, filed separate answers. Their defense was to the effect that Walker, under a contract with the company, built that portion of the road that was built, at his own expense, and at a cost of \$302,000; and that he was to receive a certain number of the first and second mortgage bonds and retain absolute control of the road until he was paid. This contract was made on November 28, 1855, and the mortgage on February 20, 1855. The mortgage was recorded on March 9, 1855. The court directed a sale of the road, the proceeds, after payment of costs, to be paid to Ludlow in preference to the mortgage.

Opinion by MR. JUSTICE CLIFFORD.

1. Appellant contends that the proceeds of the sale of the road, after paying the cost of suit, should be ratably applied towards the payment of the first mortgage bonds and the overdue interest warrants under the same, instead of being applied, as directed in the decree, to the payment of the judgment in favor of the contractor and to the overdue interest warrants, to the exclusion of the principal of the bonds. Appellees insist that inasmuch as the contractor completed the road by the expenditure of his own means, under a written agreement with the company, purporting to secure to him the possession of the road and its earnings, he has a right to retain the same, and that the proceeds of the sale should be applied to the liquidation of the indebtedness of the company to him until the same is fully discharged. Possession of the road having been delivered by the company to the contractor for the purpose of completing the road, the respondents insist that he, the contractor, having never surrendered the possession, now holds a prior lien upon the road, and in equity is entitled to a priority in the distribution of the proceeds of the sale. Attempt is made to sustain that proposition, chiefly upon two grounds. 1st. It is insisted that the mortgage to the complainant, as trustee for the benefit of the bondholders, does not hold any part of the road except what was built at the time the mortgage was executed and delivered. 2dly. They contend that a contractor, expending money and labor in building a railroad, as in this case, under an agreement with the company that he shall have the possession of the road until he is fully paid, thereby acquires a priority over an elder valid mortgage.

§ 1557. *Mortgage given by railroad company on "the road built and to be built" is prior to lien of contractor on portion subsequently built.*

Neither of the propositions is based upon any peculiar circumstances in the case, nor are there any such disclosed in the evidence to take the case out of the general rules of law applicable to similar controversies respecting railroad transactions. Nothing of the kind is pretended, and it is obvious that the pretense, if set up, could not be sustained, as there is nothing in the circumstances to distinguish the case from the ordinary course of events in that department of business. Certain persons procured a charter for a railroad, and

wanting means to complete it, decided to issue their bonds as a means of borrowing money, and mortgage their road to secure their payment. Railroads, it is believed, have frequently been built in that way, and if it be true that such a mortgage holds no part of the road except what was completed, it is quite time that the rule should be distinctly announced, that the consequences of further misapprehension upon the subject may be avoided. But we are not prepared to adopt any such rule, or to admit that the proposition has any foundation whatever in the facts of this case. On the contrary, we hold it to be clear law that the complainant, as the trustee for the benefit of the bondholders, took "the road built and to be built," together with all the other matters and things specifically enumerated in the mortgage. Express authority was given to the company by the law of the state to borrow such sums of money as they might deem necessary for completing and operating their railroad, and to issue and dispose of their bonds for any amounts so borrowed. What they wanted was money to enable them to make the road, and the authority was expressly given to authorize them to mortgage it for that purpose. Authorized as this mortgage was by express statute, the case is even stronger than that of *Pennock v. Coe*, 23 How., 128 (§§ 1305-1309, *supra*), where the rights of the parties depended upon the general rules of law.

Terms of the grant in that case were, "all present and future to be acquired property," and yet this court held, in a controversy between the grantees of a first mortgage and the grantees of a second mortgage, that the first took the future-acquired property, although the property itself was not in existence at the time the first mortgage was executed. While enforcing the rule there laid down, this court said there are many cases in this country confirming the doctrine, and which have led to the practice extensively of giving that sort of security, especially in railroad and other similar great and important enterprises of the day. Several cases were cited by the court on that occasion which fully support the position, and many more might be added, but it is unnecessary to refer to them, as the one cited is decisive of the point. 2 Story Eq. Jur. (8th ed.), §§ 1040, 1040a.

2. Failing to sustain that position, the respondents, in the second place, rely upon the terms of the subsequent agreement made by the company with the contractor, for the completion of the route. Counsel of respondents concede that the mortgage to the complainant was executed in due form of law, and the case also shows that it was duly recorded on the 9th day of March, 1855, more than eight months before the contract set up by the respondents was made. All of the bonds except those subsequently delivered to the contractor had long before that time been issued, and were in the hands of innocent holders. Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and, in that point of view, the case does not even show a hardship upon the contractor, as he must have known when he accepted the agreement that he took the road subject to the rights of the bondholders. Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the over-

sight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied.

Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but suffice it to say that, in the view of this court, the argument is not sound, and we think that the weight of judicial determination is greatly the other way. *Pierce v. Emery*, 32 N. H., 434; *Pennock v. Coe*, 23 How., 130 (§§ 1305-1309, *supra*); *Field v. Mayor of N. Y.*, 2 Seld., 179; *Seymour v. Can. & Niag. Falls R. Co.*, 25 Barb., 286; *Red. on R'ys*, 578; *Langton v. Horton*, 1 Hare Ch., 549; *Matter of Howe*, 1 Paige, 129; *Mitchell v. Winslow*, 2 Story, 644; *Domat*, 649, art. 5; 1 *Pow. on Mort.*, 190; *Noel v. Bewley*, 3 Sim., 103.

§ 1558. *By terms of mortgage, principal becomes due on default of interest.*

Decree of circuit court not only gives precedence to the judgment of the contractor, but also to the past-due coupons or interest warrants over the principal of the bonds. Complainant objects to the decree in both particulars, and we think his objections are well founded. Terms of the mortgage are, that in case of default in payment of interest or principal of any bond, and a sale or other proceedings to coerce the same, all bonds which shall be a lien in common therewith, and the interest accrued thereon, shall be considered, and shall in fact be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of said sale or other proceedings. Reference is made to another clause of the mortgage, where it is said that in no case shall the principal of any bond be considered due until twenty years after its date; but it is quite obvious, we think, that the latter clause was inserted merely to exclude any possible inference that a bondholder under any circumstances might bring an action for the principal of a bond before it became due by its terms. Such was, doubtless, the intention of the provision, but it does not in any manner conflict with the suggestion already made, that in case of sale on account of default of payment of interest or principal, that all the bonds of the same class, and the interest accrued thereon, shall be entitled to a *pro rata* dividend of the proceeds. The decree of the circuit court is, therefore, reversed with costs, and the cause remanded for further proceedings in conformity with the opinion of this court.

MR. JUSTICE DAVIS dissented.

SKIDDY v. ATLANTIC, MISSISSIPPI & OHIO RAILROAD COMPANY.

(Circuit Court for Virginia: 3 Hughes, 320-331.)

STATEMENT OF FACTS.—This was a bill in equity, filed by the trustees in a mortgage executed by the Atlantic, Mississippi & Ohio Railroad Company, a Virginia corporation, which had been created by the consolidation of several similar corporations. There were antecedent incumbrances on the railroad property, created by the constituent corporations before their consolidation. These are called the "divisional" mortgages, and the mortgage to complainants is the first conjoint incumbrance of the consolidated company. The bill charges the issuance of bonds and coupons, the non-payment of interest coupons, the insolvency of the corporation, and the peril of the bondholders. The bill prays for a foreclosure of the mortgage, and pending that the appointment of a re-

ceiver. Answers were filed, and after a preliminary hearing two receivers were appointed. Application was made for the payment of past-due wages to employees of the railroad, and after argument the following order was entered:

§ 1559. *Overdue wages ordered to be paid to employees.*

Upon the petition of the receivers heretofore filed in this cause, it is ordered and decreed that the said receivers be, and they are hereby, directed to pay, whenever in their judgments such payment is expedient, the arrearages of wages due the employees of defendant company, who have not assigned their claims, beginning with the pay roll for the month of July, 1875. The said payment is to be made according to the pay rolls this day filed with the clerk of this court, and to the persons therein designated. All other questions touching the subject of this order are reserved.

HUGH L. BOND.

RO. W. HUGHES.

Application was made for the payment of assigned labor claims and claims for materials and supplies previously furnished.

§ 1560. *Overdue wages assigned to third persons not entitled to payment; nor bills for supplies and materials.*

Opinion by BOND, J.

There have been filed a large number of petitions in this cause, asking that the receivers be required to pay out of the earnings of the Atlantic, Mississippi & Ohio Railroad, for materials furnished to the company shortly before the appointment of receivers, and for wages due to the employees of the company before the receivers took possession of it. The petition of George Faris is, to be paid the amount of judgment recovered against the company, upon which execution was issued and levied upon personal property belonging to it. We have thought it unnecessary to set out all the petitions, and have selected these as types of the whole. Whatever is the equity of these is the equity of all, and what is done by the court with them will be the disposition of the others. At the time the materials which the petitioners furnished the company were purchased, the railroad corporation was indebted several millions of dollars, to secure which indebtedness it had long antecedently executed and recorded a mortgage, pledging its whole property, of every kind and description. This sum of money was borrowed and loaned upon the express condition that this mortgage should be so made. When the mortgagees parted with their money they took the precaution to require this security for its repayment.

When the parties who now seek payment for the materials furnished to the company by them parted with their goods to the company, they did not take the precaution to require any security. Were the court now to grant their petition, and out of the mortgaged property, pledged to pay a particular debt, pay them, it would substitute the unsecured for the secured debt. If these simple contract debts for goods, furnished on the credit of the company alone, are to be paid before the mortgage debt is paid, they stand on a better footing than the secured debts. If they are to be paid *pari passu* with the mortgagees, then the mortgage is valueless. It is suggested that these claims for materials furnished stand in a different position from the general floating or unsecured debts of the company, because the contracts were made just before the commencement of these proceedings, and the material has been used by the receivers. This can make no difference. All material furnished the company, and for which it is indebted and which was not consumed in the use, is now used by the receivers. Whether a debt be an hour or a year old can make no difference in its equity. It stands

in the same relation, no matter what its age, to the secured debt of the road. To allow one of these debts to be paid out of the mortgaged property is to allow all. That is to say, the unsecured debt would be paid *pari passu* with the secured debt, and in a court of equity it would come to pass that the only persons who had no security would be those who had taken it.

Certain of these petitions are on the part of former employees of the road to whom wages are due for work done before the receivers were appointed. Some of these claims are presented by the employees and others by their assignees. So far as this case is concerned, there can be no distinction; their equities are the same. It is impossible to discover upon what better footing these claims stand than do those of the material-men. They are simple contract debts of the company. The labor of the employee was bestowed upon the materials furnished, and both labor and goods became the property of the company. There can be no distinction in law or equity between a debt due for labor or for goods sold and delivered. But in order to set up some sort of equity in this behalf, it has been argued that the mortgagees had a right to take possession of the road so soon as default was made in their mortgage, and that not having done so, they suffered the defendant company to contract these obligations, which were for their benefit. It has never been decided yet that because a mortgagee does not immediately pounce upon his security, foreclose, take possession and sell, that he impairs the obligation of his lien. If a man have a mortgage on a large stock of goods of a retail merchant, and default is made, it will hardly be contended that unless possession is at once taken the lien for wages of the mortgagees, clerks and employees is superior to the mortgage.

These petitions present cases of great hardship, but the contract for hire was with the company, not with these mortgagees, and these claimants are entitled to be paid, as are the material-men, out of anything the company has unmortgaged. There was, at the time of these contracts for labor and material, no law of Virginia giving a statutory lien. The only lien pretended to be set up is an alleged equitable one. That the opinion of the legislature was that no such lien existed is plain, from the fact that by the recent act of March 21, 1877, chapter 200, an effort has been made to give such a lien as that set up in these petitions. Like that of George Farish, the executions in these cases were levied upon mortgaged property. The creditor is entitled to whatever interest may result to the company after the mortgage debt upon the road or the locomotive taken in execution is paid. He is entitled to nothing more. When these proceedings are matured, the assets of the company will be marshaled and sold, the liens and priorities of creditors ascertained, and the proceeds of sale will be distributed according to the rules of equity, among such as have proved their debts. These petitioners must await that event.

HUGHES, J., concurred.

ON PETITION FOR LEAVE TO THE RECEIVERS TO ISSUE TEN YEARS' EXTENSION CERTIFICATES.

Opinion by HUGHES, J.

The circuit judge was willing at once to sign the order asked for by the complainants on the 24th inst.; but we concurred in thinking it well to take a few days for consideration, and I am now ready to state the grounds of the action of the court.

§ 1561. *Ten years' interest certificates ordered to be issued.*

The petition of the trustees of the consolidated mortgage sets forth that certain bonds secured by certain mortgages on the divisional roads of the defendant company, and amounting in the aggregate to \$866,944, are past due, or will soon mature; and that the holders of a large portion of them are content to forbear the payment of the principal so due, and would do so if relieved from the necessity, when collecting the semi-annual interest accruing and to accrue, of transmitting their bonds to the places of paying interest, and having each payment indorsed upon the bonds. The petition, therefore, asks, as a convenient means of making and evidencing these payments, that the receivers be allowed to prepare coupons for the payment of future interest, to be attached to such bonds as may be held by persons willing to forbear the collection of the principal due them, and to continue to receive the semi-annual interest which their bonds now carry.

The class of bonds and obligations past due or soon to fall due, to which the petition refers, are as follows:

- \$157,000 of the 7 per cent. first mortgage bonds of the Norfolk & Petersburg road which were due in 1863, and were extended to 1873, and
 - \$306,000 of the 8 per cent. first mortgage bonds of said road which were due in 1868 and were extended to 1877 — the two making \$463,000 of first mortgage bonds of that road, past due.
 - 5,000 of 6 per cent first mortgage bonds of the Virginia & Tennessee road due since December, 1872.
 - \$60,500 of 8 per cent. bonds, called "*interest funding bonds*," issued to Decatur H. Miller, December, 1869, to take up and extend coupons of the Virginia & Tennessee road then due, and secured by deed of trust on that road.
 - \$133,444 of 8 per cent. bonds issued in December, 1873, by the consolidated company in extension of the time of paying certain coupons of the several divisional roads then about falling due, the unpaid coupons standing as a pledge for the security of these bonds issued in their stead, which will fall due January, 1879.
- \$866,944** being the total amount of the bonds to which the petition refers.

The allegations of the petitioning trustees are that "the holders of a large proportion of the said liabilities are willing to extend the time for the payment of the said principal;" and that "the interest of all parties will be promoted by an order of court authorizing and directing the receivers to prepare and issue to such holders of said obligations as are or may hereafter be willing to receive them," such certificates as are described in the petition. It will be observed that the extension contemplated is but a repetition of what was done during the defendant company's regime on frequent occasions, without objection from any source, and to the common advantage of all parties interested.

No objection is made to the prayer of the petition by any class of bondholders, a large number of whom are represented to be in favor of the arrangement. The bondholders are the only persons substantially interested in the proposal, and are the class who are naturally most intelligent, alert and sensitive on the subject. The only objection comes from certain of the trustees of mortgages resting on the divisional roads, especially the trustees under the first and second mortgages of the Norfolk & Petersburg road. But the interest of trustees, in such a question as this, is merely nominal, and their powers but little more than perfunctory. Under a proper sense of the responsibility of their position it is perfectly competent for them to file formal objections to the prayer of the petition, and submit the whole matter to the judgment and discretion of the court. This it was no doubt their duty to do, and they have performed that duty; but, as the question presented to the court is more one

of interest and of policy than of law, if the bondholders, who are the persons really interested in the proposal, consent, and no shareholder objects, the court would be slow to thwart the wishes of the former, at the instance of trustees having no substantial interest, and who are but formal parties to the record.

If any of the divisional bondholders desire to forbear the collection of the principal of their bonds, why should they be required by their trustees to foreclose? If, in forbearing, they desire a convenient and usual process of collecting the instalments of interest due them to be provided, then what right have their trustees to object? If this road were still in the hands of its company there could be no doubt of the right and power of the company (a right which it frequently exercised) to extend the time of paying such bondholders as were willing to forbear, and to devise a convenient means whereby such bondholders could collect and make receipt for the semi-annual interest falling and to fall due. And but for the fact that this road is in the hands of receivers, who are the servants of the court, and can do nothing except by its authority, this petition would be unnecessary. It has been presented out of abundant prudence; and its prayer is simply that the receivers may have leave to adopt a convenient and usual means of enabling those bondholders, who wish to forbear the collection of the principal due them, to collect and give receipt for the interest as it shall fall due. The coupons proposed by the trustees are to cover semi-annual instalments of interest for ten years; with the proviso (to be embodied in them) that they are to be delivered up whenever they shall be called in, either by the receivers or by any company succeeding to them in the control of the road. The bondholders who apply for them will be bound to an extension, for ten years, of the time for demanding the principal of their bonds. But the receivers, and the company succeeding to them, will be bound to no time of extension at all, and indeed nothing at all, except the payment of such instalments of interest as shall fall due while the coupon certificates proposed shall be outstanding. No change of securities or of the rights of any party in interest can be effected by the proposition in any degree; except only that the bondholders who choose will be allowed to relinquish for a time their right to the immediate payment of the principal of their bonds.

As there can be no change in the rights of parties, except such as those bondholders who choose may voluntarily submit to, the only question for the consideration of the court is, whether it is for the interest of all concerned to permit the transaction proposed. The effect of the transaction will be to satisfy those bondholders who have a present right to the immediate foreclosure of certain divisional mortgages resting upon parts of the line of the Atlantic, Mississippi & Ohio road by a separate sale of those divisional roads. By satisfying them the court will diminish, and, I trust, remove, the danger of separate sales of parts of the line, and prepare the way for a sale of the road as an entirety. The court feels bound to employ every means in its power and within the scope of its jurisdiction, to prevent any disintegration of the line.

Its custody of the road has not so far been prejudicial to any interest connected with it. Leaving out of view such injury as may have been caused by the floods of the last week, the road is in better condition than ever before, while the floating debt left by the company has been diminished. During the custody and management of its receivers the bonds secured upon the divisional roads have in every instance appreciated very materially, if the court may be presumed to take note of the quotations of the markets as made known by the

public prints. The bonds of the second mortgage on the Norfolk & Petersburg division have appreciated since June, 1876, from *sixty-eight cents* in the dollar to *seventy-eight cents*. The bonds of the first mortgage of the Norfolk & Petersburg divisional road have appreciated since June, 1876, from about *eighty-six cents* in the dollar to about *ninety cents*. Certain other of the bonds secured on divisional roads have risen as much as thirty cents in the dollar since June, 1876, when the receivers took charge of the consolidated line. It is also true that there has been no depreciation in market value during this period of any class of bonds secured on the divisional roads. The court, therefore, being aware of these facts, does not consider that it acts to the prejudice of any party in interest in adopting any measure tending to prevent and avoid the separate sale of any division of the road in foreclosure of divisional mortgages, whereby it may insure a sale of the line as an entirety. It feels bound to pursue a policy looking to the preservation of the integrity of the road from Norfolk to Bristol by many considerations.

If the line were broken into several parts each would be comparatively valueless. The experience of all railroad management, in this country and elsewhere, is, that lines of road broken into parts, under disjointed management, cannot be conducted with economy, efficiency or success, and are incompetent to compete with rival lines for the business of the country. If the Atlantic, Mississippi & Ohio Railroad were broken at Lynchburg, in its ownership and management, the roads east of that point, having little travel, would be reduced in their business to a very diminutive local trade, and, if sold with their feeble revenues, would not pay the mortgages resting upon them. If the road from Lynchburg to Bristol were detached from the line, in ownership and management, it would cease to be a part of a great avenue for the heavy products of the western country, and would be dependent for its chief resources upon travel and light express freight, which it would carry as part of a north and south line. Running through a mountain region, it would speedily become, under the heavy expenses constantly necessary to maintain it, as feeble in its revenues and resources as when it was first consolidated in management with the roads to Norfolk.

As a consolidated line of east and west transportation for the trade of the west, this line of road has been growing in importance and public consideration more and more each year, ever since its consolidation. Western trade, the first avenue of outlet for which was the Erie canal, and which afterwards sought the lines of road constructed parallel and near to that work, has been tending for several years to lines on lower latitudes and shorter routes. The large business of the Baltimore & Ohio road is a striking exemplification of this tendency. The growing magnitude of the business of the Chesapeake & Ohio Railroad is another evidence of the strong tendency of western trade to avoid frost and long lines, in favor of more southern and shorter lines. The present great and growing business of the Atlantic, Mississippi & Ohio road is a further and conclusive proof that western trade is seeking the shortest lines across the continent to the Atlantic ports. Whether western produce seeks to reach the Atlantic seaboard from Memphis, or St. Louis, or Louisville, or Omaha, or Chicago, the line of the Atlantic, Mississippi & Ohio road presents the shortest and, with some inconsiderable expenditure on parts not yet completed, can be made the most eligible of all the great east and west lines of railway, except probably that of the Chesapeake & Ohio road. It has the advantage of resting upon tide-water in the east, near the foot of Chesapeake Bay, whose outlet

to the ocean is on the same latitude *vis-a-vis* with the straits of Gibraltar, and of terminating at the first safe port north of the dangerous Carolina coast. Its western terminus at Bristol is a converging point for lines of railroad coming up from all parts of the southern and southwestern states, and from the Mississippi at Memphis and St. Louis. With a small expenditure in the direction of Cumberland Gap or of New River, Bristol or Central Depot would become the focus also of lines of railway pointing from Louisville, Cincinnati, Omaha and Chicago, to the seaboard. When a saving of two hundred miles in distance is continually offered to the trade of a vast region of country, local influences and artificial contrivances cannot, for any very long period of time, prevent it from seeking the shorter routes. The *prorating* distance from Norfolk by sail vessels to Liverpool being only five hundred miles, and to New York only seventy-five miles, and by steamers to Liverpool only one thousand miles, and to New York only one hundred and twenty-five miles, this tendency of trade to find outlet to the ocean by way of Norfolk over the Atlantic, Mississippi & Ohio road from beyond Bristol must continually strengthen, unless unfortunately the road should be broken into parts.

The disintegration of the line of the Atlantic, Mississippi & Ohio road at Lynchburg would be fatal to its value as an east and west avenue of produce moving to market from the west and southwest, and of merchandise returning to those regions from the east, the north and Europe. The Virginia & Tennessee division would degenerate into a mere road of rapid transportation for light goods and passengers between north and south. The Southside and the Norfolk & Petersburg divisions would lose their present through trade from the western and southwestern states, and speedily degenerate into the unimportant local works which they were within the memories of persons not yet of matured age.

Paramount, however, to the mere pecuniary interests of the bondholders and shareholders in this line of road and its several divisions, are the public interests connected with it. The court is not unmindful of the fact that the commonwealth of Virginia, in bestowing an expenditure of seven or eight millions of dollars upon the roads constituting this line, intended them to be more than local works, and especially intended that the Virginia & Tennessee road should be more than part of a line of north and south transportation for travel and light freights. This character of road was scarcely within the contemplation of the state. Her intention was to construct a line of east and west transportation that would bring the staple products of the northwest, the west and southwest across her territory to her principal cities, and at Richmond and Norfolk would place her merchants in connection with the large commercial operations of the world. The court keeps constantly in view this cardinal policy of Virginia, and has every assurance that the foreign bondholders are desirous to pursue, advance, secure and render permanent this policy. As far as it lies within its jurisdiction, and as it may be done within the scope of its proper functions and may not impair the rights of parties in interest, the court will discourage separate accounts and separate sales of foreclosure in this suit; in order that, after disposing of the many interlocutory motions and petitions before it, it may enter a decree in foreclosure directing a sale of the whole line as one work under which this line of road may be rendered permanently intact and indissoluble. An order of court is, therefore, entered in accordance with the prayer of this petition.

PETITION BY DUTCH BONDHOLDERS TO BE MADE PARTIES.

Opinion by BOND, J.

The defendants of record in this cause on the 9th day of September, 1871, executed a mortgage of their railroad and effects to the complainants to secure the payment of certain bonds mentioned therein and the interest thereon as it fell due. There was default in the interest, and the complainants, the mortgagees, brought suit to foreclose the mortgage. Everything has proceeded regularly from time to time without complaint on the part of the *cestuis que trust* under the mortgage until the filing of the petition now under consideration, which is a petition by certain of the bondholders alleging that they should be made parties to the suit. The reasons given for this request are: 1st. That the petitioners are a committee known as the Amsterdam committee for the protection of the rights of the consolidated bondholders of the defendant company, by which is meant that they are bondholders under the mortgage to the complainants or their representatives.

The petition then alleges that these proceedings on the part of the trustees were commenced by a minority of the bondholders, but it does not seek on that account to dismiss them, nor does it allege that the proceedings were taken against their objections or wishes. They allege that for the protection of their interests they have appointed counsel to represent them in this country, and that they hold one-half of the bonds, or nearly so, under the mortgage above mentioned, and that not being parties to the suit upon record, they do not receive notice of the proceedings as they go on from the trustees or their counsel, and they pray that they may be made parties to the suit in order that they may take part in the proceedings in the cause as it progresses from time to time. This petition was filed on the 21st of December, 1877, and was signed by James C. Parrish, who was not alleged in it to be a bondholder nor the counsel for any such in this court.

Upon April 4, 1878, another petition was filed, amending the first, already referred to. In this amended petition it is alleged, first, that certain proceedings have been had heretofore between the bondholders represented by a committee of the Amsterdam committee, with a like body representing English bondholders at London, and after a long recital of interviews between the parties of bondholders, the one in England and the other in Amsterdam, respecting the reorganization of the defendant company, it states that they could not agree upon a plan for such reorganization, and that the English bondholders had the aid of the counsel of the complainants in drawing up and advocating their plan of reorganization in opposition to that of the German bondholders; and it further alleges that the English bondholders, through their agent, had advertised that their plan of reorganization had the approval of the receivers of the road and of the counsel of the trustees of the mortgage, the complainants in this suit. It is alleged that the agent of these European bondholders applied to the trustees under the mortgage to be supplied with copies of the papers filed from time to time in the cause, and that they have not done so, and have refused so to do. And it is charged that the trustees are carrying on the suit in furtherance of the plans of the English bondholders without reference to those of the German bondholders or their committee, and the prayer is that they may be made parties to the suit.

§ 1562. *The trustees in a railroad mortgage are the only necessary and proper parties to represent all the bondholders.*

It is nowhere alleged in this petition, original or amended, that the trustees

or their counsel, so far as this suit has progressed, have not acted for the benefit of all the bondholders under the mortgage without partiality or prejudice. No single act of the trustees in the conduct of the suit is referred to as detrimental, or in antagonism to the interest of the petitioners. Nor is the court asked, on account of their negligence, fraud or incompetency, to remove them and give to the petitioners or the bondholders the conduct of the suit. The sole objection is that among the bondholders themselves there has arisen a dispute respecting the reorganization of the defendant company, and that the trustees or their counsel have, in consultation with such bondholders as they have had access to, given preference to the plan of one party of the bondholders rather than to that of the other. No allegation is made, however, that this preference has been expressed in any proceedings taken in court, or that it has influenced in any way the conduct of the suit on the part of the trustees.

Of course in every cause in equity all the parties in interest must be made parties to the suit, but in the case of *Richards v. Chesapeake & Ohio Railroad* this court has already held that to foreclose a mortgage given by a railroad company to trustees to secure the payment of bonds and coupons mentioned in it, as they mature, the trustees are the only necessary parties to the suit; that the proper parties to be defendants are the parties who hold or claim in opposition to them is equally clear. In order, therefore, to disturb the rights of the trustees to bring and conduct this suit, in which they represent every bondholder known to the mortgage, at the instance of such a bondholder, it must be shown to the court that the trustees have done, or contemplate doing, in the cause some act which will be detrimental to the interest of such bondholder or set of bondholders. This is not averred or proved in the matter of this petition. It is alleged that the trustees have approved a plan of reorganization proposed by one set of bondholders rather than another. But the court cannot consider any proceedings among the bondholders or trustees which are not the subject of proceedings in this court and this cause, so that until it is proved, as it is not now asserted, that the trustees under this mortgage ought not, by reason of negligence, fraud or incompetency, to conduct this suit, the petitioners have no right to ask that they be appointed plaintiffs to share in such conduct, or to conduct it wholly themselves. I know of no instance in a case of foreclosure of a railroad mortgage where the trustees have been displaced or required to take an adjutant bondholder to assist in the conduct of a suit, except where some malfeasance or incompetency is alleged on the part of the trustee. But the petitioners ask in the petition, as amended, at once to be made parties, whether plaintiff or defendant, and cite numerous instances where the courts have allowed bondholders of different interests or classes who, though represented by the same parties, had, or thought they had, different interests to be defended or asserted from others represented under the same mortgage or deed of trust. It seems to me none of these cases apply to the matter of this petition. There is but one class of bondholders under this mortgage. The interests of each bondholder are identical. Some of the bondholders have moved the action of the trustees and others have not. The one are active bondholders and the others are inactive. Some of them are represented by one committee and others are represented by another, but this does not constitute a class of bondholders; their interests are identical, and one might as well say that because bondholders under the same mortgage were represented in court by different counsel that constituted them a different class

of bondholders, and that they were, because represented by different persons, entitled to be parties to the suit.

The moment a petition is presented to this court by any party interested in the conduct or result of this suit, which alleges that these trustees are derelict, incompetent or partial in any action they propose to the court, that petition shall be, as it is entitled to be, respectfully heard; and if, after consideration of the proof, it shall be ascertained that the petitioner is correct, the trustees will be removed, and the bondholders allowed to conduct the suit in their own way without the intervention of trustees, except so far as they may be nominal parties to it.

And these petitioners who now ask to be made parties, plaintiffs or defendants, while we refuse them the conduct of the suit or to be made parties to it, are at liberty, whenever a motion is made in this cause which in their judgment is hostile to the interests of their clients, to oppose it, as they have done in this instance, by petition; if the circumstances show bad faith on the part of the trustees, they will be removed, and others appointed to conduct the suit. This serves all the purposes of this petition, except that the bondholders represented, or alleged to be represented, by the signers of it may not have the right of appeal from any decree of the court which they think unfavorable to their specific and personal interests, unless made parties to the record. Under those circumstances, when they arise, we think any bondholder who feels that his rights are injured by the action of the trustees, or of the court, has a right to be put in such position, either as plaintiff or defendant, as will enable him to have them adjudicated by an appellate court. That case is not presented to us by this petition, and the prayer of it is, therefore, in this instance, refused.

Dissenting opinion by HUGHES, J.

I have differed so seldom with the presiding judge (whose opinion is the law of the court) that it is with great reluctance that I now express a dissent from his ruling. In the result at which he arrives in the decision just read I concur substantially, as the petitioners can gain all they now desire under the ruling of the court. I think that the bondholders who did not unite in directing the trustees to move in this cause for foreclosure may, of mere right, be made parties *defendant*. In considering the petition of the Dutch bondholders, I have been content to confine my view to the terms of the trust deed securing the bonds of the consolidated company. A provision of that deed authorizes the trustees to proceed for foreclosure at the direction of one-fifth of the bondholders secured. It thereby classifies these bondholders into those who move in the suit and those who fail or refuse to move. It has never appeared affirmatively in this cause how many of the bondholders united in instructing the trustees to proceed for foreclosure. That question, I believe, went by default at the commencement of the suit, which began (before suit was entered) with a consent order for the appointment of two receivers. This consent was afterwards withdrawn. It now appears that the holders of about two millions of the bonds are represented by the trustees; that the holders of another two millions are not in sympathy with the trustees, and are here petitioning for a standing in court with a view to looking after their own interests; and that the holders of still another million and a half of bonds are taking no part in the proceeding one way or the other. Thus the petitioners are neither actually nor presumptively complainants in this cause. Inasmuch as the trust deed itself classifies the bondholders into those by whose instructions the trustees

are acting, and those who may see reason to dissent from that action; and inasmuch as actual objection to the policy of the trustees is made by the holders of the imposing amount of two millions of bonds, it seems to me that the court is bound to recognize the classification of bondholders made by the deed itself, and of mere right to let into the cause in the person or persons of some authorized representative as parties defendant, in the manner prescribed by rule 48 in equity, the petitioners for the Dutch bondholders.

I should prefer that this should be done, and I have no doubt the petitioners themselves would prefer it to be done, under their original petition, in which they pray to be admitted as of mere right. This would relieve them from the necessity, which is doubtless an unpleasant one, of formally arraigning the trustees before the court for any sort of dereliction, and I suppose, if they were allowed, they would withdraw their amended petition and stand upon the mere right of being parties to the cause of the class contemplated by the trust deed, who did not move as plaintiffs and who are not in sympathy with the policy of the trustees. None but those bondholders who gave instructions to the trustees to proceed for foreclosure are technically or theoretically complainants in this cause, and I see no technical irregularity and no violation of the theoretical or logical proprieties of equity practice in allowing to a large class of interested persons who, under the terms of the trust deed, cannot be presumed to be represented by the trustees or to be parties complainant in this suit, either in law or fact, a standing in court as parties defendant.

ON THE PETITION OF D. K. STEWART.

Opinion by HUGHES, J.

The two statements of agreed facts show the following case: In 1854 the board of directors of the Virginia & Tennessee Railroad passed a resolution authorizing the issue of stock, to be called "preferred stock," interest (not dividends) on which was agreed to be paid regularly, and was agreed to be a lien, or liability of the company, next in grade to the second mortgage bonds, and to take precedence of all indebtedness subsequent to the date of the resolution. The stock was issued and bought with that understanding, but no mortgage or trust deed was executed for the sole purpose of creating this lien. Afterwards, in 1855, the company executed a mortgage, known as the income mortgage, in which the prior lien of the interest on this stock was recognized and protected. Again, just before the execution of the mortgage to the foreign bondholders, John Collinson, their attorney in fact, issued a prospectus, setting forth the debts of the company that would be superior to the said mortgage, and naming the annual interest on this stock among them.

Just after the war, in 1866, the principal of a great deal of the debts of the company became due. Crippled as it had been by the war, the company was unable to meet these obligations at the time, and consequently proceeded to fund them in new bonds at eight per cent. interest. But for amounts under \$1,000 it issued certificates bearing interest at the same rate. A great many coupons for interest past due, on the several mortgages of the road, were also funded in certificates of the same character. In no instance did the company require those who bought these certificates to waive the mortgage lien, nor did the company require them to accept these certificates in absolute *payment* of the coupons, etc., funded. In the prospectus of Mr. Collinson, mentioned above, these certificates were named as one of the debts superior in dignity to the mortgage bondholders, and the plaintiffs' trustees, by buying in a lot of

them for the benefit of their *cestuis que trust*, paying in exchange therefor bonds secured by the mortgage to them, recognized their priority. The questions to be considered, therefore, are (a) whether the interest on the preferred stock ever was a lien; (b) whether, if a lien as between the original parties, the trustees and their *cestuis que trust* have had sufficient notice, actual or constructive, to make it a lien as against them; (c) whether the acceptance of these certificates operated a waiver or satisfaction of the bonds, etc., which were surrendered in exchange for them. I will consider these questions in their order.

§ 1563. *Preferred stock may, by agreement, be a lien as between the parties.*

I have no difficulty in holding that the mode in which this preferred stock was issued created a lien as between the parties thereto. They were issued with the declaration that they were a lien; they were bought on the faith of that representation. A court of equity will raise equitable liens for the purpose of justice, and, if a lien could not be created otherwise, could even make the company execute a conveyance for that purpose. But it is not necessary. A court of equity considers that as done which ought to be done in order more fully to effectuate the intention of the parties. It will, therefore, consider that as a lien which was so intended to be by the parties. And it will do so with special readiness in this instance, where it has been recognized and treated as such without dispute by all parties for more than twenty years.

§ 1564. *Preferred stock a lien as against subsequent mortgagees having notice of agreement that it should have priority.*

I therefore pass to the consideration of the question whether it was a valid equity as against the mortgage to the plaintiffs' trustees. If they take with notice of the equity decided above to exist, they take subject to it. Of course it is not necessary that the holder of every bond secured by that mortgage shall have notice. Notice to their agents, the trustees, and John Collinson is notice to them. I hold that not only their agents had notice, but that probably they themselves had sufficient notice at least to put them on inquiry. This notice was given (1) By the income mortgage, a deed duly executed and recorded; that deed expressly recognizes the lien and the priority of the lien of this preferred stock. It is recognized in terms which admit of no ambiguity. (2) By the prospectus issued by John Collinson, their agent. This was widely circulated, and doubtless no one bought these bonds without reading it. And actual notice given in this manner is as effective as if given in any other. (3) The fourteenth section of the act of incorporation of the Atlantic, Mississippi & Ohio Railroad, providing for the classification, etc., of the debts and stock of the divisional roads, was itself calculated to apprise subsequent incumbancers of the existence of those debts, etc., and to put them on inquiry in protection of their own interests. I therefore hold that the interest on this preferred stock is a liability of the company next in dignity to the second mortgage bonds of the Virginia & Tennessee Railroad, and superior in dignity and valid against the lien created by the mortgage to the plaintiffs' trustees.

§ 1565. *Novation can only arise by agreement.*

Nor have I any more hesitation in deciding in favor of the priority of lien of the registered certificates. I see nothing to show that a novation was contemplated by either party. A novation can only arise in pursuance of an agreement, express or implied. A contract of such a character must be clearly proved, and the burden of proving it is on the one who alleges it. An intention on both sides to enter into such a contract must be proved.

§ 1566. *Certificates for overdue interest not a waiver of the original lien.*

There is no proof of such an intention in this case. That it was not intended by the company is shown by the resolution authorizing the perpetuation of the mortgage lien on the face of the certificates. And surely it cannot be held that such was the intention of those who received these certificates, when they were neither expected nor required to waive their lien. It cannot be held that they waived it voluntarily. It is well-settled law that the acceptance of different or additional evidences of debt is not a satisfaction of the former evidence or security, unless it is clearly shown to have been so intended. A debt is not paid by taking a note for it, nor is a mortgage paid by taking a certificate of indebtedness. A party may receive as many different securities for the same debt as he pleases, and the law will not hold that he waived his former securities, unless it is clearly proved that he did so, and intended to do so. Those, therefore, who claim that these registered certificates were an absolute satisfaction of the mortgage lien to that extent must prove that it was so intended. There is no such proof in this case. On the contrary, everything points to the opposite conclusion. The purpose for which these certificates were issued is plain. At the time the interest or parts of the principal so funded became due, the company could not meet their payment. It wanted time, and in consideration of the time thereby granted it increased the rate of interest, and funded interest as principal. Their consideration, therefore, was not the waiver of their lien. It was the additional time thereby granted. That, it is settled, is a sufficient legal consideration. Such funding operations are of daily occurrence. The Miller covenant was of a similar nature, and since the appointment of the receivers, in the fall of 1877, they obtained leave of court to issue somewhat similar certificates extending the time of payment of some of the divisional mortgages. Until this proceeding, these certificates have always been treated as liens. They were stated to be such by Mr. Collinson in his prospectus; they were recognized as such by the trustees themselves. Unless on the supposition that these certificates were a lien superior to their own mortgage, the trustees would hardly have brought in \$40,000 of them, and surrendered in exchange for them an equal proportion of their own bonds. I, therefore, hold that their lien is not lost, and that they are of the same dignity as the interest coupons, etc., in exchange for which they were issued. Nor can I help feeling that the resistance of the prayer of their petition places the complainants in the attitude of bad faith to the petitioners.

A petition was presented by the Dutch bondholders, praying that the Virginia & Tennessee Railroad Company be made a party before a decree of foreclosure should be entered. The petition was denied. Judge Hughes, dissenting, filed an opinion, which appears below. Graham's executors filed a petition, in which they, as holders of a part of the old stock of the Virginia & Tennessee Company, asked for leave to file a bill against the receivers in a state court. The court refused the permission, saying that the petitioners might sue the complainants as the Atlantic, etc., Railroad Company, but that the receivers were neither necessary nor proper parties to such a suit. Graham's executors thereupon asked to be made parties defendant to the bill, and this was also denied.

The following is the opinion on the Dutch bondholders' petition, delivered by HUGHES, J.:

Among my objections to a decree in the present *status* of the case is the fact

that the Virginia & Tennessee Company is not a party defendant to this suit.

Various sections of the act of June, 1870, providing for the formation of the Atlantic, Mississippi & Ohio Company, contemplate expressly or impliedly the continued existence, for certain purposes, of the several original companies of which the Atlantic, Mississippi & Ohio was formed, after and notwithstanding the formation of a consolidated company. One of the sections provides that no shareholder in an original company should be required to subscribe his shares to the stock of the consolidated company. Another section provides that the joint company shall arrange with the divisional companies for the use of their respective roads and properties upon such terms as the latter may agree to "in general meeting." Another provides that the property and franchises of the divisional companies should vest in the general company only *as* and *when* it shall absorb the whole of their shares respectively. Another keeps alive the divisional companies for the liquidation of their respective debts as long as the claims of their creditors and shareholders shall remain unsatisfied. Another provides that a separate account of the property, receipts and expenses of each divisional company shall be kept, for the purpose of protecting the claims and preserving the rights of their respective creditors and shareholders until they are satisfied. In short, I gather from the whole tenor of the act of 1870, that the legislature contemplated a continued separate existence of each divisional company, for certain important purposes, as long as any of the shares of its capital stock were not subscribed to that of the Atlantic, Mississippi & Ohio Company, and as long as any debt which it had contracted remained.

Moreover, the act of March 6, 1872, entitled An act to complete the organization of the Atlantic, Mississippi & Ohio Company, contemplated the existence of the divisional companies subsequent to the organization of the Atlantic, Mississippi & Ohio Company, and provided a method of extinguishing them by authorizing the condemnation of their stock. It does not appear that anything has been done under the authority given by this act towards extinguishing in the manner which it provides the Virginia & Tennessee Company, and it is a fact of record that that company remains extant as a legal corporation.

But there is nothing of record to show how much of the stock of the divisional companies is outstanding; and it seems to me that this is a matter of sufficient importance to be made the subject of reference to the master commissioner. In order to know, however, with approximate accuracy the state of things in this regard, I have obtained from the secretary of the divisional companies a statement from their books of the number of shares held in them respectively, which have not been subscribed to the Atlantic, Mississippi & Ohio Company. That number is as follows: In the

Norfolk & Petersburg Company.....	43 shares.
Southside Company.....	15 "
Virginia & Kentucky Company	605 "
Virginia & Tennessee Company	3,393 "

Leaving out of consideration the three first-named companies, it seems to me that the court would not be justified in ignoring the existence of the Virginia & Tennessee Company, in which there is outstanding stock representing a capital of \$340,000. Heretofore it has been possible for the court passively to shut its eyes to the existence of this company, but it can no longer do so; for since the last hearing of this cause a petition has been presented by a portion

of the shareholders of this company asking leave to file a bill in a state court (a copy of which is attached to the petition), setting out facts to show its continued existence, and not only impeaching the validity of the organization of the Atlantic, Mississippi & Ohio Company (the defendant in this suit), but attacking as fraudulent the mortgage deed for satisfying which the court is now asked to decree a sale of the railroad which belonged to the Virginia & Tennessee Company. These petitioners are holders of unextinguished stock in a company which the law expressly keeps alive in respect to its debts and to this stock to the amount of several thousands of dollars.

§ 1567. *Necessary parties to bill for foreclosure.*

It is a cardinal rule in equity that all persons should be parties to a suit who have an interest in a complete decree settling the title to the subject of the suit and determining all claims upon it; that is to say, it is an imperative rule that all should be made parties, who, if parties, would be concluded by a complete decree. Our decree in this cause, in order to be complete, must determine the amount of all debts binding the property, and must settle the title of the property as against all claimants. The object of this suit is to procure the sale of a complete title, subject only to the claims of the divisional mortgages. We are to pass a title to the purchaser good against all the world except the lien of the divisional mortgages, and we are to determine the amounts due upon these mortgages. In order to such a decree, it is not only incumbent on us to bring all parties into the cause who have valid claims against this property, but all who have a right in law to litigate these matters, however barren of result that litigation might promise to be. We are to sell a title not only good against successful litigation, but as to which all parties in interest shall be estopped from vexatious litigation. We are not only to sell the property but to settle the title to it.

Among the debts we are ascertaining, by references to a commissioner and by solemn decree, are those of the original Virginia & Tennessee Company; and yet that company, which as to its debts is as certainly in existence as the Atlantic, Mississippi & Ohio Company itself, is not a party to the record. We are determining the debts which it owes in order to a sale of the property which it pledged, without making it a party to the proceeding for sale.

What if we should sell to a highest bidder ignorant of the existence of the Virginia & Tennessee Company and of its relations to the railroad sold; and what if that bidder, on hearing the facts of the case, should refuse to comply with the terms of sale because of these facts: would the court compel a compliance? I think it might well hesitate to do so.

In the present *status* of this cause our decree would not conclude the Virginia & Tennessee Company or its stockholders either as to the title of the Virginia & Tennessee Railroad, or as to the amount due on its divisional mortgages.

Such a decree would have still another injurious effect. The act of assembly of March 6, 1872, authorizing the condemnation and extinction of the stock of the Virginia & Tennessee Company not subscribed to the Atlantic, Mississippi & Ohio Company, was entitled "An act to complete the organization of the Atlantic, Mississippi & Ohio Company." It is an act of the class which are strictly construed. It is an act of which only the Atlantic, Mississippi & Ohio Company can avail itself upon a strict construction of the language of its title, and of the terms of its fifth section. But the sale of the Virginia & Tennessee road by this court will extinguish the Atlantic, Missis-

issippi & Ohio Company, as a corporation; and with its extinction will lapse the right of condemning the outstanding stock of the divisional companies given by this act of 1872. So that our decree, if given in the present stage of this suit, instead of settling the title of the property to be sold, as against the Virginia & Tennessee Company's stockholders, will keep alive that company indefinitely, with power at any time to disturb the title which we sell. Whereas, if the Virginia & Tennessee Company were made a party to the suit, it would be concluded by the decree, and the sale of its property would, by operation of law, *ipso facto* extinguish that company, as it will extinguish the Atlantic, Mississippi & Ohio Company. (a)

DAVENPORT v. RECEIVERS OF THE ALABAMA & CHATTANOOGA RAILROAD COMPANY.

(Circuit Court for Alabama: 2 Woods, 519-523. 1875.)

STATEMENT OF FACTS.—Plaintiff recovered a judgment in a state court against the receivers of the Alabama & Chattanooga Railroad Company for \$3,000, having brought his suit with the consent of this court. This petition is filed against the successors of the former receivers of the road for an order that the judgment be paid out of the earnings of the road or the proceeds of its sale.

Opinion by Woods, J.

The claim is for \$3,000 and costs, on a judgment rendered as damages, for an injury received by Davenport while traveling as a passenger on the Alabama & Chattanooga road, when it was run by the receivers Rice and Haralson. The question is, whether such claim can come in as a lien on the fund, superior to the first mortgage in existence when the right to damages accrued.

§ 1568. *The claim of a person for damages suffered on a railroad run by a receiver has no priority over existing liens.*

It is too clear for argument, that, if the road had been run by the president and directors when the injury was sustained, no such claim could have priority. The party would have traveled over the road, taking the risk of the ability of the company to respond, just as every man who obtains a right or contract does so with the risk of the ability of the party to answer to him. The receivers of the court were merely appointed to act instead of the president and directors, except so far as the orders of the court otherwise direct, and the liability stands on the same footing as if it had been created by the president and directors, unless a higher right can be assigned to it under the orders of the court. The object of appointing a receiver is to take care of the property for those entitled to it, and he has no powers except such as are conferred upon him. In other words, he acts as special agent by appointment of the court. Kerr on Receivers, 3, 46. A receiver stands like an administrator, who certainly can by no act override existing liens, and he is under no personal liability to respond except for his own personal neglect. *Meara v. Holbrook*, 20 Ohio St., 137. This case is cited for petitioner. It holds that there is no personal liability on the receivers, and that the liability must be discharged from funds in their hands, but by no means settles that liens on such funds are subordinated to such later liabilities.

The estate in the hands of a receiver must bear the loss, but only such estate as is liable for the loss, and not the estate of one who holds a paramount lien. Lord Eldon, in *Norway v. Rowe*, 19 Ves. Jr., 153, declares that the appointment

(a) The final decree of foreclosure and sale is given at length in the original report. See, also, §§ 1602-1605, *infra*.

of a receiver does not prejudice the rights of a prior mortgagee, and then uses this language: "And the constant habit of the court upon such a motion (to appoint a receiver) is not to look at mortgagees farther than to take care that they are not prejudiced." In *Redfield on The Law of Railways*, vol. 2, p. 363, the proposition is thus distinctly stated: "The appointment of the receiver does not operate to derange the priority of legal or equitable liens. The money in his hands is in the custody of the law, for whoever can make title to it; and when the party entitled to the estate is ascertained, the receiver will be his receiver." The case, therefore, comes down to this: Does the decree of Circuit Justice Bradley, of August 26, 1872, or the decree of foreclosure of January, 1874, establish such liens? And it may be stated thus: Has Justice Bradley departed from a well settled rule of law, to create a lien not essential to running the road, and not necessary for increasing, either directly or consequentially, the rights of the first mortgage bondholders for the protection of whose rights the appointment was made? It is clear that such a lien is not one of the incidents to running a road, nor was its creation necessary to procure traffic and travel; nothing of the kind is intimated in the application for a receiver, and no such view or idea is presented in the order, an analysis of which will make this clear.

The order of the circuit justice recites that the property is deteriorating in value, and being wasted and scattered and destroyed, whereby the security of the first mortgage bondholders, and the interest of all other persons then concerned in said property, are subject to hazard, danger and sacrifice. It then recites the impossibility to dispose of the property in its then present condition without great sacrifice, and the proposal and agreement of the parties . . . "that a receiver or receivers shall be appointed in this cause, to take charge of said property and put the same into proper condition for its preservation and disposition for the mutual benefit of all parties interested therein. And whereas, in view of all the evidence and admissions of the parties, the court is satisfied that a receiver or receivers ought to be appointed to take charge of the entire property and manage the same, and to put the same in order and repair to prevent the entire destruction thereof:" Therefore it was ordered that receivers be appointed: 1. To take possession, recover and receive the property covered by the first mortgage. 2. To sue for damages done to it, etc. 3. To put the property in repair, and to complete the road, and to procure rolling stock, etc., necessary to operate it, "and to operate the same to the best advantage, so as to prevent the said property from further deteriorating, and to save and preserve the same for the benefit and interest of the said first mortgage bondholders, and all others having an interest therein."

Then follows the creation of the prior lien, and it is for money raised or advanced "for the purposes aforesaid." The order then in words provides: "That any funds raised by said receivers by loan as aforesaid, or received by them from any other source as such receivers, which may not be employed or required for the purposes above mentioned, or allowed to them by the court for their services as such receivers, shall be paid by them into this court for the use of the said first mortgage bondholders, as their interest or principal shall become due." We here have an explicit declaration that no money is to be used by the receivers except for the purposes above mentioned. Now is it necessary, in order to operate the road, that any man entitled to his action for injuries should have a prior lien on the road for such damages? And is the lien to be created by inference, and on conjecture that the creation of such a lien was necessary

in order to operate the road? As a fact, it is known that almost every railroad in the United States is under mortgage, and that every such one is operated without being subject to a lien for such liabilities. There is not one word in the inducements recited for the appointment of the receivers, or in the purposes named for which they were appointed, which, by the remotest inference, countenances the creation of a prior lien.

The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts. The party has a right to be paid from the fund remaining, after satisfying prior rights. He has a right to be allowed his claim to be paid from an excess remaining. He has the same right against the property which he could have had if the road had been run by the president and directors when his right accrued, and none other. Turning to the decree of foreclosure of January, 1874, we see how clearly the court viewed the order of the circuit justice in the light presented. It devotes the proceeds of sale, first, to necessary expenses incident to the execution and due prosecution of the trust created in behalf of the mortgage, etc. But it cannot be said that the giving of a prior lien to a traveler for damages is an expense incident to the execution of the trust which was created in behalf of the mortgagees. Such a claim is in fact no "expense" at all, in the proper or ordinary sense of the word. It is a liability resulting secondarily from operating the road, and that is all. The petition must be dismissed.

§ 1569. A claim for advances made to a railroad company to pay for construction does not take precedence of an existing mortgage, though the party made the payment at the company's request, and it resulted to the advantage of the mortgage bondholders. To give him a superior equity, on account of his payment of the company's indebtedness, it must be alleged and shown that he acted under such inducements from the bondholders, and had such dealings with them in the transaction, as estop them to assert their liens against his claim. Before relieving the company by payment of its note, the petitioner could have required from the company and its secured creditors express security of a character at least co-equal with the mortgages, if not superior to them; and in the absence of such security the mortgage liens could only be displaced by such affirmative acts on the part of the bondholders as would in equity operate to estop them from asserting those liens in hostility to him. *In re Kelly*,* 5 Fed. R., 846, 851.

§ 1570. Contractor with agreement for possession.—Where a contractor undertook to complete the building of a railroad, under an agreement that he should take possession of the road until the company should pay him what might be due for construction, it was held that the contractor having completed the road had an equity superior to an existing mortgage for the amount of his claim. The court presumed that the mortgage bondholders assented to such agreement. *Dunham v. Cinn., Peoria & Chicago Railroad*,* 9 Pitts. L. J., 90.

§ 1571. Priority not affected because road built by means of the junior mortgage.—The order of priority of two or more railway mortgages is not affected by the fact that a part of the road was wholly built by money raised by means of the junior mortgage. *Galveston Railroad v. Cowdrey*, 11 Wall., 459 (§§ 1297-1304).

XIV. LIENS AFFECTING PRIORITY OF RAILROAD MORTGAGES.

[See LIENS.]

SUMMARY — *Liens under general and special laws in North Carolina*, § 1572.—*Secretary of a company not a servant or employee*, § 1573.

§ 1572. The general lien law of North Carolina does not apply to railroads. Under a special statute of that state, making all debts of a corporation existing at the time of its making a mortgage a first lien upon its property, no lien exists for work performed or debts incurred after the making of a mortgage by a railroad company. *Tommey v. Spartanburg & Asheville R. Co.*, §§ 1574-1576.

§ 1572. The secretary of a railroad company is not a "servant or employee" of such company within the meaning of a statute directing the payment of unpaid wages of "servants and employees." *Wells v. Southern Minnesota R'y Co.*, § 1577.

[NOTES.— See §§ 1578-1580.]

TOMMEY v. SPARTANBURG & ASHEVILLE RAILROAD COMPANY.

(Circuit Court for North Carolina: 4 Hughes, 640-645; 7 Federal Reporter, 429. 1881.)

Opinion by BOND, J.

STATEMENT OF FACTS.— This is a bill filed by the mortgage trustees and the bondholders secured by the mortgage against the defendant corporation and others, to wit, creditors of the defendant corporation claiming mechanics' liens and statutory liens for labor done on the Spartanburg & Asheville Railroad, to foreclose the mortgage and sell the road pursuant to the terms of the mortgage. The case is for final hearing upon the pleadings, evidence, report of the special master, and exceptions to his report. The material facts reported by the master are not controverted, and are these:

The Greenville & French Broad Railroad Company was incorporated by the legislature of North Carolina, February 13, 1855, and the Spartanburg & Asheville Railroad Company was incorporated by the legislature of South Carolina, February 20, 1873, and the two companies were consolidated under the name of the Spartanburg & Asheville Railroad Company, July 31, 1874, under the general laws of the two states, and the new company thus formed is clothed with all the rights which were originally conferred upon the separate companies. The defendant company thus organized commenced to build its road from Spartanburg, in South Carolina, to Asheville, in North Carolina, and having expended its assets, the stockholders resolved, on the 9th day of August, 1876, to issue and sell bonds to the amount of \$670,000, and to secure their payment and interest on them by a mortgage upon the consolidated road. The mortgage was duly executed by the company on the 1st day of October, 1876, and the bonds to the amount of \$642,000 were sold or hypothecated, and came into the hands of the plaintiff holders and others for value *bona fide*. The third section of the mortgage, which is filed as an exhibit, contains the conditions of it and the powers granted to the trustees, mortgagees thereunder. It was not seriously contended in the argument that the defendant company had not power to make the mortgage, or that the conditions had not been broken at the commencement of this action.

§ 1574. *Liens of contractors and laborers for work performed after a mortgage of a railroad.*

The master so finds, and his report is hereby confirmed. The defendant creditors claim that they, as contractors and laborers, have a lien upon the road prior and superior to the bondholders, and are first entitled to the proceeds of the sale of the road, if the court should decree a sale. This is the principal question in the case. These claimants are of two classes: *First*, those who have filed in the proper court "mechanics' and laborers' liens;" *second*, those who have not filed such liens in the state courts, but claim a lien by statute. Of the first class are Fry & Deal, John Garrison, Rice & Coleman, and T. G. Williamson, whose claims are fully set out in the master's report. These claims, we think, ought not to be allowed, except as postponed to the mortgage debt.

§ 1575. *The general lien law of North Carolina does not apply to railroads.*

It is not necessary, in our opinion, to argue whether or not these lien claims

are filed under the provision of the state law. In each case the work was done and the lien filed subsequent to the execution of the mortgage; but we think the statute upon which the claims are based does not apply to railroads. Battle's Revisal, ch. 65. No case has been cited where any court in North Carolina has held that such a lien was within the purpose or meaning of that statute, although the statute was passed in 1869-70. The act does not mention railroads as the subject of such liens, and the intimation of the supreme court of North Carolina in *Whitaker v. Smith*, 81 N. C., 340, is the other way. It was here held that the statute gave a lien to "mechanics and laborers" exclusively, and that an "overseer" was not a laborer, and reference made to 8 Penn. St., 168, where it is held that an engineer is not a "laborer." The first class of claimants filed their liens as contractors. They are not, in our opinion, mechanics and laborers within the meaning of the North Carolina law as held by its supreme court.

§ 1576. *Lien under a special law.*

The second class of creditors referred to in the master's report do not claim a lien under chapter 65, Battle's Revisal, as the other lien claimants have done, but they do claim that by virtue of chapter 26, sec. 48, Bat. Rev., all debts due them, and all contracts with the corporation at the date of the execution of the mortgage, were liens prior to the mortgage. These debts at the date of the mortgage, October 1, 1876, have been paid, except the sum of \$3,316.87, due E. Clayton, with interest from August, 1876, and some smaller sums, all of which are stated in the master's report. We do not think that under that section the claimants have any lien. We are of opinion that the statute contemplates debts already incurred and contracts executed at the time of making the mortgage.

It has been suggested to us by counsel, since the argument, that the case of *Brooks v. Railway Co.*, 101 U. S., 443, has an important bearing upon this case; but we think the supreme court of Iowa held, as we do now, that a railway was not a building, within the meaning of their mechanic's lien law, in *Nelson v. The Iowa R'y Co.*, construing section 1855 of the code of 1860, which resembles the North Carolina statutes, and reversed their judgment after the law was amended. So far as the claim of E. Clayton is concerned, we think the master's report must be confirmed. The land was purchased by him after the commencement of the construction of the railroad, with full knowledge that it was to pass over it, and indeed while he was constructing the railroad over it. He is in a court of equity for relief, and he must do equity. The master reports that he is not damaged and he will be allowed nothing. And the same is true of the land claimed by Rice & Coleman. We see no reason for disturbing any of the findings of the master relating to the claims of W. H. Inman, and his report is confirmed, and a decree will be passed in accordance with this opinion.

WELLS v. SOUTHERN MINNESOTA RAILWAY COMPANY.

(Circuit Court for Minnesota: 1 McCrary, 18-20. 1880.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.—The defendant company was organized, after foreclosure and sale by the purchasers, under an act of the legislature of the state of Minnesota, approved March 6, 1876.

This act contained the following proviso: "Provided, however, that such

court (the court granting decree) shall provide in such foreclosure decree, or otherwise, that such purchaser or purchasers shall fully pay all sums due and owing by such defaulting and foreclosed railroad company to any servant or employee of such company." In 1872 a suit was commenced to foreclose the Southern Minnesota Railroad Company, as to part of its line, by the trustees, under certain mortgages given to secure the bonds issued by the company. On November 23, 1873, a receiver was appointed, who took possession of the mortgaged property. A decree of foreclosure was entered May 27, 1874, and on December 27, 1876, the decree was modified so as to allow a sale in the interest of second lien holders, subject to the lien of the first mortgage bondholders, and on sale being made, February 10, 1877, the defendant company was organized by the purchasers.

§ 1577. *The secretary of a railroad company not a "servant or employee."*

The plaintiff brings this suit to recover compensation at the rate of \$2,500 per annum, as secretary of the old company from June 1, 1874, at which time he claims he was elected, until June 19, 1876. At the time of his election the mortgaged property, including one hundred and sixty-seven miles of completed railroad, was in possession of the receiver, and the stockholders had no right to select their own agents for the management of the corporation; at least, the mortgaged property. It is urged by the defendant that the act of March 6, 1876, which also contains this proviso, "that nothing herein contained shall be construed to change or impair the force of any decree of foreclosure heretofore made, or any of the terms or provisions thereof," relieves this defendant from the operation of this statute. It is unnecessary to decide this point, as from the view entertained, another objection is fatal to a recovery by the plaintiff. The secretary, under the by-laws, is an officer of the company, and salaries due officers are not the "sums due and owing any servant or employee," which the new organization are required to fully pay. The legislature intended to provide for the unpaid wages due servants or employees; that is, operatives of the grade of servants "who have not a different, proper and distinctive appellation, such as officers and agents of the company." See 37 N. Y. R., and cases cited. The charter of the old company, and the various acts amendatory and relating thereto, as well as the act of March 6, 1876, recognize the distinction between officers and employees, and the latter act refers to the secretary as an officer in the same section which contains the proviso; and it is apparent that when certain persons are in the act designated officers, and are not expressly named in the proviso which requires the payment of sums owing "servants or employees," they are excluded from its operation. The word "employee," following "servant," is descriptive of the persons intended to be paid, and excludes officials to whom are intrusted the management of the corporation business. The officers of the company are its representatives, and, it may be said, are the official masters who direct and control the servants and employees. The former are appointed or elected, and are trustees (see 21 Wall., 624, §§ 1636-40, *infra*); the latter are hired, and are the subordinates of the former. Judgment ordered for defendant.

§ 1578. The liens of material-men, laborers and others upon railroads must be perfected according to state law in order to obtain preference of payment. *Jessup v. Atlantic & Gulf R. Co.*, 8 Woods, 441 (§§ 1555-56).

§ 1579. The court might require a receiver to pay certain claims for supplies and wages of workmen, and even to hold the property subject to them; not as a lien on the road, but in the exercise of the equitable discretion of the court in dealing with property which is of a

peculiar character, and under circumstances of which the past history of litigation affords no example or precedent. What should be included within the claims to be paid has also been the subject of consideration, and the practice has been to allow all to be paid that could be fairly regarded as a part of the actual operating expenses of the road, whether for labor or supplies, in their various forms. *Turner v. I. B. & W. R'y Co.* 8 Biss., 815, 818.

§ 1580. Vendor's Lien.—Parties who bought a railroad, leaving part of the purchase money unpaid, and became incorporated as a railroad company, hold the property subject to the vendor's lien for the unpaid purchase money. A consolidation with another company did not release that liability. *North Carolina Railroad Co. v. Drew*, * 3 Woods, 691.

XV. FORECLOSURE SALES UNDER RAILROAD MORTGAGES.

SUMMARY—*Sale of portion of premises when divisible*, § 1581.—*Discretion of trustee as to time of sale*, § 1582.—*Court will not stay sale for more prosperous times*, § 1583.—*In distributing proceeds of sale court may prefer defaulted coupons*, § 1584.—*Setting aside sale for inadequacy of price*, §§ 1585, 1586.—*Proceedings against fraudulent sale must be commenced within reasonable time*, § 1587.—*Proceedings to set aside sale after confirmation*, § 1588.—*Sale by bondholder in fraud of other bondholders*, § 1589.—*Combination of officers to prevent competition*, § 1590.—*Bondholders may combine to purchase*, § 1591.—*Such bondholders are not in position to take exception to sale*, § 1592.—*Purchasers who have conspired with company's directors*, § 1593.—*Setting aside sale where notice misstated the sum due*, § 1594.—*Sale invalidated by judgment creditor*, § 1595.—*In Louisiana fraudulent purchaser allowed for putting road in working order*, §§ 1596, 1597.

§ 1581. A portion of the mortgaged premises, if divisible, may be sold upon default in paying one instalment of the debt, and then upon a second default a further order of sale may be made. *Fleming v. Soutter*, § 1593.

§ 1582. A mortgage trustee will be left to exercise his discretion as to the time of making sale under a decree of foreclosure and as to making a sale at all pending an appeal from the decree, which the appeal does not supersede. The trustee is the representative of all the bondholders, and it is for him to determine whether the best interests of all concerned would be promoted by a sale, and individual bondholders have no right to insist upon an execution of the decree. *Farmers' Loan & Trust Co. v. Central R. R.*, §§ 1599-1601.

§ 1583. The court will not stay the sale of a railroad under a foreclosure decree to await more prosperous times, on the ground that the company's financial condition is improving, and it hopes after a time to be able to redeem, especially if it does not pay the defaulted interest, nor put in the registry of court any money except a sum for security for costs and loss of interest caused by the postponement of the sale. *Duncan v. Atlantic, etc., R. Co.*, §§ 1602-1605.

§ 1584. In distributing the proceeds of a foreclosure sale, the payment of coupons which matured before a general default may be preferred by the court when there is nothing in the mortgage requiring a *pro rata* distribution. Thus, unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest has been paid, should be paid before coupons or interest falling due at a later date, and before the principal of any of the bonds; and coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds. *Stevens v. New York & Oswego Midland R. Co.*, §§ 1606-1608.

§ 1585. Mere inadequacy of price is not sufficient to set aside a foreclosure sale; the price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase. *Turner v. I. B. & W. R'y Co.*, §§ 1609-1620.

§ 1586. Where parties apply to have a sale set aside for such cause they must show that some suitable person will make an advance bid. *Ibid.*

§ 1587. Proceedings to set aside a decree of foreclosure as fraudulent must be commenced within a reasonable time. Courts of equity may refuse relief on account of the staleness of the claim, although no statute of limitations governs them. *Sullivan v. Portland & Kennebec R. Co.*, §§ 1621-1630.

§ 1588. After confirmation of a sale of a railroad under decree of foreclosure, holders of mortgage bonds will not be allowed at a subsequent term to be made parties to the original foreclosure suit so that they may impeach the sale and confirmation as fraudulent, although the power to make further orders is expressly reserved in the decree. The proper remedy of bondholders in such case is by original bill. *Wetmore v. St. Paul & Pacific R. Co.*, §§ 1631-1635.

§ 1589. A sale by a bondholder in fraud of other bondholders will be set aside. One holder of a few bonds out of a large amount issued by a corporation, and secured by a mort-

gage of its property, has no right to use the mortgage as an instrument by which he may become the owner of the mortgaged property at a grossly inadequate price, leaving the other bonds unpaid. It is his duty, if he makes use of the mortgage security at all, to make it productive of the most that can be obtained for all who are interested in it. *Jackson v. Ludeling*, §§ 1636-1640.

§ 1590. Officers of a corporation have no right to enter into a combination the object of which is to divest the company of its property and obtain it for themselves at a sacrifice or the lowest possible price. An agent cannot lawfully seek for his own profit at the expense of his principal. A contract entered into by an agent for his own benefit contrary to his instructions is fraudulent and void. A combination to remove competition at a public sale or to induce an agent to sacrifice the interests of his principal is unlawful. *Ibid*.

§ 1591. The fact that the purchasers at a foreclosure sale of a railroad are bondholders or creditors of the company who have combined to make the purchase does not deprive other bondholders and creditors of the right to bid at the sale and does not affect its validity. *Kropholler v. St. Paul, Minneapolis, etc., R. Co.*, § 1641.

§ 1592. Bondholders who have become parties to a scheme for the purchase of the mortgaged road and the formation of a new company, and have in pursuance thereof surrendered their bonds in exchange for stock and bonds of such new association, are not in a position to take exception to the foreclosure sale. *Crawshaw v. Soutter*, § 1642.

§ 1593. Purchasers of a railroad at a foreclosure sale, who have conspired with the directors of the road in effecting a fraudulent sale, will be held as trustees for the benefit of the parties in interest to the full value of the property purchased, less the sum actually paid by the purchasers for a lien upon the property. *Drury v. Cross*, §§ 1643-1645.

§ 1594. A foreclosure sale will be set aside as fraudulent where it appears that the notice of sale misstated the sum due under the mortgage; as, for instance, by setting forth that the amount of the bonds secured was \$2,000,000, with \$70,000 interest, when in fact less than \$200,000 was outstanding in the hands of *bona fide* holders for value, and the remainder had either not been issued at all or had been through fraud transferred to the directors at merely nominal prices. *James v. Railroad Co.*, § 1646.

§ 1595. A foreclosure sale, set aside at the instance of a judgment creditor, is invalidated only as to such creditor. The bondholders, having formed a new company, and purchased the property at the foreclosure sale, upon satisfying such judgment creditor, retain the property; and the mortgage trustee cannot maintain a new bill to foreclose the mortgage for their benefit. *Barnes v. Chicago, M. & St. P. R. Co.*, § 1647.

§ 1596. In Louisiana, one who has fraudulently purchased a railroad at a foreclosure sale, and is therefore a possessor in bad faith, is nevertheless entitled to compensation for putting it into working order. He is entitled to compensation for necessary repairs; and the reconstruction of a railroad and putting it in working order is so much in the nature of necessary repairs that, according to an equitable construction of the code, compensation for such reconstruction is required to be made to him. He should not be allowed, however, for the cost of things which were consumed in the use; but only for the cost of such improvements as are in existence when the property passes out of his possession. *Jackson v. Ludeling*, §§ 1648-1654.

§ 1597. He is entitled to interest on his expenditures for improvements to an amount not exceeding the net earnings received from the property. He is accountable for the net earnings of the property, and has a lien upon them for the cost of the improvements. *Ibid*.

[NOTES.— See §§ 1655-1661.]

FLEMING v. SOUTTER.

(6 Wallace, 747, 748. 1867.)

APPEALS from U. S. Circuit Court, District of Wisconsin.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— These are appeals from decretal orders made in the case of *Soutter, survivor, etc., v. The La Crosse & Milwaukee Railroad Company* and others. That suit was instituted for the foreclosure of a mortgage on the eastern division of the road of the La Crosse & Milwaukee Company, and a decree had been entered in the circuit court in pursuance of a mandate from this court, in which it was directed that the complainant shall be at liberty, when further instalments of interest should become due and unpaid, to apply for an order for the sale of the said mortgaged premises in accordance with the

mandate. On the 18th September, 1866, an order was entered directing a sale of the premises on account of default in the payment of \$40,000, an instalment of interest that had become due on the first of the same month, which order was entered on petition and due notice, and after argument by counsel. The first two appeals were taken from this order.

§ 1598. *Orders of sale for each successive default are proper and regular.*

A second default was made in payment of another instalment on the 1st of March, 1867, and after hearing the parties on both sides, an order for a sale was made on the 5th of the same month. The third appeal is from this order. We have examined the proceedings to which objections have been taken, and are of opinion that they are in conformity with the principal decree in the cause, and that the order should be affirmed.

FARMERS' LOAN & TRUST COMPANY v. CENTRAL RAILROAD OF IOWA.

(Circuit Court for Iowa: 4 Dillon, 533-543. 1877.)

STATEMENT OF FACTS.—While an appeal from a decree of foreclosure was pending in this case in the supreme court of the United States, that court vacated the *supersedeas*, and certain bondholders of the mortgagor railway company applied to this court for an order to the trustee to sell the property in its hands, notwithstanding the pending appeal and in accordance with the terms of the mortgage. This order was refused, and a like result attended an application to the supreme court. The application was renewed at the May term, 1877, and the court was asked to order the trustee to execute the decree notwithstanding the appeal and against the protest of other parties interested. Further facts appear in the opinion of the court.

Opinion by LOVE, J.

I have gone carefully over the papers and given them the best consideration I could. I proceed to give my impressions as to the disposition which ought to be made of the case. I have a very decided opinion that the court ought not, at present, and upon the showing made by the majority of the bondholders, to order the trustee to execute the decree. The case is a peculiar one. The circuit court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree. Now, it turns out that this assumption was not well founded, so far as the appellants (Cowdrey *et al.*), who are now resisting the execution, are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any court upon their rights and equities under the mortgage. If the court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I do not see that they would have any reason to complain, even though they could not, in the event of a reversal, be placed, as to their rights under the mortgage, *in statu quo*. But in the absence of any real adjudication by the court, and by virtue of a consent decree, to which they were not parties, to have the property in which they are interested disposed of, so that in the event of a reversal they cannot be awarded the very relief to which they would be entitled by the terms of the mortgage, would seem to me not at all in accordance with the principles of equity.

Again it is impossible for us to know what the decision of the supreme court

will be, and what complications may consequently arise from the execution of the decree in the mean time. Will the supreme court dispose of the case with reference to the fact that the decree below has been executed and the trust property placed beyond judicial control; or will it determine the controversy with reference to the state of the case and property at the time when the decree was entered below? I confess I do not see the way clear in the future, if the *status quo* of the trust property be changed as required by the terms of the decree. On the contrary, it appears to me that no complications can possibly arise if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay. If the majority feel aggrieved by the refusal of the court to grant their present motion, I suppose they have their remedy; they can apply for a *mandamus* and thus submit their case to the judgment of the supreme court, and if it be a matter of right in them, and not of discretion in the circuit court, they can thus obtain redress. If the circuit judge feels any embarrassment in regard to the matter, he might consider the propriety of reserving his determination till the regular term in May.

§ 1599. *The rights of individual bondholders pending an appeal.*

Opinion by DILLON, J.

1. I am of opinion that individual bondholders, not parties to the record, and who are represented by the trustee, have no legal right to demand that the trustee shall order a sale under the decree and have the same executed, if the trustee is of opinion that the interest of all the bondholders would be best subserved by not having a sale made pending the appeal.

§ 1600. *Duty of the trustee to decide when a sale shall be made.*

2. The question whether a sale should be made under the decree pending the appeal is one which primarily belongs to the trustee to determine, having in view the interest of all the *cestuis que trust*. That question the trustee, by the petition, refers to the court. Under the circumstances I am of opinion the court ought not to order the trustee to cause a sale to be made at the present time; such is also the opinion of Judge Love, hereto annexed, and in which I concur. An order can be made on the foregoing petitions in conformity with these views, and the special master will cause the order to be entered of record, and the respective counsel to be notified hereof. We decide the matter now so as to enable the parties who desire a sale to apply to the supreme court at this term for a *mandamus* to compel the execution of this decree if they shall so desire. (a)

FARMERS' LOAN & TRUST COMPANY v. CENTRAL RAILROAD OF IOWA.

(Circuit Court for Iowa: 4 Dillon, 546-548. 1877.)

STATEMENT OF FACTS.—This case came up on a motion to confirm a sale made by a special master, and upon exceptions to his report. There was also before the court an application for an appeal and a *superedeas*.

Opinion by DILLON, J.

We have considered the exceptions of Mr. Cowdrey and others to the master's report of sale, and are of opinion that they must be disallowed.

(a) The application was subsequently renewed and refused.

§ 1601. *When a supersedeas has been vacated, the plaintiff can have the decree executed notwithstanding the pendency of the appeal.*

The plaintiff, notwithstanding the pending appeal, has a right to execute the decree — the *supersedeas* having been vacated. It was incidental to this right, which remains in this court, to make the order substituting "*The Public*" in the place of "*The Financier*" — more especially as the evidence produced before me when the order was made, showed the two newspapers to be the same, the change being one of name only. At all events, the object of the notice was publicity, and the requirements of the decree in this respect have been substantially complied with. The other exceptions are based upon supposed errors in the decree. But while that decree remains unreversed, it must be accepted and treated by this court as correct. The master, in making the sale, has followed the decree. The exceptions to his report are overruled, and the motion to confirm the sale is granted, and the master is directed to execute a deed to the trustee pursuant to the terms of the decree.

LOVE, J., concurs.

Opinion by DILLON, J.

The several motions to order the property to be conveyed by the trustee to one or other of three new rival companies must be denied, for the reason that under the decree and the deed of trust no evidence is before us "that the holders of a majority of the outstanding bonds secured by the first mortgage have, *in writing*, requested or directed," or assented to the articles of incorporation of either of said new companies. This written request or assent on the part of the present holders of said bonds to the articles of incorporation is expressly required by the deed of trust, and it is not changed by the decree. The decree and the deed of trust must be construed together. This written request or assent must be produced either to the trustee or to this court or to the master, before either the trustee or the court is authorized to convey the premises to the new corporation. Such is the express requirement of the deed of trust. If the parties desire, we will appoint the master to act in this matter in the place of the trustee, and direct him to proceed without delay to ascertain whether a majority of the present holders of bonds have assented or shall assent in writing to the articles of incorporation. When that fact is reported to us, we will direct the trustee to convey the premises to it.

It is for the bondholders, and not the court, to determine what corporation or company is or shall be entitled to the property. We see no substantial objection to the scheme proposed in the order submitted to us, providing for the receiver's debts, but as this is dependent upon a conveyance to the new company, no absolute order in this respect can be entered at this time. We mention this now, so that the creditors and bondholders may be apprised of our views.

LOVE, J., concurs.

DUNCAN v. ATLANTIC, MISSISSIPPI & OHIO RAILROAD COMPANY.

(Circuit Court for Virginia: 4 Hughes, 125-157. 1880.)

STATEMENT OF FACTS.—For the facts of this case reference is hereby made to 1 Hughes, page 90, and to *Skiddy v. Atlantic, etc., R. Co.*, §§ 1559-67, *supra*. A decree of foreclosure of the mortgage was made May 9, 1879, and a com-

missioner appointed and authorized to sell, July 9, 1880. Before the sale the state of Virginia filed a bill of review praying a postponement of the sale, and petitions to the like effect were filed by the defendant company and by the cities of Petersburg and Lynchburg.

§ 1602. *Rule as to bills of review; when too late.*

Opinion by BOND, J.

This bill of review has been filed after a lapse of two entire terms of the court since the entry of the decree sought to be reviewed; and is therefore too late, under rule 88 in equity.

§ 1603. *After appeal a bill of review cannot be filed.*

But even if this were not so, the bill could not be entertained. The state having appealed, it has no right to file a bill of review. If the errors set forth in the bill offered are apparent on the record, they have been so apparent ever since the final decree which is appealed from was filed. It is these errors the state asks the supreme court to correct. If the reasons for the bill are that new facts have come to the knowledge of parties since the filing of the final decree, then its offer is too late. The final decree takes effect from the time of its record, and not from the appointment of the officer to execute it.

§ 1604. *What is not a cloud upon title.*

In reference to the petition of the defendant company, there is no cloud on the title such as is now set up, which has not heretofore been determined to be no obstacle, so far as the parties in this suit are concerned, to the foreclosure of the mortgage and the sale of the mortgaged premises.

§ 1605. *When prosperity is not a reason for postponing a sale.*

And as for the reasons set forth, that the road is more prosperous than heretofore, we think they ought to have no weight with the court, and afford no sufficient ground to postpone the sale ordered. It would, after all the success which has attended the management of the receivers, take nearly ten years of such success continued to pay the already overdue interest of this mortgage debt. The defendant company offers no guaranty that such prosperity will continue. It proposes to go further in debt and to incumber the complainants' security further to pay a present obligation. The complainants' debt is ascertained. They are entitled to execution therefor, and it was never heard to prevent such execution that the mortgagor, having been unfortunate in business, had now great hope of more success hereafter, to realize which the mortgagee ought to wait for him. In consequence, however, of this omission set out in the following order of the court, the sale of the property of the company was postponed from the 1st November, 1880, until the 10th of February ensuing:

"ORDER POSTPONING SALE.

"DUNCAN & BARLOW, Trustees, }
 vs.
 "THE A., M. & O. R. R. Co. }

"It having been made to appear to this court that the master heretofore appointed to sell the mortgaged premises, property and franchise heretofore decreed to be sold in this suit, has advertised said premises, property and franchises, to be sold at public auction at the court room of the United States circuit court, in the custom house, in the city of Richmond, Va., on the 1st day of November, 1880, at 12 o'clock;

"And it having been made to appear to this court that said master has failed and omitted to serve written notice on the attorney-general of the state

of Virginia, and the board of public works of said state, at least ninety days before the sale, as directed by said decree: It is now ordered by this court, and the said master is hereby ordered and directed to adjourn said sale at 12 o'clock noon on the 1st day of November, 1880, at said circuit court room, to the 10th day of February, 1880, at 12 o'clock noon, at said circuit court room.

"And the said master is hereby further ordered and directed to serve on the attorney-general of the state of Virginia, and on the board of public works of said state, at least ninety days before said adjourned day of sale, written notice of said intended sale in conformity with the twenty-ninth paragraph of the decree in this cause.

"And the said master is hereby further ordered to give due notice of said adjournment in accordance with the directions of said decree, and to publish said advertisement of sale and the adjournment thereof, directed by this order, in conformity with the requirements of the statutes of the state of Virginia relating to the sale of any work of internal improvement in which the state is a stockholder or otherwise interested.

"ROBERT W. HUGHES, Judge.

"Richmond, October 30, 1880."

RENEWAL OF MOTION TO POSTPONE SALE.

Opinion by BOND, J.

This is a motion on the part of the mortgagor to postpone the sale ordered by the decree in this case filed May 9, 1879. The case has been pending in this court for nearly five years, and has regularly proceeded with no prospect of any other result than the one it is about to reach. The mortgagor has allowed the time for redemption to pass, and alleges in argument that it has been too poor to do so ever since the bill was filed. The motion before us is not made upon any proof or showing that the finances of the mortgagor have at all improved, nor that it has been promised the certain aid of any capitalist to enable it to redeem; it merely alleges that it believes that if the court would make certain provisions in the order opening the present decree and postponing the sale, the company would be able to redeem. The facts upon which that belief is founded are not given, and the court can look at it in no other light than as the ordinary lingering hope of a debtor that his financial condition will somehow improve. The mortgagor, to be sure, offers to put in the registry of the court the sum of \$100,000, to be security for costs and loss of interest caused by the postponement of the sale, but he does not offer to pay now the defaulted interest nor to allow the \$100,000 as a penalty for not redeeming as he says it expects to do. Under these circumstances the court does not think that it would be equitable to open its decree and make the complainants risk the rise and fall of the present inflated market, and the accumulation of interest, and the risk of loss of business and consequent diminished receipts of the road, but think the company has had abundant time to make its arrangements to redeem had it any prospect of doing so. The fact that the charters of Lynchburg and Petersburg do not allow those cities to borrow money, being large stockholders, to aid in redemption, and that the state legislature is not in session, does not alter the matter. It is too remote to prophesy what those corporations would do were they assembled, and certainly to postpone the complainants from the foreclosure of their mortgage on such a remote contingency or expectation would be most inequitable, especially as the security for the remuneration for loss by delay, should there be such loss, is, as we have said, so inadequate.

The complainants applied for a decree of sale at the October term, 1877. The court did not grant the decree till May, 1879, although the complainants made persistent and very frequent applications throughout the whole period of delay. After the decree the court did not order a sale till July, 1880, complainants mean time pressing continually for such order. During the whole of this delay no effort was made by defendant company to redeem its property. It is too late, two days before the sale, to ask for its postponement without a tender of the debt or what is equivalent to a tender. During the whole of this delay the court felt it was taking great responsibility, but fortunately the revival of business and the admirable conduct of the receivers have prevented any loss from this delay; and we do not, upon so indefinite a proposition as is now made at this stage, propose to continue such risk. The defendant company must take its chances at sale along with all other bidders in open market.

MOTION TO REDUCE THE AMOUNT OF CASH REQUIRED TO BE PAID BY THE EXISTING DECREE.

Opinion by HUGHES, J.

The decree already passed states what is to be sold and the method of sale, and determines the rights of the parties, and after so long time since its filing and the advertisement of the sale provided by it, and on the eve of the sale, the court will not alter it, no objection to it having been made heretofore by any party to the suit. If there is any difficulty created by its terms in the bidding, and it can be shown after the sale that bidders were hindered by any obscurity or harshness of its terms, the party suffering from that defect can come into court and object to the ratification of the sale on that ground. If the decree as it now stands results in a sale for an inadequate price, when the court comes to consider the master's report of sale, then will be the proper time for reaching the objection now urged. In general, we think we have no power to amend the decree in any particular after so long a time has passed since it was pronounced. (a)

STEVENS v. NEW YORK & OSWEGO MIDLAND RAILROAD COMPANY.

* (Circuit Court for New York: 18 Blatchford, 412-418. 1876.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—In deciding, in March last, various questions raised in this case, I held that the coupons due July 1, 1873, were not paid by the company or extinguished, and that they are valid in the hands of those who hold them (as between such holders and the holders of others of the bonds and coupons) to the extent of the sums for which they hold them as collateral security, if less than the face of the coupons, and, if greater, to the extent of the face of the coupons. Further consideration has confirmed me in the foregoing conclusion. I further held that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest has been paid, should be paid before coupons or interest falling due at a later date, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds are paid. I have heard a reargument of this ques-

(a) The railroad was sold February 10, 1881, subject to certain mortgages. The several decrees in the case confirming the foreclosure sale and deed, directing payment of the complainants' claims, fixing the compensation of the trustees, distributing the surplus funds and discharging the receivers, are set out at length in the original report.

tion. The effect of the decision, as stated by those who are dissatisfied with it, is, that unpaid coupons or interest not maturing on or after January 1, 1874, will be paid in the order in which they became collectible down to and including July 1, 1873, and before payment of anything on the bonds. It appears that the unpaid interest which fell due January 1, 1870, is \$350 of coupons; July 1, 1870, \$70 of coupons; January 1, 1871, \$56 of coupons; July 1, 1871, \$185.50 of coupons; January 1, 1872, \$416.50 of coupons; July 1, 1872, \$12,246.50 of coupons, and \$35 of interest on registered bonds; January 1, 1873, \$16,982 of coupons and \$70 of interest on registered bonds; and July 1, 1873, \$265,540.50 of coupons and \$70 of interest on registered bonds. The entire interest which fell due on and after January 1, 1874, is unpaid, being, for each semi-annual instalment, \$265,424 of coupons and \$14,576 of interest on registered bonds. The total semi-annual interest was \$280,000.

Of the unpaid interest which fell due before July 1, 1873, \$30,411.50 is in coupons, and \$105 in interest on registered bonds. There is no proof of the present ownership or condition of any of the \$30,411.50 of coupons, and no evidence as to whether they have been detached or not from the bonds with which they were issued. Of the unpaid interest which fell due July 1, 1873, \$265,540.50 is in coupons, and \$70 in interest on registered bonds. No coupons which fell due July 1, 1873, were paid, but all of them were at that time detached from the bonds with which they were issued, and became the property of parties, named in the evidence, other than the parties who continued to hold such bonds and the unmaturing coupons belonging and attached thereto. Of the interest on registered bonds which fell due July 1, 1873, \$14,383.50 was paid.

§ 1606. *Construction of a mortgage. Priority of payment.*

It is contended that there is no principle, legal or equitable, which entitles the interest which matured before July 1, 1873, to be paid in the order in which it fell due, and before payment of any of the bonds; that it is not shown that payment of the interest was ever demanded and refused; that no right to be paid the interest accrued until demand and refusal; that, until then, the debtor was not in default; that the debtor was justified in paying subsequently maturing interest, even though prior maturing interest remained unpaid, so long as the payment of such prior maturing interest had not been demanded; that he is prior in right who is prior in the time of presenting his demand, when presentment is required; and that those who, prior to July 1, 1873, received their interest, received no preference as against those who did not receive their interest, because the latter did not demand it and the former did. It is further contended that the foregoing views apply equally to the interest which matured July 1, 1873; that there is no proof that payment of any such interest was ever demanded from the debtor; and that, as to the unpaid coupons which matured July 1, 1873, the present holders of them, as purchasers of them from the parties for whom they cashed them at their face value, acquired, as against such parties as still holding the bonds from which such coupons were detached, only the right to present the coupons for payment and to receive payment. The general principle is invoked that, where several debts are secured by one and the same mortgage, and become due, and the mortgage is then foreclosed, they will be paid *pro rata* from the fund, if it is insufficient to pay the whole of them; and it is contended that the only exception to this rule is, where the mortgage, by its terms, creates a preference in favor of some of the debts, or where the original creditor, as to any which he has assigned,

has designed to confer a right of prior satisfaction on the assignee. This general principle being applied in the proposed decree in this case to all the interest which matured after July 1, 1873, and such interest being required to be paid *pro rata* with the principal of the bonds, it is contended that a different rule ought not to be applied to the interest which matured on and before July 1, 1873. The principal contest is as to the preference claimed for the \$265,540.50 of unpaid coupons which fell due July 1, 1873, the amount of all the other unpaid interest which fell due on or before July 1, 1873, being only \$30,482.50.

The bill in this case sets forth that the debtor made default, on the 1st of July, 1873, in the payment of the coupons which became due on that day, and has never paid any of such coupons. As the bill is filed by the trustees under the mortgage, who represent the bondholders, I think this averment in the bill is properly to be taken, as against the bondholders, as an averment that the coupons which fell due July 1, 1873, were presented, and payment of them demanded and refused, and thus default was made, inasmuch as every bond with coupons attached to it provides that the interest is payable on presentation of the coupons. But, in addition to this, I am of opinion that the transactions between the debtor and the parties who furnished the money to cash the coupons were such as to amount either to a waiver, on the part of the debtor, of the presentment of the coupons, because of a previous mutual understanding that they could not and would not be paid if presented, or to an actual demand and refusal.

In support of the preference claimed it is contended that, as to interest which matured at any given time on and prior to July 1, 1873, inasmuch as some of the parties entitled to receive such interest received it from the debtor, and some did not, the former will have received a preference, unless the latter are now to be put on an equal footing with them. To this it is replied that there really was no preference; that, so long as the debtor was solvent, every party entitled to interest was paid as he presented his matured claim; that if he did not present it, he took the risk of the debtor's becoming insolvent; and that he had no special property in, or lien on, the funds of the debtor, which could require the debtor to set apart funds sufficient to pay undemanded matured interest which fell due at an earlier date, before paying demanded matured interest falling due at a later date.

§ 1607. *Priority of payment of interest coupons over principal of bonds.*

I do not think any distinction can be made between interest which matured before July 1, 1873, and interest which matured on that day, growing out of the fact that payment of the latter was demanded and refused, or a demand was waived, and that the former was not demanded. I do not see how any diligence of those of a given class who were paid their interest, in asking to have it paid, can be imputed as laches to others of the same class who did not ask to be paid their interest, so as to work a virtual preference in favor of the former. To give to the latter their interest in full, before paying the principal of the bonds, is only to put all those in a given class entitled to interest on an equal footing; and to put them on such equal footing requires, also, that interest maturing at an earlier date shall be paid before interest maturing at a later date. Here are special equities, it seems to me, which would be violated if such an inequality were left to exist as the exclusion from the full payment of interest of some of a given class. There is nothing in the terms of the mortgage, in this case, which requires such exclusion. On the contrary, the

mortgage provides that, after default, the mortgagees shall sell so much of the mortgaged property "as shall be necessary to pay and discharge the principal and interest, according to the tenor thereof," of all the bonds issued, and shall out of the moneys arising from such sale pay the principal and interest which shall then remain due and unpaid on the issued bonds. The words, "according to the tenor thereof," may very well be held to embrace the payment of interest, according to the times of the semi-annual recurrences of interest, and in such order. Certainly, there is nothing in those words, or elsewhere in the mortgage, that forbids a course which is absolutely necessary, unless a result is to be effected which will not be a payment of interest according to the tenor of the bonds, but will leave some part of a given instalment of interest paid in full, and the rest of it not paid in full. In the case of *Dunham v. Railway Co.*, 1 Wall., 254 (§§ 1557-58, *supra*), the mortgage provided that, in case of default and a sale, all bonds, and the interest accrued thereon, should be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of sale. Hence it was held that there could be no preference of past-due coupons over the principal of the bonds. No case was cited on the argument which decides the above question adversely to the view I take. Most of the cases cited were not cases of coupons or interest on numerous bonds secured by mortgage, and none of them were cases where some interest in a given class had been paid and the rest not paid, and the fund was insufficient to pay all the principal and interest due. The case of *Sewell v. Brainerd*, 38 Vt., 364, was not such a case, nor was the case of *Miller v. Rutland & Washington R. Co.*, 40 Vt., 399; and, in the latter case, no preference was claimed.

§ 1608. *A special equity.*

The above views cover all the questions involved. But, as to the holders of the unpaid coupons of July 1, 1873, there seems to me to be a special equity. It was through the advance of money to cash those coupons in the hands of the holders of the bonds to which they belonged, that such holders obtained the money for those coupons. On such advance, those coupons passed into the hands of those who now hold them. But for such advance, the coupons in the hands of the original holders of them would not have been worth their face value, as they were made to be by such advance. The original holders of such coupons must be regarded as still holding the bonds to which such coupons belonged, or if not, those who hold such bonds and subsequently maturing coupons belonging thereto must be held to be subject to the same equities with such original holders. No special reasons are shown in the evidence, why, as against any of such holders, the present holders of the coupons of July 1, 1873, are estopped from claiming priority. Those who had their coupons of July 1, 1873, cashed by means of such advance, retained the money, and to permit them now to exclude the holders of such coupons from being paid in full, and put on an equality with the registered interest of July 1, 1873, which was paid in full, would be to permit them to work an inequality which would be unjust.

TURNER v. INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY COMPANY.

(Circuit Court for Indiana: 8 Bissell, 380-393. 1878.)

STATEMENT OF FACTS.—The road in this case was sold by masters in chancery under decrees made by the United States circuit courts for Illinois and Indiana. The sale was made by the masters jointly. Exceptions were filed by various persons and by the company.

§ 1609. *What is sufficient to settle a question of jurisdiction.*

Opinion by DRUMMOND, J.

The first exception is that the court had no jurisdiction of the case, and therefore the decree was void. Under the circumstances, I can scarcely consider this an open question. The cases were originally brought in the state courts of Illinois and Indiana, and were transferred, under the act of congress of 1875, to the circuit courts of the United States for the southern district of Illinois and the district of Indiana. A motion was made in the circuit court for the southern district of Illinois, to remand the case to the state court, on the ground that the federal court had no jurisdiction. The question was argued before Davis and Treat, JJ., fully considered and decided by them; the court holding that it had jurisdiction of the case, under the act of congress of 1875. An order was accordingly made, denying the motion to remand. A like order was made in the district of Indiana. I do not think, therefore, it would be proper for me, whatever my own view of the question of law might be, to change the ruling of the court. If erroneous, the parties have their remedy by an appeal to the supreme court of the United States.

§ 1610. *If before a cause has been removed the state court has acquired jurisdiction of a party by process of publication, he is a party to the suit.*

The second exception is, that the issues raised in the original bill were not determined by the court; as there was a chattel mortgage to one Thomas as trustee, and no effort was made by publication, subpoena, or otherwise, to bring him within the jurisdiction of the court. The facts were substantially these: He was made a party to the cross-bill, filed by the Farmers' Loan & Trust Co., of New York, the original bill having been filed by the Turners. The law of Illinois, where the proceeding took place, and which is to decide this question, is, that a non-resident who is not served with process in a chancery proceeding can be brought into court on an affidavit and publication. An affidavit was accordingly filed, and publication in pursuance of the statute was made in a newspaper. Before the proof of publication was filed in the state court, where the case was pending, it was transferred to the circuit court of the United States, and, it is said, that the proof of publication was not even made before the order of transfer. I am not prepared to admit that would destroy the legal effect of what had taken place in relation to the affidavit and publication. It seems to me, on the contrary, if the law of the state was observed, a party would be brought into court under the circumstances of the case, although the proof of publication was not actually made. It might be a very doubtful matter whether or not the fact of the transfer would vitiate the notice. On the contrary, it would seem, in a case properly transferable, all the conditions which the state law has imposed on the case before the transfer are to be observed; and if anything should occur to prevent the consummation of the act, which the law of the state contemplated, the transfer would not render it nugatory. However, whether that be so or not, it is clear, from what has appeared since these exceptions were argued, that Thomas, the trustee, was a party to the proceeding in the circuit court of Illinois. He appeared by answer filed. He was, therefore, a party to the litigation, and he cannot now object that the court had no jurisdiction over him as trustee of the chattel mortgage.

§ 1611. *If a defendant files an answer, the court acquires jurisdiction over him, whether a replication is filed to his answer or not.*

It is said that a replication was not filed. That would not prevent the court

from exercising jurisdiction over him as trustee, or impair the effect of the adjudication of the court. If no replication was filed, that must be considered as waived.

Inasmuch as the cross-bill of the trust company was filed for the express purpose of determining the respective rights of the parties before the court, some of whom were Thomas, trustee of the chattel mortgage, and the New York company, the trustee representing the bonds for which the mortgages on the main line were given, it must be considered that when the court adjudicated upon that question and determined that the bondholders, under their mortgages, had a prior and better right, that it also decided the other question, although nothing is said in the decree as to the rights of Thomas, the trustee of the chattel mortgage. He claimed a prior right under the chattel mortgage. The other parties claimed a prior right under their real estate mortgages. The court decided that the bondholders, and the mortgages which were given to secure the bonds, had a prior right. That was the main question before the court, which was decided, and, of necessity, the rights of Thomas, as trustee, were also adjudicated. Therefore, the issues raised by the pleadings in the original bill and cross-bill, as to the claim of Thomas for a prior lien, were adjudicated. The second exception must be overruled.

§ 1612. *In what particulars the court has power to amend a decree at a term subsequent to that at which it was entered.*

The third exception is, that the court had no authority to amend its decree after the term of the court. The facts were that the original decree was entered on the 18th of July, 1877, and the amendment was made in May, 1878. I admit the rule which denies the power of the court over a decree after the term when it was rendered. It cannot change or alter the essential parts of the decree. But what was the order made by the court in May, 1878? It is termed *a further direction for the execution* of the decree theretofore entered. The original decree provided that the property should be sold on a certain number of days' publication. That was changed by the amendment. The original decree provided for the distribution of the funds arising from the sale in a particular manner. That was changed by the amendment of May, 1878. But these things did not affect the substance of the decree. Of the right of the court to make that order I cannot doubt. We will, therefore, pass on to the question about which there seems to be serious controversy. The thirteenth article of the original decree provided that the sale should be made subject to judgments for right of way, to the taxes which were a lien upon the property, and also to a certain contract of lease for box freight cars which had been made with the receiver by a man named Adams. The fourteenth article of the original decree provided — after declaring that \$50,000 should be offered as a deposit, and after the purchase \$50,000 more should be advanced, out of which two sums certain costs should be paid — that, on the delivery of the deed, so much more of the purchase money should be paid into court, in cash or certificates of receiver's debts, as should be necessary to pay that portion of the receiver's debts made in the operation of the main line of railway not theretofore directed to be assumed by the purchaser, with such other claims as should be allowed by the court; meaning what were called the back claims, many of which were pending and undecided, and in which it was understood that, under certain circumstances, the decision of the court might be reviewed by the supreme court of the United States.

§ 1613. *Amendments which the court had power to make at a term subsequent to that at which the decree was entered.*

It will be seen, therefore, that, under the original decree, the sale was to be made subject to certain claims, and that the purchasers had to provide money enough to pay all the claims which might be allowed by the court on appeal to the supreme court of the United States. What is the change made in these respects by the amendment? It recites "that the sale shall be made subject to the judgments for right of way, to the taxes, to the lease made with Adams by the receiver, and also subject to certain debts which might be due from the receiver, and also to such claims as might be allowed by the court on appeal to the supreme court of the United States." The only effect was that, whereas, by the original decree, the creditors were required to bid enough to pay these claims and some of the debts of the receiver, in the amendment it was provided that the sale should be made subject to them, so that they remained as a burden upon the property. That is the only change made which it is material to consider. Was that such a change in the original decree as the court had the power to make? I think it was. It was, so to speak, simply changing the amount of money which was required to be bid for the property. Undoubtedly it would have been better and much more satisfactory if the court, before it had ordered a sale under the original decree, could have informed the parties who might purchase the property what was the precise amount of liens upon it. But that, in the nature of the case, was impossible, unless we had waited, before the property was sold, until the final determination of these various claims by the supreme court of the United States, which might have involved the retention of the property by the court for several years. Therefore, it was thought best, by the court and by the parties who are interested in the property, that it should be sold, and that the purchaser should pay enough to meet all the claims then definitely ascertained, and that the property should be subject to those adjudicated hereafter. By the original decree and the amendment the character of the claims, in either event, remains unchanged.

§ 1614. *Mere inadequacy of price is not sufficient to set aside a foreclosure sale.*

The fourth exception is that the bid of \$1,000,000, for which the mortgaged premises were struck off and sold by the masters, was inadequate. And the reason alleged why so small a bid was made is because of the limited time the bidding was kept open. The property was offered for sale by the masters at 10 o'clock on the morning of the day specified. The advertisement was read, and the bid received. After waiting considerable time, there being quite a number of persons present, and no other bid being received, the property was struck off to the purchasers at that price. This was a matter, to a very great extent, discretionary with the masters. Undoubtedly, if the masters had any reason to suppose that there would soon be an additional and higher bid, they should have kept the bid open and allowed it to have been received. But, if it was clear, from all the attending circumstances, that no additional or higher bid would then be made, I do not see that it was incumbent on them to hold the bid open for an indefinite time — an hour, or even half an hour, or any particular time — in order to allow persons afterwards to come in and bid off the property. The sale was advertised the time required by the court. All parties in interest, and especially those who were parties to the suit, are presumed to have been notified of the time and place of sale, and, if they desired the property to bring its value or near it, they had every opportunity of being present,

and prepared to bid such a price as would come up to their ideas of its value.

It is clear from the affidavits, which have been introduced, that there was nothing to indicate that an additional bid would be made for the property. It was, accordingly, struck off to the purchasers. It is true, perhaps, that under some aspects of the case, the bid might be considered a small one. That is to say, it might not be regarded as the value of the property; but we have to take into consideration the circumstances connected with the sale. The incumbrances on the property were to a considerable extent indefinite and unknown to the purchasers, and subject to which they had to make their bid. It was believed that the amounts were very large. A great difference exists among counsel as to the amount which may be allowed. So that it is impossible for the court to disregard this consideration. Then, I think the court ought not to be unmindful of the position of the purchasers themselves. They represent those who have a superior right in equity to this property. They are a committee of the bondholders, most of whom have agreed to the arrangement made under which they have bid this amount for the property; all who are not parties had the option of participating in this arrangement. It is made for the benefit of all. Who has the prior right to the property now? They are not an outside third party who may have purchased it for less than its value, but they are the equitable owners of the property. Besides, it is not because parties may think that property, which has been sold under the order of a court, has not realized its full value, that the court will set the sale aside. The price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase. Now, it cannot be pretended that anything of that kind has occurred here.

§ 1615. *Where parties apply to have a sale set aside they must show that some suitable person will make an advance bid.*

Again, the practice of this court has been, where parties come into court and claim that property has been sold at an undervaluation, to require some person of responsibility to make an advance bid such as will authorize the court to order a resale. Although this offer has been made in the exceptions, no person has come in, of whom the court can take judicial notice, and said that he would give such an advance upon the price as would justify the court in reselling the property. To be sure, it was stated that a certain capitalist had offered to give \$500,000 more. I know nothing of him. I cannot take the statements of counsel made in this general way. One of the counsel, himself, says he would make an advance of \$50,000 on the bid that has been offered. I know nothing about his responsibility. I do not know whether he can make good his statement to the court or not. I, therefore, would not be justified in setting aside the sale on that ground, and hold them as the responsible parties who will make such an advance upon the bid as to warrant the court in ordering a resale. The fourth exception will therefore be overruled.

§ 1616. *There is no redemption from the sale of railroad property under foreclosure proceedings in the federal court.*

The fifth exception is, that, after a decision made in this court, that the right of redemption did not apply to railroads, there was not sufficient opportunity for the parties in interest to make arrangements to bid in the property at the sale. If that decision was correct, of course the parties were presumed to know the law. In point of fact, the decision in the case of *Brine v. Insurance Co.*, 96 U. S., 627 (§§ 800-804, *supra*), was contrary to the practice of the circuit

court of the United States for the district of Illinois for many years; a practice which had been accepted and acquiesced in by the bar in all cases of foreclosure. After this practice had thus continued an exception was taken to it, and the supreme court of the United States held, in the case cited, that, in cases of foreclosure of mortgages on real estate, the law of Illinois was a rule of property in the circuit court of the United States, and, as that law gave the right of redemption, the sale must be made in the circuit court of the United States subject to redemption. Of course the question immediately came up, whether this law applied to railroads, and, with a view of taking the opinion of the court upon that question, it was brought before the circuit court of this circuit. It was recently argued at Chicago before Judges Harlan, Gresham and Blodgett, and the court held that the rule in the case of *Brine v. Insurance Co.*, *supra*, did not apply to the sale of railroads under decrees of the circuit court of the United States. This being the law of this circuit till changed by the supreme court of the United States, I cannot admit the claim set up in the exception, and, therefore, the fifth exception will be overruled.

§ 1617. *In sales of large railroad properties it is a proper practice to require a deposit of fifty thousand dollars when the bid is made, and the payment of a like amount when it is accepted.*

The sixth exception is, that the terms of sale were unusually onerous; as it was required that the person making the bid should deposit \$50,000 with the masters, and, if the bid was accepted, the successful bidder should forthwith pay to the masters an additional sum of \$50,000, making, in all, \$100,000. And, it is said, the premises would have sold for more if these conditions had not been annexed to the sale. As these conditions were imposed by the court, it is rather an attack upon the judgment of the court. It must be remembered that this was a very large property. It was a railroad over two hundred miles in length, with its rolling stock, franchises and interests of all kinds. There were very large claims which had to be met immediately, including costs and expenses. And it seemed as though such a sum was indispensably necessary in order to meet these claims. It must be recollected, too, that the litigation had been protracted for a number of years; that parties had been performing services without any compensation year after year, lawyers, masters, clerks, etc. And after so long a time, and after the performance of so much service, it was thought some provision must be made for its payment, and accordingly \$100,000 was not thought inadequate. The language of the original decree was, "that the masters in chancery are hereby authorized and directed to require a deposit to be made by each and every bidder at such sale of \$50,000, as security." That was to prevent what are termed "straw bids," and prevent delays. It sometimes happens that men who are dissatisfied with the decrees and orders of the court, and who claim an interest in the property, bid for the purpose of delay, and, when called upon to make their bids good, are unable to do so. The court wanted to prevent anything of that kind, and, in order to require responsible parties to bid, it was decreed that each bidder must show his responsibility by depositing the sum of \$50,000, and then, after this deposit was made, \$50,000 additional was required to be deposited by the successful bidder by another article in the original decree, for the same reason. I cannot think that these conditions were onerous or unusual. The sixth exception will, therefore, be overruled.

§ 1618. *Rule as to sales subject to contingent claims.*

The seventh exception is, that the masters were unable to inform the pur-

chasers of the amount of claims or debts subject to which the property was sold; and that restrained bidders. The main fact is undoubtedly true. It was impossible for the masters to state precisely the amount of claims upon this property; because that amount may depend in a very great degree upon the decision of the supreme court of the United States. And to obtain that decision, it would have been necessary to suspend the sale for several years. That was something, therefore, which grew out of the necessity of the case and which could not be avoided. The eighth exception is substantially like the seventh. They, therefore, will both be overruled. The ninth exception is, a pledge made by Thomas, the trustee of the chattel mortgage, that if the court will again offer the premises for sale, they shall sell for more than a million dollars, and the costs of making the sale. I have already spoken of that, and have said that there has been no offer made in such a way that the court can take judicial notice of it and order a resale of the property. This promise or pledge has not been made good, and the ninth exception will be overruled. The tenth exception is simply a reference by Thomas to the orders and decrees of the court, which need not be further mentioned.

§ 1619. *Circumstances under which a committee (agents) will not be required to disclose their principals.*

The eleventh exception, which has been added since the original exceptions were filed, is that there is a certain committee acting as agents of the bondholders of the railway company; that there was no provision on the subject in the decree under which the sale was made; that the members of the committee are the parties who bid at the sale, and that the report of the masters does not show who were the principals for whom this property was purchased, and does not state what interest each of the parties interested in the purchase has. I do not know why that is necessary. These purchasers come forward and claim they are a committee of the bondholders. The court may take judicial notice of the fact that they represent the owners of the property. All that the court can require of them is that they shall comply with its orders. They have, so far, complied and shown their ability so to do. Indeed, perhaps in most of the sales which take place, certainly in many, under the decree of the court, the parties who are the nominal purchasers are often agents representing others. And they are not disclosed until the deed is demanded of the court, and sometimes not even then. The eleventh exception will be overruled. I think this disposes of all the exceptions which have been made except what relates to the bankruptcy of the Turners.

§ 1620. *An assignee in bankruptcy, if made a party to a suit, must come in and assert his rights or he will be barred by decree on default.*

The original bill was filed by them. Thereupon, a cross-bill was filed by the Farmers' Loan & Trust Company, which, as the court found, was the main actor and rightful one in the litigation as having a prior lien with authority to control it. The court sustained the prior equities of the company as the representative of the bondholders. After the first cross-bill was filed by the Farmers' Loan & Trust Company, the Turners went into bankruptcy and the assignee in bankruptcy was made a party upon the record. Undoubtedly, by the bankruptcy of the Turners, they ceased to have any authority over their property or any litigation then pending. But they had been the actors, originally, in the litigation, and a cross-bill had been filed against them by the Farmers' Loan & Trust Company. Under that state of facts, there was an informality or irregularity in one respect in the decree. A default was taken

against the Turners as though they were legally *in esse* interested in the litigation, contrary to the fact. But is the assignee to be heard now, and has he the right to say that the decree of the court did not bind him? I think not. If the assignee chose to lay by and do nothing, although made a party, then all that can be said is, that it is a mere irregularity in entering the decree; appearing there in court, made a party to the proceeding in court, it was his right to take the necessary steps to protect the interests of the bankrupts. If he did not choose to do so, certainly it would be unjust that the rights of others should be destroyed or even impaired because of his neglect.

While, therefore, there may be an informality in the decree, still I cannot see that it affects the rights of the Farmers' Loan & Trust Company, the general validity of the sale, or the decree, and, therefore, that objection will be overruled like the others. In disposing of the various objections that have been taken to this sale, it may be proper to add, in conclusion, that both Thomas and the assignee are parties to the decree, or they are not. If they are, they are necessarily bound by it. If they are not, their rights can be protected by a proper proceeding in a proper court. For these reasons the sale must be confirmed.

SULLIVAN v. PORTLAND & KENNEBEC RAILROAD COMPANY. (a)

(Circuit Court for Maine: 4 Clifford, 212-227. 1874.)

Opinion by CLIFFORD, J.

STATEMENT OF FACTS.—Two principal questions are presented for decision by the claim of the complainants. They contend that the foreclosure of the second mortgage, under which the new corporation claim title to the mortgaged property, was illegal and void. But, whether so or not, they claim that they and all others holding the six per cent. certificates are entitled to recover their proportion of the four per cent. annual interest so remitted and paid over to the treasurer, whether paid during the possession of the old or the new corporation, as the latter, as the complainants insist, took their title, if any, with notice of all the said votes, stipulations, agreements and alleged liens, and of the alleged trusts imposed upon the old corporation by virtue of the arrangement, and they also pray for an account and for an injunction, as set forth in the bill of complainant.

§ 1621. *Decision of a state court as to a foreclosure is rule for federal court.*

Since the decision of the state court in the case of the old corporation against the new one, it must be assumed that the foreclosure was *bona fide*, and in strict conformity to the state law, as the decision in that case, whether the judgment be held to be a legal bar to the present suit or not, must be regarded as furnishing the rule of decision to the federal courts in all such respects, as it is plain that every objection now taken to the foreclosure, except perhaps the one that the state law already referred to, providing for a foreclosure in such cases, is unconstitutional, was fully presented to the state court, and was by that court directly overruled. *Kennebec & Portland R. Co. v. Portland & Kennebec R. Co.*, 59 Me., 20. Viewed in that light, it is quite clear that the only questions of much importance now open for decision in the case are as follows: 1. Whether the state law providing for foreclosure, as applied to this case, is a constitutional law. 2. Whether the claim of the complainants that the new corporation is liable to them in this suit for the four per cent. annual

(a) Read this opinion in connection with the one by the supreme court, *infra*, §§ 1622, 1623.

interest, remitted by the holders of the Yarmouth certificates, and paid over as heretofore explained, can be sustained.

Construe the prior law of the state as it was construed by the state court in that decision, and it is obvious that the first proposition of the complainants cannot be sustained, as the later statute does not differ, in the particular mentioned, from the prior law which was in force at the date of the mortgage. Beyond all doubt, it was competent for the state court to construe the prior law, and it is equally clear that the law as construed by the state court furnishes the rule of decision in the federal courts; and if so, it follows that the latter act is not repugnant to the former, and if not, every possible ground of complaint is removed, which is all that need be said upon the subject. S. C., 59 Me., 47. Grant all that, and still it is insisted by the complainants that their claim for the four per cent. annual interest remitted by the holders of the Yarmouth certificates is still open, and that the claim is unaffected by that decision, or by the foreclosure of the second mortgage, or by the deed of conveyance under which the new corporation hold their supposed title to the mortgaged property.

§ 1622. *Contract void for usury.*

Grave doubts are entertained whether any branch of the proposition can be sustained; but it may be well to inquire, in the first place, whether the claim could be sustained as against the foreclosure and the title of the new corporation as derived from the deed of conveyance given by the trustees named in the second mortgage, even supposing that the claim is wholly unaffected by the decision of the state court, affirming the validity of the foreclosure. Certificates of stock known as old preferred stock were issued by the corporation to the amount of \$240,000, of which \$200,000 are outstanding and unredeemed. Persons holding such certificates were promised ten per cent. annual interest by the corporation which issued the certificates, but such certificates of stock were not secured by mortgage nor by any collaterals of any kind, the holders relying entirely upon the promise of the corporation. All of the claim of the complainants is founded upon that issue of certificates of stock, coupled with the relinquishment of the four per cent. of the annual interest promised to the holders of the Yarmouth certificates, and which they remitted subject to the stipulation of the old corporation, that the amount remitted should be held by the treasurer, in trust, to be applied, if required, to the payment of the annual interest promised to the preferred stockholders. Made as all these contracts were with the old corporation, it becomes important to inquire to what extent they were obligatory upon the promisors, as the new corporation did not acquire any title to, or possession of, the mortgaged property prior to the date of their deed of conveyance from the trustees named in the second mortgage. Throughout that period, and to the 11th of March, 1870, the legal rate of interest in the state was six per cent., and the law of the state provided that, in any action brought on any contract whatever, on which there is directly or indirectly taken or reserved a rate of interest exceeding the legal rate, the defendant may, under the general issue, prove such excessive interest, and that it shall be deducted from the amount due on such contract. R. S. (1840), p. 317; R. S. (1859), p. 322; Sess. Acts (1870), p. 95.

Valid contracts for a higher rate of interest than six per cent. may be made since the passage of the last-named "act concerning the rate of interest," but both these contracts were made nearly seventeen years before that act was passed, when, beyond all doubt, the whole excess beyond six per cent. was un-

authorized by law, and might have been avoided as usurious. Both parties knew that the rate of interest stipulated in the two contracts was unauthorized by law, nor can it make any difference that the corporation promised, in the indorsement upon the old certificates, that the four per cent. annual interest remitted in excess of the legal rate should be held in trust by the treasurer, to be applied to the payment of interest to such of the holders of preferred stock as should adopt the proposal of the stockholders, as both agreements rested in executory contract, and contemplated the payment of a rate of interest not authorized by law.

Ten years and more elapsed from the date of the said indorsement upon the said certificates, before the trustees named in the second mortgage conveyed the mortgaged property to the new corporation, and throughout that period the four per cent. annual interest was remitted, or was not claimed, by the holders of the Yarmouth certificates, without any steps being taken by the corporation to set apart the same, or any part of the same, to be applied as stipulated in the said proposal of the stockholders. Nor were any steps taken within that period, or ever afterwards, to the filing of the bill of complaint by the holders of the preferred stock, to enforce that stipulation or to secure the benefit of it in any way whatever. Seventeen years and more had elapsed from the date of the indorsement on the Yarmouth certificates to the filing of the bill of complaint, during all of which time nothing was done by the holders of those indorsed certificates to enforce any such claim, or to require either the old or the new corporation to make any such payment, or set apart the four per cent. annual interest so remitted, or any part of the same, for any such purpose as that now claimed in the bill of complaint. Tested by these considerations, it is undeniable that the claim against the old corporation, if any they ever had, was barred by the statute of limitations before the present suit was instituted, and that all that portion of the claim which arose prior to the date of the conveyance under which the new corporation claim to hold title may be dismissed without further remark. R. S. 1857, p. 510.

Suppose that is so, still it may be suggested that the claim of the complainants, arising within six years next before the filing of the bill of complaint, is not barred by the statute of limitations, which presents the question whether the new corporation ever became liable to fulfil the stipulation contained in the indorsement upon the Yarmouth certificates, that the four per cent. annual interest, so remitted by the holders of the old certificates, should be held by the treasurer of the corporation, in trust, to pay interest to such of the holders of the preferred stock as should accept the before-mentioned proposal of the stockholders. Undoubtedly they took their title subject to the rights secured to other parties holding prior mortgage rights, such as holders of bonds or certificates secured by prior mortgages, but the new corporation may well contend that the complainants do not stand in any such relation to their title, as their claim is not secured by mortgage, and as nothing was ever done, either by the complainants or by the old corporation, to set apart the amount promised under that stipulation, or any part thereof, as a fund to be appropriated to that object. Had such a designation of the fund been made by the parties to the stipulation, much weight would be due to the allegation of the bill of complaint, that the new corporation took their title with notice of the claim of the complainants.

But in view of the facts as they existed at the date of the conveyance, it is difficult to see how that allegation can avail the complainants, as the conduct

of both parties to the stipulation clearly indicated that they concurred in regarding it as inoperative and of no effect, as nothing had been done, or claimed to be done, to show that the new corporation, in accepting their title, assumed any obligation whatever in that behalf. Notice is alleged in the bill of complaint, but it is expressly denied in the answer, and there is no proof upon the subject, except what may be inferred from the relation which the corporators of the new corporation, or some of them, previously bore to the promisors in the stipulation. Direct proof that the new corporation had notice that the complainants made any such claim, at that date, is entirely wanting, nor can it be maintained even if they had knowledge of the said votes and stipulations, that those votes and stipulations, without more, are sufficient to constitute a lien which was binding and operative, as against the new corporation, for the amount claimed in this suit.

Sufficient has already been remarked to show that this suit is brought to set aside the foreclosure, and to recover the four per cent. annual interest remitted by the holders of the Yarmouth certificates, in favor of such holders of preferred stock as accepted the aforesaid proposal of the stockholders of the old corporation. Instituted, as the suit was, solely for these two objects, nothing need be said in respect to the right of the holders of the Yarmouth certificates to recover the principal of their loan, and six per cent. interest thereon, as no such issue is involved in the record. Attention, therefore, must at present be confined to the claim of the complainants to recover the four per cent. annual interest remitted by the holders of the Yarmouth certificates. Unless it can be held that the arrangement between the old corporation and the holders of the Yarmouth certificates amounted to a valid lien in favor of the complainants, it would seem to be clear that the claim cannot be supported, as it plainly could not be as against the old corporation, and it must be admitted that the new corporation took the absolute title to the mortgaged property, subject only to any legal rights previously vested in other individuals or corporations. Difficulties of an insuperable character stand in the way of the theory, assumed by the complainants, that the votes and stipulations referred to amount to a lien upon the four per cent. annual interest, so remitted and paid over to the treasurer.

1. Because the contract to pay ten per cent., of which the four per cent. was a part, was usurious, and as such was unauthorized by law. 2. Because the contract was merely executory, and did not, without more, amount to a lien, even if the contract was legal, as the interest remitted was never set apart to be applied to the described object. 3. Because the remedy of the party, if the contract was binding, was at law for the breach of it, as the interest, when received, was immediately mingled with the earnings of the railroad, and paid out to meet current expenses. 4. Because the party interested acquiesced in that disposition of the interest for more than seventeen years without complaint, including the whole period of the pendency of proceedings for foreclosure, and for more than seven years after the conveyance by the trustees named in the second mortgage to the new corporation. 5. Because both parties to the stipulation in question, up to the date of the conveyance to the new corporation, treated it as a mere executory contract, never indicating by any recorded act that they regarded it as constituting a lien upon any particular fund. 6. Because the whole claim of complainants against the old corporation is barred by the statute of limitations. 7. Because the whole claim of the complainants for the application of the four per cent. annual interest is barred by

the proceedings of foreclosure. 8. Because the new corporation took their title divested of all claims which were illegal, or which were barred by the statute of limitations or by the foreclosure proceedings. 9. Because the decision of the state court, affirming the validity of the foreclosure proceedings, is a complete answer to the whole claim of the complainants for the four per cent. annual interest so remitted and paid over to the treasurer of the old corporation. 10. Because the complainants were guilty of laches in asserting their claim, having delayed to take any steps to enforce it for more than seventeen years from the time the stipulation was executed. 11. Because they have been guilty of laches in asserting their claim against the new corporation, having delayed to make the claim for more than seven years since the new corporation acquired their title under the foreclosure and the deed of conveyance from the trustees named in the second mortgage. 12. Because the complainants were not authorized to institute or prosecute the suit, as it does not appear that the corporation ever refused the same, or to adopt the necessary measures to protect their rights, if any they had, in respect to the claims set forth in the bill of complaint. *Mozley v. Alston*, 1 Phil. Ch., 790; *Foss v. Harbottle*, 2 Hare, 461.

§ 1623. *A usurious contract to apply excess by indorsements cannot constitute a lien.*

Enough has already been remarked to show that the contract for ten per cent. annual interest was usurious, and that the contract of the promisors to apply the excess in the manner contemplated by the indorsement on the Yarmouth certificates would not constitute a valid lien which could be enforced in law or equity against a subsequent purchaser of the mortgaged property.

§ 1624. *Liens may be created by statute or by contract.*

Such a contract, even if legal, being merely executory, would not, without more, amount to a lien which could be enforced against a subsequent purchaser of the mortgaged property, as the unexecuted promise did not create any vested interest in the corporate estate, real or personal. Liens may be created by statute or by express contract between the parties, or they may arise from usage, or be implied from the dealings or business relations between the parties, in which latter class of cases the lien is generally displaced by the surrender of the possession. Taken in its widest sense, it is doubtless true that the term lien includes every case in which personal or real property is charged with the payment of a debt; but the question in this case is, whether enough was ever done to charge the mortgaged property with any such obligation. Statute liens depend upon the construction of the statute, and contract liens depend upon the terms of the contract; but the inquiry in this case is, whether sufficient was done to effect the purpose of the parties.

§ 1625. *Equity acknowledges liens which cannot be enforced at law.*

Equity indubitably acknowledges liens which cannot be enforced at law, but an equitable lien, though not necessarily creating a property in the thing, must amount to a charge upon it, in order that it may be recognized and enforced in a court of justice. *Ex parte Foster*, 2 Story, 131.

§ 1626. *What is indispensable to validity of a lien.*

Obligations of this kind are frequently binding between the parties when they are of no avail against a subsequent purchaser or attaching creditor. Slight evidence may be sufficient, in equity, to show an assignment or setting apart of the fund in a case like the present; but in this case there is no such evidence whatever. On the contrary, the case shows that for eleven years the

four per cent. was received by the old corporation, without ever recognizing any such obligation, and the amount so received was constantly mingled with the other earnings of the railroad, and paid out to meet current expenses. It is indispensable to the validity of such a lien, say the supreme court, that there should be a distinct appropriation of the fund and an agreement that the creditor shall be paid out of it, and it is clear that nothing of the kind appears in this case. *Wright v. Ellison*, 1 Wall., 22; *Morton v. Naylor*, 1 Hill, 583; *Hoyt v. Story*, 3 Barb., 262; *Burr v. Carvalho*, 4 Myl. & C., 690; *Watson v. Wellington*, 1 Russ. & M., 602. If the agreement was binding, the remedy of the party for the breach of it was at law against the old corporation. *Insurance Co. v. Bailey*, 13 Wall., 621; *Hipp v. Babin*, 19 How., 271.

§ 1627. *Courts of equity bound by statute of limitations in certain cases.*

Acquiescence in the course pursued by the old corporation, in mingling the remitted interest with the other funds of the corporation, and in paying out the same to meet the current expenses of the corporation, without any attempt to institute any proceedings to protect their supposed rights, was gross laches on the part of the complainants. Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statute of limitations, which governs courts of law in like cases, and this rather in obedience to the statute than by analogy. In many other cases they act upon the analogy of the limitation at law, as where a legal title would, in ejectment, be barred by twenty years' possession, courts of equity will act upon the like limitation, and apply it to all cases of relief brought upon equitable titles or claims, touching real estate. *Wagner v. Baird*, 7 How., 258; *Moore v. Greene*, 2 Curt., 202; 2 Story, Eq. Jur. (8th ed.), 1520; *Farnham v. Brooks*, 9 Pick., 243.

§ 1628. *Staleness will bar in equity where no statute of limitation applies.*

But there is a defense of the kind, peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. *Badger v. Badger*, 2 Cliff., 154. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. 2 Sugd. Vend. & P. (7th Am. ed.), 399; *Roberts v. Tunstall*, 4 Hare, 257; *Jenkins v. Pye*, 12 Pet., 241; *Harwood v. Railroad Co.*, 17 Wall., 81; *New Albany v. Burke*, 11 Wall., 107. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which appeal to the conscience of the tribunal exercising jurisdiction in the case. Pecuniary prejudice, of a serious character, must have been occasioned to the new corporation by the delay of the complainants to set up their claim, as the new corporation in the mean time discontinued and abandoned a portion of the original location, and located and constructed a new route instead, and effected a connection not before existing, between their railroad and another railroad, which form a continuous line from Augusta to Boston.

Nothing in the nature of an excuse for the delay appears in this case, but both parties, throughout the whole period mentioned, treated the stipulation as inoperative and of no effect. Self-evident as the seventh proposition is, nothing need be added in its support. Nor is any argument necessary to uphold the eighth proposition, as the plainest principles of justice would forbid, in view of the circumstances, that the new corporation should be held to pay

any claim which is illegal as against the old corporation. Having shown that the complainants had no valid lien upon the mortgaged property, it follows that the decision of the state court is a complete answer to the whole claim under consideration, as it conclusively affirms the validity of the foreclosure, overruling every objection to it set up in the present suit.

Laches is a good defense, for the reasons set forth in the tenth proposition, which requires no further discussion. Nor is any further discussion of the eleventh proposition required, as it is fully supported by the authorities already cited, to which one or two more may be added. *Hovenden v. Annesley*, 2 Sch. & L., 636; *McKnight v. Taylor*, 1 How., 168; *Smith v. Clay*, 2 Amb., 645. Much discussion of the twelfth proposition is unnecessary, as it is quite clear that those which precede it are sufficient to show that the bill of complaint must be dismissed. Suffice it to say that no steps were taken to secure the co-operation of the old corporation before the suit was instituted, nor does it appear that any request in that behalf was ever made by the complainants. *Dodge v. Woolsey*, 18 How., 341 (CORPORATIONS, §§ 565-573); *Bronson v. La Crosse, etc., R. Co.*, 2 Wall., 301 (§§ 1460-66, *supra*); *Ang. & A., Corp.* 4th ed.), § 341. Bill of complaint dismissed, with costs.

SULLIVAN v. PORTLAND & KENNEBEC RAILROAD COMPANY. (a)

(4 Otto, 807-812. 1876.)

APPEAL from U. S. Circuit Court, District of Maine.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The Kennebec & Portland Railroad Company was authorized to build a railroad from Portland to Augusta, both in the state of Maine. On the 30th of April, 1850, that portion of the road between North Yarmouth and Portland, about twelve miles in length, was mortgaged to Ruel Williams, John Patten and J. B. Carroll, trustees, to secure the payment of \$202,400 advanced to the company by the *cestuis que trust*. The debt was represented by certificates bearing interest at the rate of ten per cent. per annum. On the 1st of November, 1850, the company mortgaged the whole line of the road to the commissioners of the sinking fund to secure \$800,000 lent to the company by other parties. On the 17th of October, 1851, the road and franchises were mortgaged to John Patten, Joseph McKen and M. S. Hagar, in trust to secure bonds issued by the company to the amount of \$230,000, known as first mortgage bonds. On the 15th of October, 1852, the road and franchises were mortgaged to the same trustees to secure the payment of a further issue of bonds to the amount of \$250,000, known as the second mortgage bonds. In the progress of the work on the road, the company issued certificates of preferred stock, known as old preferred stock, to the amount of \$240,000. On this stock dividends of ten per cent. per annum were to be paid. Two hundred thousand dollars of it in amount is averred to be still outstanding.

On the 7th of October, 1852, a proposition was made by the company to the following effect: The company was to waive its existing right to redeem at pleasure its road from North Yarmouth to Portland, and to make it irredeemable until November 1, 1870, provided the holders of the certificates of indebtedness would, by indorsement thereon, authorize the trustees, after paying the holders three per cent. semi-annually upon the amounts severally represented by such certificates, "to pay over semi-annually to the treasurer of the company, for

the use and benefit of the company, the balance of the income (for interest) which the stockholders are now entitled to receive (viz., two per cent.), to be held by him and appropriated, as far as may be required, or as the same may go, to the payment of interest to such preferred stockholders as shall surrender their old certificates of stock, and receive new certificates of preferred stock bearing three per cent. interest or income semi-annually, in lieu of five per cent., as now stipulated; said payment of three per cent. to the holders of said certificates and of the balance aforesaid to the treasurer by said trustees semi-annually, to be in full of the annual income of ten per cent. to which said certificate holders are now entitled."

It was ordered by the company, that, if the proposed arrangement should be made with the North Yarmouth certificate holders, the fund thereby saved should be applied in payment of the dividends accruing on the new certificates of preferred stock as also proposed. Authority was given to the president of the company to issue such new certificates of preferred stock, and to waive the right to redeem the North Yarmouth road until November 1, 1870, the time named in the proposition. None of the holders of the preferred stock accepted this proposition until September 1, 1853. The first new certificate bears date on that day. The other certificates were issued subsequently. On the 16th of December, 1853, the company ordered three per cent. to be paid on the 1st of January then next to all the holders of the new certificates for the preferred stock. The company became hopelessly insolvent. The trustees of the second mortgage foreclosed that mortgage. The foreclosure was perfected and became absolute in May, 1862. In November, 1862, the bondholders under that mortgage formed a new corporation by the name of the Portland & Kennebec Company. The trustees conveyed to this company. The company went into possession, and has since been in possession, and operated the road and claimed to own it.

This bill is filed by the complainants, as holders of the new certificates of preferred stock, for themselves and in behalf of the other holders not before the court. The claim is to recover the four per cent. per annum relinquished by the North Yarmouth holders of certificates of indebtedness, pursuant to the proposition of the original company, and which proposition was also to give to the holders of the new certificates of preferred stock what is claimed by this bill.

The circuit court, properly, as we think, decreed against the complainants and dismissed the bill. They have brought the case before this court for review. In the argument here they have insisted that the process whereby the foreclosure of the second mortgage was effected was irregular, without warrant of law and void; and that if this were not so, the complainants, upon the other facts of the case, are entitled to the relief sought. The first proposition is conclusively negatived by the judgment of the supreme judicial court of the state. *Kennebec & Portland R. Co. v. Portland & Kennebec R. Co.*, 59 Me., 20. Nothing more need be said upon that subject.

§ 1629. *A new corporation, formed by purchasers at a foreclosure sale, not liable for debts of the old corporation.*

There is no privity between the complainants and the new corporation. The agreement or arrangement relied upon was made with the Kennebec & Portland Railroad Company. The Portland & Kennebec Railroad Company was not in existence when it was entered into. There is no ground for insisting that the latter succeeded to this liability of the former. The new company

did not take the property with any such *onus*. The liability rested wholly on the contract of the parties by whom it was made. It did not run with the property into the hands of those who acquired it by the foreclosure. They did not assume the liability, expressly or by implication. Hence neither they nor those claiming under them are in anywise bound. The foundation of the claim as to both is *res inter alios acta*.

Nor was there any privity whatever between the North Yarmouth creditors and the preferred stockholders. Whether the stockholders did or did not receive what was surrendered by the creditors did not affect or concern the latter. The moneys surrendered were to be paid over "semi-annually to the treasurer of this company for the use and benefit of this company." With such payment the duties of the trustees terminated. Thereafter the company was to apply the fund for the benefit of such of the stockholders as should comply with the condition prescribed. There were two distinct propositions: one to the debt-holders, the other to the stockholders. The latter could get nothing unless the former accepted. But the acceptance of the former had no relation to the acceptance of the latter. After the former accepted, the latter still had the option to accept or refuse. The indorsement required to be made by the debt-holders upon their certificates did not refer or relate to the stockholders. When the arrangement between the old company and the debt-holders was complete, it was equally effectual and conclusive upon those parties, whether the preferred stockholders did or did not thereafter take any action. There was no assignment or transfer of any interest in the mortgage. There was simply a release and extinguishment of so much of the liability secured, and, by consequence, of the lien and existence of the mortgage to that extent. Thereafter the liability and the mortgage were as if they had never been for anything more. The new company acquired the ownership of the road, and its entire income, subject only to the pre-existing mortgages. The source whence the fund in question was to flow was destroyed by the foreclosure. When the latter was complete the former ceased to exist, and thenceforward was as if it had never been.

The defense of the statute of limitations is not set up by plea nor in the answers. We cannot, therefore, consider the case in that aspect. *Wilson v. Anthony*, 19 Barb. (Ark.), 16. The objection that there is a remedy at law is only available where such remedy is as plain, adequate and effectual as the remedy in equity. *Boyce v. Grundy*, 3 Pet., 215. Here, if the complainants could recover the moneys claimed, they would be entitled, also, to discovery, and an account. Where this objection lies, it is the duty of the court *sua sponte*, to take notice of it and give it effect. There is, in such cases, a constitutional right to a trial by jury. *Parker v. Woollen Co.*, 2 Black, 545. The charges of fraud and conspiracy in the bill are wholly unsupported by the proofs.

§ 1630. *Staleness of claim.*

To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for

the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly. *Wilson v. Anthony*, 19 Barb. (Ark.), 16; *Taylor v. Adams*, 14 id., 62; *Johnson v. Johnson*, 5 Ala., 90; *Ferson v. Sanger*, Dav., 256; *Fisher v. Boody*, 1 Curt., 219; *Cholmondeley v. Clinton*, 2 Jac. & Walk., 141; 2 Story's Eq., sec. 1520a. "A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." *Smith v. Clay*, 2 Amb., 645. If the complainants had severally sought to enforce their claim in an action at law, *ex delicto* or *ex contractu*, the bar of the statute of limitations would have been complete after the lapse of six years. R. S. of 1857, p. 510. This bill was filed on the 21st of February, 1871. The complainants were supine and silent for more than seventeen years. In the mean time, the Kennebec & Portland Company became hopelessly and finally insolvent, and its affairs a wreck. Proceedings were instituted to foreclose the second mortgage, and brought to a close. The company lost all its property, and has since existed only in name. A new corporation has come into existence, and acquired and owns all the property and effects lost by the old one. This transfer occurred more than seven years before the first step was taken in the present case. This long delay thus characterized is unaccounted for. The facts are amply sufficient to warrant the application of the rule of laches, and to give it the fullest effect.

Decree affirmed.

WETMORE v. ST. PAUL & PACIFIC RAILROAD COMPANY.

(Circuit Court for Minnesota: 5 Dillon, 581-536; 1 McCrary, 466-474. 1880.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—This case, which has been very fully argued before us, and which we have taken into consideration as thoroughly as we are able at this term, is one of very great importance, considering the sum involved in the controversy. The purpose of the petition is no less than to set aside the sale of a railroad which is perhaps worth \$20,000,000 or more; a road which has been reorganized since the purchase, with a new set of directors, a new set of stockholders, very largely and above all, a new set of bondholders. The road was purchased under a decree of this court, the purchase was confirmed, and a new company organized, which has been in possession of the road over a year, and has issued, as I say, some \$10,000,000 or \$15,000,000 of new bonds, held all over the world; and now original bondholders in the old company, representing \$1,500,000, come and ask that all these proceedings be set aside, and that we proceed *de novo* to sell the road. These petitioners were not parties to that suit in the sense in which they now seek to be made parties. The first thing that they ask in the present proceeding is that they may be made parties. If they were parties at all—as in some sense they were, and represented by their trustees in the proceedings of foreclosure,—they were not parties in such a sense as would enable them to control the litigation, or come forward now as parties originally engaged in the litigation; and they, therefore, seek, very properly, if they are to have any relief in this proceeding, to be made parties

in the first instance. The first question that presents itself is whether they can be made parties.

§ 1631. *Mortgage trustees represent the bondholders.*

Taking all to be true that they say in their petition, the case stands that, during the proceedings of foreclosure, these petitioners ought to have been represented, and were legally represented, by the trustees, plaintiffs in the foreclosure suit. The foreclosure was manfully resisted by the corporation for three or four years. It was obvious that the mortgage ought to be foreclosed and the road sold, as the interest had not been paid for years. The present applicants state that the road, at that time, was worth say \$8,000,000. Fifteen million dollars of bonds were liens upon it, with whatever other claims there might have been against it, besides the interest coupons, so that the road had a bonded debt of twice the amount these petitioners say it was then worth. It was, therefore, obvious that it was just and right to foreclose the mortgage, and sell the road for the payment of those debts.

During this litigation it became apparent to the court that this road had to be sold. They finally entered a decree for the sale. It has been said in the argument that that was a consent, and, therefore, was something of an *ex parte* proceeding, but the record does not show any such state of the case as that. It shows very clearly that the parties were present, and although there is, in some parts of the record, a preliminary statement that such and such parties were present in court, and consented to the decree, or submitted a decree which they desired to have entered, the record goes on further to state that the court did not enter that decree, but that it took the paper and entered a decree upon its own consideration. It was, therefore, a decree on a full consideration by the court — one which met its approval, upon an examination of the merits — and it ordered the sale. The sale was had. A part of the original bondholders were, under a special organization, according to the laws of Minnesota, purchasers. That did not settle the controversy or the rights of the parties absolutely. The master who made that sale was required to report it into court. He did report it, and the sale was confirmed.

§ 1632. *After confirmation of a foreclosure sale, bondholders not allowed to become parties for the purpose of impeaching it.*

The language of that order differs but little from the ordinary language made use of in decrees, to the effect "that further orders may be made upon a footing of this decree;" and I cannot believe that when it was made it was in the contemplation of the court who was confirming this sale that the "further orders" there spoken of was such an order as would set aside the sale. That was the thing they were passing upon. Who has ever heard of a decree which disposes finally of millions of property — a decree under which the purchasers were to take possession and get a final deed, and under which they would enter upon the management of the property and create new rights, by bonds and all that sort of thing — who ever supposed that such a decree as that was to stand for nothing more than a mere preliminary or interlocutory order which the court could set aside at any time that, in its judgment, sufficient reasons for not confirming the sale should be brought to bear? It is much more in conformity with reason, with precedent and common sense, to believe that the "further orders" referred to here are such orders as might be necessary for the distribution of the funds as between the parties, and the payment of the bonds which had to come in and which might be disputed as to their ownership — probably for the delivery of the possession (for I do not see anything in this

decree which requires the delivery of the possession), probably for the making of a deed (for I do not see anything here about the making of a deed). There are fifty things you can imagine which would be consistent with the confirmation of the sale, and which might yet require further orders of the court. I have not the slightest idea that after all the consideration and all the trouble that preceded the sale, and all the parties coming in and agreeing to sell and consenting to it, that the court simply said: "We confirm this sale subject to the setting aside of the confirmation whenever we think proper." Such a thing would be plainly against the interests of the purchasers as well as against the interests of the parties. I therefore think there is nothing whatever in that order which justifies the interference that is asked in this case.

Now, that sale being confirmed, a deed made by the master, property turned over and delivered to the purchasers, those purchasers having reorganized under another corporate name, doubtless a great deal of the stock that they held passed into the hands of other men — certainly the bonds that they issued upon the strength of that new organization, to the extent of \$8,000,000, having passed into the hands of other men,— these parties now, for the first time, come into this court and ask that they be permitted to upset all this transaction, to do that which they did not seek in the five years of litigation, namely, to be made parties to this suit, and then to be treated in the double aspect of persons who are parties to the suit and having all the rights of parties from the beginning, and also in the aspect of persons who were not parties to the suit, and whose rights have not been foreclosed.

No authority is shown, no precedent is shown, and I do not believe any can be shown for such a proceeding. It is so anomalous, so unusual, so much out of the way, that I think it requires express authority in the way of precedent or statute to show that such a thing as that can be done. The counsel, apparently seeing this difficulty, have made an order accompanying the confirmation proceedings the foundation, to a large extent, of this application. There is a single sentence at the end of the long order concerning the confirmation. The first part of that confirmation is: "That the said report, the said foreclosure sale, and all proceedings thereon, be and the same are hereby, in all things, confirmed." There are several orders relating to the distribution of the proceeds, and what the master should do with the money, and so on, and then it winds up: "This order is made by and with the consent and at the request of the trustees, the complainants, and with the consent of the parties defendant shown above, and the right to make any further order is reserved."

The argument in favor of opening this case by these petitioners, who are not parties, is that we will permit them to be made parties; that this order is sufficient to open up everything. *First*, that it is sufficient to go back and open up the original decree; but if not, that it is certainly sufficient to allow the court, upon such representations as they here make, to set aside the order of confirmation, then to set aside the sale, and then to order a resale, or take such steps as may be just to the parties. On the whole, then, we are of the opinion that there is no principle or precedent which would warrant these petitioners being made parties to this suit with a view of making such motion in the case.

§ 1633. *The remedy of bondholders in such case is by original bill.*

In the next place, we are of opinion that this order is not to be construed as extending to any such relief as is asked by these petitioners. We perhaps ought to stop there. I understand that a bill in chancery, in the nature of an original bill, or a bill of review, has been brought into this court, and demurrer thereto

sustained by Judge Nelson, which, of course, is subject to appeal. See *Kropholler v. St. Paul, etc., R'y Co.*, 2 Fed. R., 302; S. C., 1 McC., 299 (§ 1641, *infra*). I feel bound to say, that, if these parties are entitled to any relief in regard to this transaction, it is by some such bill as that, and not by a proceeding to go under the foundation of this suit by being made parties to it, and then seeking to controvert matters which were error in the proceedings. If there has been such fraud practiced upon these parties by their trustees as would justify any relief in connection with that suit, it must be by such a bill as that, whereby they come in and set up their own interest, and show how they were cheated and defrauded. But I must say — I think I have a right to say — perhaps it may be of value in future litigation (although I would not be bound by it in the supreme court), that I have not seen such evidences of fraud in this proceeding as to justify the court to set aside this sale. It seems to me that here was a case of a mutual interest by bondholders and others at hazard, whose purpose and object was to have that road sold to satisfy the bonds. All of them must have desired that the road should be sold to satisfy their debts.

I have already myself decided, on a plea in the original suit concerning the removal of the first trustees and the substitution of others, that that was rightfully done. Of course, I think so now. The road ought to have been sold. It was the duty of the trustees to procure its sale as soon as possible. They did, with great energy and perseverance, proceed in this court, and finally obtained, after years of litigation, a sale of that property, for the purpose of paying these debts. A sale was had, and it is said that one reason why it should be set aside was that it was sold for an inadequate sum. It was sold for a sum above what the court fixed, as chancery practice calls it, as an "upset price."

§ 1634. *Foreclosure sale for an inadequate price.*

Of course the court, in fixing an upset price, intended to say that it was better that it should sell at that price than not to sell at all, and the court had taken the necessary means to get all the information on the subject possible, as the case stood at that time. It is wrong to suppose that the same court will now set aside the sale, which brings a million and a half of dollars, because the objection that now, in the light of a year or two after that, in the improved circumstances and the prosperous times, in the value attaching to that road growing out of the connections newly made, we are now to consider the thing as of the present time, in relation to its value at the time the same was made. This is one of those constant, every-day events of people who have let things slip out of their hands coming back afterwards to endeavor to secure the value which they failed to recognize or secure at the time. Nothing hindered these bondholders from bidding. It is said there was a million and a half dollars among them. They could have bid as well as the other bondholders. The trustees did not feel disposed to fight them; they left them to protect themselves.

I must say, also, in regard to the trustees, that I don't see (although, by the decree, they had the power, and perhaps a conditional instruction, that they should purchase that property if they thought it was selling for a totally inadequate price) that we can say they did not exercise their best judgment about that when they let it go. We do know that there were large expenses to be paid; that there was a large sum of money in cash to be paid before it could be bought by the trustees and paid for in the bonds of the corporation. We know that there were a million of dollars of debentures and other interests that had to be provided for before the road could be purchased by the bonds,

and we do not know of any adequate means that the trustees had to raise the cash and the amount of these debentures. I must say, in regard to the argument urged here more than once by Mr. Gilman, that these trustees should have sold the land for that purpose, does not strike me as being an argument of very great weight. They could not have sold land in time to raise that money in any ordinary mode, in any satisfactory mode, in any mode that would not have been liable to greater objections, or as great, as to let the road be bought in by a majority of the bondholders. I myself do not see any fraud committed by these trustees.

§ 1635. *Purchase by an organized body of bondholders.*

The great objection, however, is that these bondholders commenced proceedings long ago under the foreclosure proceedings to organize themselves into a body of men by a committee for the purpose of buying the road. In regard to that, it is to be said that they excluded nobody — none of the bondholders — from coming in on the same terms as themselves. They invited every one to come in with them. These petitioners, representing a million and a half, who now hold these bonds, stood out and declined to come into the arrangement, and took no steps to protect themselves or the property. What right have they, when these parties spent money, time and trouble to have this road sold, to claim all the advantages which diligence and labor and money expended; and especially the money for these debentures, in the idea that they were trying to get the road into the hands of a receiver and of keeping it up? What right have they to come in now and say: "We avail ourselves of your labor, money and time for the simple reason that you undertook to get this road sold for the purpose of paying yourselves as well as us?"

Because these men co-operated and put themselves in condition to buy the road, it does not seem to me that they were, therefore, acting in any fraudulent manner. They deprived these petitioners of none of their rights. They were at liberty to join the syndicate, as it was called; they were at liberty to bid; they were at liberty to come in and make themselves parties. They did nothing of the kind. Were these bondholders, who purchased the road, to be put into the condition of a single man, who owned \$12,000,000 out of \$15,000,000 of bonds, I can see no reason why they should not take steps to have the road sold, and buy the road as cheap as they could get it, provided they cheated or hindered nobody in the matter.

This branch of the subject was not necessary to be decided here, and the parties may take an appeal from Judge Nelson's decision. I only make these remarks for the consideration of counsel. The present petition is overruled.

JACKSON v. LUDELING.

(21 Wallace, 616-634. 1874.)

APPEAL from U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Bill in equity against Ludeling, and others enumerated in the opinion as those to whom the property was sold by the sheriff; also the Vicksburg, Shreveport & Texas Railroad Company. The bill asked that a certain mortgage made by the company might be declared a valid lien on the property described in it, and that the sheriff's sale above referred to might be set aside. The complainants were bondholders under the mortgage, and preferred stockholders. There was a prayer also for a receiver. The bill was dismissed.

Opinion by MR. JUSTICE STRONG.

The sale under consideration was made under an *ex parte* order, obtained from a judge in chambers on the 23d of December, 1865, at the suit of Gordon, who described himself as the owner of four of the mortgage bonds, upon which coupons amounting to \$720 were due and unpaid. The petition for the order of sale did not aver that Gordon was the owner or bearer of the mortgage, or that he had any rights therein superior to the rights of any other bondholder for whom the mortgage was a security. It might, perhaps, be doubted, therefore, whether under the law of Louisiana he was in a condition to petition for executory process for a sale of the mortgaged premises, and whether the judge had any authority on his petition to order a sale. No question of this kind, however, is seriously made here, and we proceed to notice at once the manner in which the process was used, the proceedings prior to the sale and at the sale, and the actions and relations of the purchasers. Gordon's petition made no disclosure of the name of any other holder of bonds secured by the mortgage. Ostensibly he sued for himself alone. He asked for no notice, and none was given, of his application to any other bondholder, though there were seven hundred and sixty-one bonds outstanding, held principally in other states. The order of seizure was granted by the judge on the 23d day of December, 1865, but it was not filed in the clerk's office until Saturday, the 30th of that month, late in the afternoon, and on that day the sheriff made a seizure and served a notice thereof upon H. M. Bry, who was then acting as the president of the corporation, and who subsequently became one of the purchasers at the sale. On the 2d of January, 1866, the sheriff advertised the property for sale in one newspaper published in the town of Monroe, and by posting a copy of the advertisement on the church door and another at the door of his office. The sale was appointed for the first Saturday of February, which was the earliest day on which it could be made under the law of the state. By that law the property seized was required to be appraised, and could not be sold for less than two-thirds of its appraised value. It consisted of a railroad about one hundred and ninety miles in length, with numerous water stations, buildings, warehouses, depots and depot grounds, cars, locomotive engines, wagons, machinery, utensils, bills receivable from numerous promisors, aggregating more than \$40,000, unpaid stock subscriptions exceeding \$320,000, and a large land grant of several hundred thousand acres, together with the franchise of the company. To appraise all this property the appraisers were summoned to meet on February 3d, the day of the sale, at 10 o'clock, A. M. They were appointed by Gordon and Bry, both of whom were purchasers at the sale. Obviously it was impossible for the persons appointed to make any fair appraisal at that time. Yet they reported one of all the property at \$75,000 in legal-tender notes, and the sale proceeded. From the sheriff's return as first made, drawn up by John T. Ludeling, Gordon's attorney, and one of the purchasers, the sheriff exacted an illegal and onerous condition. The condition was, that the purchaser should pay cash to pay the interest coupons then due, with credit to meet the immature interest and bonds, and should give bonds, with personal security, for the credit portion of the bid. At the first cry the property was struck off to George M. Branner & Co. for \$550,000; but because they failed to pay at once the interest coupons then due and presented, the sheriff immediately set up the property again in bulk, and sold and adjudicated it to John T. Ludeling, John Ray, Francis P. Stubbs, Wesley J. Q. Baker, William R. Gordon, Henry M. Bry, Joseph F. McGuire, John A. McGuire,

Robert Ray, Joseph P. Crossley, Charles W. Phillips, Robert C. Strother, Christopher H. Dabbs, George C. Waddell, William M. Pincaird and James U. Horne, the said John T. Ludeling having bid in the property for them for the sum of \$50,000, and they having complied with the terms of sale by paying the proportional amounts of the several coupons due, which were presented for payment, to wit, \$10,739.83, to William R. Gordon, John T. Ludeling and James U. Horne, the holders of one hundred and fifty-four bonds, and to F. P. Stubbs \$850.68, being the amount due on the coupons he presented for payment. Such was the sheriff's return. Two days afterwards he made a deed to the purchasers.

Were there nothing more in this case than is narrated by the brief history thus given, which is uncontradicted, it would be difficult to characterize the transactions as anything less than a great wrong perpetrated by the agency of legal forms. The great body of the bondholders could have known nothing of the proceeding to sell the mortgaged property and discharge their lien. Their residence was remote, and the sale was hurried as fast as the forms of law permitted. Not a day was lost. They were not afforded an opportunity to attend and bid at the sale, or pay off Gordon's small claim of \$720. Neither they nor their trustee were consulted. The sale was made in a village far in the interior. It was advertised in only one local newspaper, and not a day longer than the law required. The appraisement was made at the last moment, and it was obviously intended to facilitate a hasty sale for a nominal price. Onerous and illegal conditions of sale were exacted from other bidders, but not from these purchasers, who paid nothing except to themselves. A property upon which had been expended nearly \$2,000,000, together with a large stock subscription, a large grant of lands, and considerable movable property, was bought for \$50,000 by the very persons who defeated a sale for a much larger price, and the purchase money was retained by themselves.

§ 1636. *Equity will not permit one bondholder to make use of the mortgage so as to obtain an advantage for himself over the others secured by the same mortgage.*

But to a thorough understanding of the case it is necessary to consider the relation in which many of the purchasers at the sale, who are the present defendants, stood to the complainants, and how far their conduct was consistent with that relation. As we have seen, William R. Gordon, at whose suit the executory process for the sale was ordered, was the holder of four bonds. These he obtained in the month of October, immediately preceding the sale, paying for them \$640, and by his purchase he became entitled to the security of the mortgage ratably with the holders of the other bonds. In equity he was a *quasi* owner in common with the other bondholders of whatever rights the mortgage gave. He was not a partner with them, nor *strictly* a tenant in common, but the relation into which he introduced himself by his purchase imposed upon him some duties. If he actually held the mortgage he held it as a trustee. Whether he did or not, it was a duty which he owed to the other bondholders not to destroy its value. When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Community of interest involves mutual obligation. Admitting, then, that Gordon had a right to make use of the mortgage to enforce the payment of the bonds which he held, he had no right so to use it as to obtain an advantage for himself over the other bondholders. He had no right to employ it as an instrument by which

he might become the owner of the property mortgaged at the lowest possible price at which it could be obtained, leaving the bonds held by his associate holders unpaid. His duty, if he used it at all, was to make it productive of the most that could be obtained for all who were interested in it, and if he sought to make a profit out of it at the expense of those whose rights in it were the same as his own, he was unfaithful to the relation he assumed, and was guilty of fraud. In *Gue v. Tide Water Canal Co.*, 24 How., 263, it was said by Chief Justice Taney, when delivering the opinion of the court, that "it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by disavowing from the franchise property which is essential to its useful existence."

If, now, the conduct of Gordon be observed and compared with the relation he sustained to the other mortgage bondholders, it will be apparent he was utterly regardless of his duty. Before he sued out the executory process he conceived the scheme of forcing a sale of the mortgaged premises, not for the purpose of paying the debt which was a lien upon them, but for profit that might be made out of the purchase, or as he represented in substance to one whom he requested to join in his plans, because there "was a probability of a very decided speculation from the sale." And in pursuance of this scheme, on the 10th day of January, 1866, only a few days after the executory process was placed in the sheriff's hands, he entered into a written agreement with John T. Ludeling, W. J. Q. Baker, F. P. Stubbs, G. C. Waddell and John Ray, which had for its object the purchase of the railroad and mortgaged property, for the exclusive benefit of the parties to the agreement, with no reference to the other bondholders. By this agreement he placed himself in an antagonistic position to those creditors of the company whose security he was using. Their interest was that the property should bring a full price, but his, under the agreement, was that it should be sold for the lowest price possible. Nor is this all. He himself appointed one of the two appraisers who, on the day of the sale, made an appraisement so obviously inadequate and unfair that it forces a conviction it was made collusively to enable the parties to the agreement to obtain the property at a price nearly nominal. The entire property was appraised at \$75,000. Five hundred and fifty thousand dollars were bid for it (though the bid was rejected), and immediately after it was adjudicated to Gordon and his associates, they were offered for their bid \$1,000,000, as testified by the person who made the offer, or \$600,000, as admitted by Ludeling, and the offer was rejected. Gordon was also a party to the steps taken by which the sheriff was induced to reject the bid of \$550,000 made by Branner & Co., and put the property up for a resale. It is impossible to look at all this without coming to the conclusion that Gordon's conduct was, from beginning to end, a violation of the duty he owed to the other bondholders, a duty growing out of his relation to them, and out of his appropriation of a security in which they had an interest nearly two hundred times greater than his own.

§ 1637. *Officers of a corporation have no right to enter into a combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice, or the lowest possible price.*

And the situation of the other defendants is little, if any, better. John Ray, Joseph F. McGuire, John C. McGuire, Christopher H. Dabbs, Wesley J. Q. Baker, Robert Ray and Henry M. Bry were directors of the railroad com-

pany when the executory process was sued out, and when the sale was made. Bry was the vice-president and acting president, in consequence of the absence of the president, who was in Georgia. Joseph McGuire was the company's secretary and treasurer. All these parties were at hand, residents in or near Monroe. As officers of the company they had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, and also, to a considerable degree, of the bondholders, owners of the mortgage. We do not say they might not have purchased the property at a sale over which they had no control, and made under judicial process adverse to the company. Perhaps they might. But we do say they had no right to join hands with Gordon. They had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Such a course was forbidden by their relation to the company. It was their duty, to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bondholders. And this rule was peculiarly applicable to these defendants. On the 11th of October, 1865, only about two and a half months before Gordon instituted his proceedings to effect a sale of the road, the directors had resolved that, "in pursuance of resolutions passed by a meeting of the stockholders held on October 2d, the president of the company be appointed to make arrangements with any company who, in his judgment, might be able to put the road in repair, which was theretofore in operation, and complete the balance of the road, *'and pay the debts of the company;'* and, if such arrangements could be made, that the same be reported to the directors, and, upon their approval, that such steps should be taken as might vest the road, its franchises and other property in such company." One of the purposes of this resolution was the payment of the debts of the company. How, then, can it be claimed that directors who had thus resolved, in obedience to the instructions of the stockholders, were at liberty to participate in a scheme, the object and effect of which was to divest the company of all its property and franchises without the payment of its debts? How can they be permitted to join hands with those who sought to obtain that property at the lowest price, whose interest it was to have no other bidders than themselves at the sale, and whose action tended to defeat the avowed object of the resolution passed by the directors, as well as to make worthless the security which it was their duty to protect and render in the highest possible degree fruitful?

Having thus noticed the relation in which these defendants stood towards the company, its shareholders and its bondholders, and some of the duties and disabilities attendant upon that relation, we are prepared to inquire how those duties were performed. It is proved that a combination was formed as early as November 18, 1865, by some of these directors, to become the purchasers of the property and franchises of the company exclusively for their benefit and the benefit of those whom they might consent to associate with them. A written agreement to that effect was made and signed by John Ray, William S. Parham and W. J. Q. Baker, both Ray and Baker being then directors.

By the agreement John T. Ludeling was appointed the agent of the parties to make the purchase in their name. This was very shortly after the resolution of the board of directors, to which we have called attention, was adopted. The agreement was repugnant to that resolution, which contemplated no disposition of the property which did not provide for the payment of the debts of the company, none that might be for the exclusive advantage of some directors. The agreement was made after Wadley, the president, had left the state and gone to Georgia, where most of the bondholders resided, with a view, if possible, to effect such an arrangement as the resolution of October 11th recommended. There is no direct evidence that at this time these parties were in combination with Gordon to obtain the property for themselves by a hurried sale, conducted with the least possible opportunity for notice of his proceeding to those stockholders and bondholders resident at a distance, who had the greatest interest. But that such a confederacy subsequently existed we think ought to be inferred from what subsequently occurred. Indeed, many facts point to such a combination and can be accounted for only by it.

On the 10th of January, 1866, Ludeling, Baker and John Ray entered into another agreement with Gordon, Stubbs and Waddell, by which, after reciting that proceedings had been instituted to sell the railroad, with the property thereto attached and appertaining, they agreed severally to deposit with Ludeling a sum of money to be used for the purpose of forwarding the interests of the company (*i. e.*, the associated parties) relatively to the railroad and property bought, and that the parties to the agreement should be interested in the stock, shares and property of the company in the proportion of the amount of money put in by each one, regardless of what the property might have cost. Ludeling was designated to bid for the property, and, should he buy, was required to take the title in the names of the contracting parties and such others as might be necessary to preserve the existence of the Vicksburg, Shreveport & Texas Railroad Company. No one was permitted to sell out his interest within six months after the purchase without the consent of a majority of the other joint owners or copartners, and after that time, namely, the expiration of the six months, the refusal was given to the company. This agreement was also signed about February 1, 1866, by Robert Ray, another director, as he has testified. Thus these directors became avowedly confederates with Gordon to purchase the property and to purchase it for their own benefit. Thus they took a position in which it became their interest that the property should be sold at a low price; that there should be as little competition as possible, and that no efforts should be made to stay the sale, or give any more notice than a formal compliance with the law required. Thus their interests were brought into direct antagonism with the interests of the stockholders and bondholders. Thus they combined to defeat the accomplishment of the arrangement proposed by the resolution of the directors of October 11, 1865. It is impossible to regard this combination as anything less than a plain violation of their duty, a breach of the trust reposed in them, and, if not an actual, at least a constructive, fraud.

§ 1638. *An agent cannot lawfully seek his own profit at the expense of his principal.*

The plan proposed by this arrangement, however, was disturbed unexpectedly by the arrival in Monroe of James U. Horne, another director of the company. He appeared in the latter part of January, 1866, shortly before the day of sale, commissioned by the holders of a large number of the mortgage

bonds (nearly three hundred) to have the railroad sold and purchased by a trustee or trustees, to be selected by the bondholders and creditors of the company, in which class the preferred shareholders might be placed; a new company to be formed of the purchasers upon a basis to be previously agreed upon and signed by the several interests, the bondholders to be placed in the class of preferred shareholders, and the other creditors and preferred shareholders to have common stock. This plan proposed the extinction of common stock and the creation of a new mortgage for the purpose of repairing and stocking the road. Horne's commission was in writing. On his way to Monroe he met Gordon in New Orleans, and there learned for the first time that proceedings had been instituted to bring the property to sale. Gordon then proposed to him to unite his interests and those of his constituents with those of the party in Monroe, namely, the party that had combined to purchase the property. Upon Horne's arrival at Monroe he had several interviews with Ludeling, and it appears that he endeavored to procure a postponement of the sale, representing that Gordon had consented to such postponement. To this Ludeling replied that Gordon had no authority to make such an offer or consent. Considering that Ludeling was then a party to, and the active agent of, the combination that had been formed, this reply is most remarkable. It shows that the confederacy had then the control of the executory process and of the sale, and that the directors of the company had put themselves in the position of both sellers and buyers of the property they hold in trust; for if Gordon had no authority to consent to the postponement of the sale, it must have been because of his arrangements with the directors. But, passing this by, after many propositions, Horne was persuaded by Ludeling, and without any communication with his constituents, to enter into an agreement, which was made on the 2d of February, 1866, one day before the sale. The material part of this agreement was that Gordon, Ludeling, Baker, Stubbs, Waddell and John Ray, of the first part, and Horne, of the second part, *for himself and friends*, should club their funds to buy the property of the Vicksburg, Shreveport & Texas Railroad Company, advertised for sale on the morrow, in partnership, and, if the property should be bought by them, that the party of the first part should own two-thirds, and the party of the second part should own one-third. The agreement reveals apprehension that the sale might be stopped by injunction or declared null and void. It was signed "John T. Ludeling, for himself and friends," and "J. U. Horne, for himself and friends," and it is proved that when it was entered into Ludeling was informed of Horne's mission and of the plan he was instructed to carry out.

§ 1639. *A combination to remove competition at a public sale or to induce an agent to sacrifice the interests of his principal is unlawful.*

It is impossible to characterize this agreement as anything else than fraudulent. Its obvious purpose was to remove competition at the sale. It was a flagrant breach of trust on the part of Horne, and it was a fraud in Ludeling, with knowledge of the trust Horne had undertaken, to persuade him to violate his instructions and sacrifice the interests of his constituents, himself becoming a party to the violation.

Such were the combinations organized, and such was the object of the combinations when the day arrived on which the sale had been advertised to be made. This large property was about to be sold for a claim of \$720, at a village remote from the residence of the great body of those most interested in it. It must have been known that notice of the sale in all probability had not

reached those parties. Their agent, sent to protect their interest, had been tampered with and overcome. Not one of the defendants, who were residents at Monroe and directors of the company, who had combined to become purchasers at the sale, and not one of those who subsequently united in the purchase and became directors of the new company, not even Bry himself, the vice-president, had lifted a finger to stay the sale, or, so far as appears, had requested any delay, or had made any effort to prevent the probable sacrifice of the property; and when Mr. Garrett, a lawyer and resident stockholder at Monroe, obtained an injunction against the sale, he was bought off by the payment of \$2,500 for common stock, confessedly not worth a cent, yet taken at its par value, and he was required to stipulate that he would take no fee from, or in any manner counsel or advise, either directly or indirectly, any person who might desire to attack the sale. This arrangement was negotiated by Baker, and the money was paid by Ludeling. We have already noticed the appraisement made after 10 o'clock on the morning of the sale by two persons appointed by Gordon and Bry. Of its character we propose to say little more. Manifestly it had been prepared before the appraisers were selected. It was conveniently low to enable the associates to purchase for a sum almost nominal, and one of the appraisers at least was appointed by a person who had combined with others to become a purchaser, and who was, consequently, disqualified from selecting an appraiser, or, certainly, was unfit to make such a selection.

Everything having been thus prepared, the sale proceeded, but the scheme of the associates was at first deranged by the interference of other bidders, Branner & Co., who bid for the property \$550,000, more than seven times the amount of the appraisement, and to whom it was first struck off. Then ensued what we must regard as a most remarkable effort to prevent an adjudication to these bidders and an acceptance by the sheriff of their bid. Ludeling, for himself and his associates, and acting as their chief agent, presented one hundred and fifty-four of the mortgage bonds, four of which were Gordon's, one Bry's, and most, if not all, the remainder obtained from Horne, and demanded immediate payment of the past-due coupons. He had no right to make such a demand. He knew the bonds had been placed in Horne's hands for other purposes. He knew that it was a breach of faith in Horne to allow them to be thus used, and a fraud upon their owners thus to use them. Stubbs presented seventy-two coupons taken from other bonds, and also demanded immediate payment. And he had no authority to make such a use of those coupons. They had been placed in his hands for another purpose, which failed, and their owners had directed them to be returned. Bry also had one bond, and he presented it with its coupons. This one bond, with the four of Gordon, were all that there was any authority to present. Yet the confederates, taking advantage of Horne's breach of trust, and of Stubbs' unauthorized act, were enabled to present the coupons of one hundred and fifty-four bonds, and part of the coupons of thirty-six other bonds, for immediate payment. The sheriff joined in the demand, and, because Branner & Co. were unable at once to pay this unauthorized claim, he set up the property again immediately for sale, when it was struck off, on Ludeling's bid of \$50,000, to the persons we have named. This was on Saturday, late in the afternoon, and on the Monday next following the sheriff's deed was delivered, but the bidders, though receipting in part to each other, have still in their hands the whole of their bid except \$168.75, the amount of costs paid to the sheriff.

Thus directors of the company, owing duties to its stockholders and creditors, not only combined to obtain the company's property for themselves at a sacrifice, through the formality of a judicial sale, but were active participants in successful efforts to defeat a sale for \$550,000 in order that they might become the purchasers for \$50,000.

It is impossible to sustain such a transaction. Throughout it was grossly inequitable. That the property was sacrificed by means of an unlawful and widespread combination is abundantly proved, and that the directors who were parties to it, and who became the purchasers, were guilty of an inexcusable violation of confidence reposed in them admits of no doubt. Ludeling, it is true, was not a director, but he was a leading member of the combination and its chief agent to carry out its plans. He knew its purposes. He knew its illegality. He had negotiated the surrender of Horne, with full knowledge of Horne's breach of trust. He assumed the control of Gordon's executory process, and, as we have noticed, when told that Gordon had consented to stay the sale, he declared that Gordon had no power to do it. Indeed, Ludeling appears to have had complete possession of the sheriff. He drew up the sheriff's return, carefully stating in it that all the requirements and formalities of the law had been complied with in the second offering as they had been in the first, and he was, as the evidence shows, most active in defeating an adjudication to Branner & Co. on their large bid.

The connection of Stubbs and Waddell with the combination we have already sufficiently shown, and it is not claimed that the other defendants, Crossley and Phillips, are anything more than volunteers. They have paid nothing. The sheriff adjudicated the property to them, and his deed was made to them in common with others, but it is proved that their interest is only nominal, each having had one share given to him. They were introduced to enable the confederates to carry out their scheme. Pincaird, according to his own statement, was a party to the agreement of February 2, 1866, between Ludeling and his friends, and Horne and his friends. He was therefore one of the parties to the unlawful combination.

The defendants can take nothing from such a sale, thus made. Were we to sustain it, we should sanction a great moral and legal wrong, give encouragement to faithlessness to trusts, and confidence reposed, and countenance combinations to wrest by the forms of law from the uninformed and confiding their just rights. No words need be expended to show that the defense of the new company, the North Louisiana & Texas Railroad Company, must fall with that of the other defendants. The new company was formed by the purchasers at this illegal and void sale. It was organized while this suit was pending, and it has no other title than that of these purchasers.

§ 1640. *A judgment of homologation under the laws of Louisiana is only conclusive as to matters of form.*

It remains only to consider the effect of the judgment in the monition suit instituted by these defendants on the 21st day of April, 1866. They contend that the judgment of homologation rendered in that suit conclusively establishes the validity of the sale made to them, and bars the present bill. But we think such is not the effect of the judgment. The proceeding to homologate a sheriff's sale is peculiar to Louisiana. It is authorized by an act of the legislature passed March 10, 1834. R. S., title Monition, §§ 2374-2380. That act authorizes purchasers at a sheriff's sale to apply for a monition to all persons interested who can set up any right, title or claim to the property described in

consequence of any *informality* in the order or decree or judgment of the court under which the sale was made, or any *irregularity or illegality in the appointment and advertisement in time or manner of sale*, or for any other defect whatsoever, to show cause why the sale should not be confirmed and homologated. If no cause be shown, the judgment of confirmation in the case is conclusive upon the world. But conclusive of what? Conclusive that there have been no fatal informalities, or irregularities, or defects; we think of nothing more. The act has relation to mistakes or omissions of the officers of the law. But there is nothing in it which authorizes an inquiry into or an adjudication upon questions of fraud; nothing which concludes the question whether the purchasers have obtained their title by fraud, or whether they are trustees *mala fide* for others. And such has been the ruling of the Louisiana courts. In *City Bank v. Walden*, 1 La. Ann., 46, the court considered the effect and scope of the act. "It was passed," they said, "for the protection of *bona fide* purchasers at judicial sales from litigation concerning matters of form, a non-observance of which frequently exposed purchasers to unreasonable and vexatious suits. The difficulty of administering and preserving proofs of the observance of formalities was, in the hands of the unscrupulous, the instrument of great annoyance and expense to those who had purchased and paid for property exposed to sale under the authority of our courts. We do not understand the operation of the act to extend beyond the matters of form, nor that it purports to operate upon matters '*dehors*' the record." This is manifestly the true construction of the statute, and it is quite consistent with the enactment that the judgment of homologation is to be received and considered as "full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interests of the parties duly represented." Fraud and trust are entirely outside the record. A sale may have been conducted legally in all its process and forms, and yet the purchaser may have been guilty of fraud, or may hold the property as a trustee. In this case the complainants rely upon no irregularity of proceeding, upon no absence of form. The forms of law were scrupulously observed. But they rely upon faithlessness to trusts and common obligations, upon combinations against the policy of the law and fraudulent, and upon confederate and successful efforts to deprive them wrongfully of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence. Homologation is no obstacle to such a claim.

Judgment reversed.

KROPHOLLER v. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

(Circuit Court for Minnesota: 1 McCrary, 299-301. 1880.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.—The only question raised by the demurrer, to be considered in this case, is whether the bill is wanting in equity. The complainant makes no substantial charge of fraud against any trustee in the deed to secure the \$15,000,000 issue of bonds, and his bill alleges no grievance which determined the court to overrule the demurrers in the cases of *Stricker v. Kennedy et al.*, *Messchaert v. Kennedy et al.*, and *Sahlgard v. Kennedy et al.* Kennedy was never a trustee in this trust deed, and his acts as the agent of the committee of bondholders of the \$15,000,000 issue are not subject to the criticism made in the other cases.

§ 1641. *Creditors may fairly combine to purchase property at mortgage sale.*

The fact that Kennedy, who is not a trustee in this deed, as agent of the foreign committee, entered into an agreement for the sale of the bonds held by the committee with Smith, Stephen, Kittson and Hill, and consummated it, and such agreement contemplated the purchase of the railroad and appurtenances, would not call for the interference of a court of equity. These creditors could fairly combine to purchase the property of their debtor, and other bondholders and creditors are not, by such combination, deprived of the right to bid at a sale under the decree. The charges made against the order of the court authorizing the receiver to issue debentures and complete the unbuilt portion of the road, and the manner in which it was built, and the amount of debentures issued and paid over for such construction, afford no ground of equitable relief. The court, before the decree was made, examined the objections in respect thereto, and only issued an amount of debentures equal to the cost of construction as clearly established by proof.

The charges against the decree are not such as in my opinion would authorize a court to disturb it, and the sale was made under the decree, for anything that appears in the bill, fairly and for more than the price fixed by the court. That the purchaser was authorized to pay all of the bid except \$50,000 in the debentures issued by the court, and in the bonds of the \$15,000,000 issue at the percentage upon their fair value equal to the dividend to which they would be entitled upon a distribution of the proceeds of the sale, is not inequitable. Substantially, such a provision in a decree met with the approval of the United States supreme court in *Ketchum v. Duncan*, 96 U. S., 659. The bill, also, in attacking the sale, charges the trustees with neglect in respect thereto, amounting to fraud. I am not prepared to admit that the allegations of the bill in that behalf entitle the complainant to any relief.

In the order confirming the sale the following provision was inserted: "This order is made by and upon the consent and at the request of the trustees, the complainants, and upon the consent of the parties defendants, . . . and the right to make any further order is reserved." In view thereof, I think the complainant, if entitled to any relief against the sale and the confirmation thereof, should present a petition, asking to be admitted a party to the original foreclosure suit, and if the court admits him, the objections would then be considered. He can have such opportunity at the next June term of the court. The demurrer is sustained and the bill dismissed.

CRAWSHAY v. SOUTTER.

(6 Wallace, 739-741. 1867.)

APPEALS from U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—The La Crosse & Milwaukee Railroad Company made a land-grant mortgage to secure bondholders. The mortgage was foreclosed and the purchasers formed a new company. Crawshay and Oddie, bondholders, surrendered their bonds and took certificates of stock. Vose, also a bondholder, held bonds for \$5,000, and also certificates of stock entitling him to a corresponding amount of stock in the new company. The court confirmed the sale, subject to the payment of his debt.

Opinion by MR. JUSTICE DAVIS.

After a protracted litigation, the circuit court for the district of Wisconsin, at its last September term, confirmed the sale made by the marshal in what is

known as the land-grant foreclosure suit, brought by Soutter and Knapp, surviving trustees, against the La Crosse & Milwaukee Railroad Company. These appeals are brought here to review that order of confirmation, and will be considered together. Various exceptions were taken in the court below, and are renewed here, to the report of the marshal of the sale of the mortgaged premises, but it is unnecessary to notice them, as Crawshay and Oddie are not in a condition to avail themselves of them; and the rights of Vose, as owner of bonds or certificates, are protected by the order of confirmation.

§ 1642. *Bondholders who elect to abide by the action of trustees as to a scheme for purchasing the property cannot afterwards object to its confirmation.*

Crawshay and Oddie were original bondholders under the land-grant mortgage, but, before filing their exceptions to the report of sale, they had surrendered their bonds to the trustees, appointed under the scheme for the adjustment of the affairs of the La Crosse Company; took certificates of stock, and subsequently the bonds and stock of the St. Paul Company, as provided in the agreement for organizing it. By doing this, they elected to abide by the action of the trustees, and cannot now be heard to interpose any objection to the confirmation of the sale. Vose was one of the trustees appointed by the bondholders of the La Crosse Company to adjust its affairs, and form a new company, but differences sprung up between him and his co-trustees, resulting in their refusal to co-operate with him. It is unimportant to inquire whether his co-trustees were justified in their treatment of him, because, before the confirmation of the sale by the court, the trust agreement was substantially closed. All the bondholders, except Vose, had exchanged their securities for the bonds and stock of the St. Paul Company. Vose, at the time of filing exceptions to the report of the sale, was the owner of five bonds of the La Crosse Company, for which he held the certificates of the trustees, entitling him to a corresponding amount in bonds and stock of the new company. It is not necessary to determine whether, by exchanging his old bonds for certificates of stock in the new company, he was not so far committed to the adjustment scheme as to prevent his withdrawal from it; for in any aspect of the case, all rights that he could possibly have under the land-grant mortgage were protected by the court. The order of confirmation was expressly made subject to the payment to him, by the St. Paul Company, of five bonds of \$1,000 each, with all accrued and unpaid interest, upon the surrender by him of the certificates of the trustees, and all claims for dividends.

He certainly could reasonably ask no more than the payment of the principal and interest of his La Crosse bonds — if he was unwilling to take the stock and bonds of the St. Paul Company with their unpaid dividends, according to the trust agreement,— and as the court obliged the St. Paul Company to pay him the full amount of his La Crosse bonds, it is hard to see how he is aggrieved by the order of confirmation.

Decree affirmed.

DRURY v. CROSS.

(7 Wallace, 299-306. 1868.)

APPEAL from U. S. Circuit Court for Wisconsin.

STATEMENT OF FACTS.—Bailey & Co. furnished iron to lay the track of the Milwaukee & Superior Railroad, and held notes against the company for \$21,000. They also held \$42,000 in mortgage bonds as collateral security, and about

\$280,000 in bonds were deposited with Jesup & Co., but were not to be issued until the above debt was paid and twenty-seven miles of road built. The notes were indorsed by four of the directors. The company becoming insolvent, Bailey & Co. sued the directors on their indorsement, and the latter brought suit to foreclose the mortgage in order to save themselves out of the collaterals. Pursuant to an arrangement between the directors and Cross & Co., the latter purchased the claim of Bailey & Co. and obtained the \$42,000 and the \$280,000 in bonds, the directors agreeing to aid them to acquire the whole property of the road. The foreclosure decree was rendered on the \$322,000 bonds, and the bonds were allowed by the master as a lien on the road. This transaction was for the purpose of protecting the directors. The bonds were obtained by Cross & Co. for a very small sum, through a sale on the Milwaukee exchange. Cross & Co. bought the road and property under the decree for \$20,100. Drury & Page, judgment creditors, filed this bill to set the sale aside. The court dismissed the bill as to Cross & Co., and the appeal was taken from that decree.

Opinion by MR. JUSTICE DAVIS.

The transaction which this case discloses cannot be sustained by a court of equity. The conduct of the directors of this railroad corporation was very discreditable, and without authority of law. It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust. To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management, with absolute fidelity to both creditors and stockholders, they, nevertheless, acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed. If Bailey & Co. had sold iron to build the road, so had the Boston association sold locomotives to run it. It is not easy to see why the corporation should exhaust its effects to pay one, and leave the other unpaid. But, it is said, the directors, being unable to pay both, had the right to choose between them.

§ 1643. *Right of a debtor to prefer a creditor.*

We do not deny that a debtor has a legal right to prefer one creditor over another, when the transaction is *bona fide*; but this is, in no just sense, a case of preference between creditors. If the law permits the debtor, in failing circumstances, to make choice of the persons he will pay, it denies him the right, in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result.

§ 1644. *Even a sale under a mortgage lien will not carry a good title as against other creditors unless the foreclosure sale be free from collusion or fraud.*

That the plan adopted by the directors of this railroad to dispose of its property to Cross & Co. was a fraudulent contrivance, and necessarily, if executed, accomplished a fraudulent result, is too plain for controversy. At the time this scheme was initiated, there were only five miles of track laid, the company hopelessly insolvent, and the enterprise abandoned. In this condition of things, the directors were sued on their indorsement, and, as was natural, manifested an anxiety to have the property of the company pay the debt for which they were liable. But Bailey & Co. preferred not to enforce their mortgage lien, and only consented to allow it to be done, on being indemnified against the risk and expense of the suit. The directors, in furnishing them this indemnity, in

order to procure the enforcement of the mortgage lien to the extent of \$42,000, which in their hands was a just debt against the company, were guilty of no wrong. But the departure from right conduct, on their part, commenced at this point. Notwithstanding they had the control of the foreclosure suit, they were not content to let it proceed to decree and sale without they were, *in advance*, relieved of personal responsibility. Bailey & Co. would not release them, and they endeavored to find some person who would purchase the Bailey claim with its collaterals, and discharge them from liability on their notes. This would have been well enough, if the scheme had embraced only the \$42,000 bonds held as collaterals, which the company justly owed, and the foreclosure suit was brought to enforce. But the scheme went much further; for these directors, who controlled the corporation, in their selfish desire to save themselves at the expense of their own reputation and the rights of creditors, were willing to use the means at their command to swell the indebtedness of the road beyond its true amount, in order to aid more effectually Cross and his associates to acquire all the property of the company.

If Cross & Co. had been satisfied with the transfer of the \$42,000 bonds, which constituted the true indebtedness against the road, in the hands of Bailey & Co., the transaction on their part would have been free from censure; but the certain attainment of the object they had in view required more bonds. It was very clear that bidders might appear, if the road was to be sold for no more than the face of these bonds, while they would be deterred from attending a sale where the sum to be made was over \$300,000. To bring the decree, therefore, up to a point at which competition would be silenced, it became necessary to use the bonds in the hands of Jesup & Co. Two hundred and eighty thousand dollars in the bonds of an insolvent corporation — constituting no indebtedness against it — are thrust, unasked, into the hands of creditors, for the ostensible purpose of furnishing them additional security, when, *at the time*, they were negotiating a sale of the debt to be secured for \$7,000 less than its face. But the transfer to Bailey & Co. was a mere pretense. To preserve a semblance of fairness in the business, the bonds had to come through Bailey & Co., but the real purpose was not to help them, but to aid Cross and his associates to absorb the whole road — and this these directors were willing to do — when the debt they were struggling to escape could be paid for \$13,380.20, and the very iron in the road-bed, for which the debt was incurred, was worth over \$20,000.

It is claimed that the sale at the Milwaukee exchange, assented to by the corporation, conferred rights on the purchasers of the bonds which cannot be successfully attacked; but this claim is based on the idea that the sale was for an honest purpose, when, in fact, it was only part of a previously concerted plan to accomplish a fraudulent purpose. The ceremony of this sale was a cheap way of showing honesty and fairness, for it was very evident that an advertisement to sell a large amount of the bonds (having no market value) of an insolvent and abandoned railroad corporation would never attract the attention of capitalists.

The scheme to acquire the property of this corporation was, in its inception, fraudulent, and every step in the progress of its execution was necessarily stamped with the same character. There is nothing in this record to mitigate the conduct of the defendants who purchased the Milwaukee & Superior Railroad. They knew the road was abandoned, the company insolvent, the complainants unpaid for property then in the possession of the corporation, and yet they combine with timid and unfaithful trustees to get not only *this*, but

all the property of the corporation, and adopted a plan to carry out their project, which resulted in raising the decree to an extent that would necessarily prevent all fair competition. The fruits of such an adventure cannot be enjoyed by the parties concerned in it. There are other features in this case which provoke comments, but we forbear to make them.

§ 1645. — *purchasers at such sale, being owners of the mortgage lien, will be held liable as trustees to other creditors for the full value of the property, less the amount actually due on said claim.*

Cross, Luddington and Scott purchased the entire railroad, locomotives, cars and franchises of the company, for about \$20,000. Subsequent to the sale, they stripped the road-bed of iron, ties, spikes and chairs, which, with the locomotives, cars and fencing, they sold to various parties, and realized from the sales a large sum of money; but how much, the evidence is so singularly loose that we are unable to tell. On account of the want of certainty on this point, the case will have to be sent back and referred to a master to take proofs, who will also ascertain and report the value (if there be any) of the franchises of the company, which Cross & Co. still retain. Cross, Luddington and Scott must be held liable as trustees to the complainants for the full value of the property they purchased on the sale of the road, after deducting the amount due at the day of sale on the Bailey judgments against the directors, which amount they will be allowed to retain. They must also be charged with interest on the balance found due the complainants, from the day of the sale to the day of the final decree in this suit. The decree of the circuit court is reversed and the cause remanded, with directions to proceed in conformity with this opinion.

JAMES v. RAILROAD COMPANY.

(6 Wallace, 752-756. 1867.)

APPEAL from U. S. Circuit Court, District of Wisconsin.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—The bill before us is a creditor's bill, filed by four different judgment creditors, against the defendants, to set aside as fraudulent and void against creditors the sale under a mortgage made to Barnes, the 21st of June, 1858, for \$2,000,000, by the La Crosse & Milwaukee Railroad Company, which sale took place on the 21st of May, 1859, and under which the defendants' company was organized; and that the company be perpetually enjoined and restrained from exercising any control over the property or franchises mentioned in said mortgage, or from interfering in any manner with the road or its franchises; and, further, that the said company be decreed to take nothing under the sale, and that the property and franchises of the La Crosse & Milwaukee Company may be sold and applied, after discharging all prior liens, to the satisfaction of the judgments of the complainants.

The complainants consist of the firm of F. P. James & Co., who are the owners of a judgment against the La Crosse & Milwaukee Company for \$26,353.51, recovered in the district court of the United States for the district of Wisconsin, on the 5th of October, 1858, in favor of Edwin C. Litchfield, and which came to the complainants by assignment. Nathaniel S. Bouton, who recovered in the same court a judgment against the same company for \$7,937.37, on the 5th of April, 1859, and which judgment came to the firm of F. P. James & Co. by assignment; Philip S. Justice and others, who recovered

a judgment in the circuit court of Milwaukee county against the same company for \$235.33, and E. Bradford Greenleaf, a judgment in the same court against the same company for \$840.06. These judgments were liens on the La Crosse & Milwaukee Railroad, subsequent to the mortgage to Barnes, already referred to, which, with the sale under it, is sought to be set aside as fraudulent and void against creditors.

The mortgage was given to secure the payment of an issue of bonds for \$2,000,000, on the 21st of June, 1858, and which were issued accordingly by the president and secretary, and were made payable in thirty years. One thousand bonds of \$1,000 each, fourteen hundred of \$500 each, and three thousand of \$100 each, interest at seven per cent., payable semi-annually on the 1st day of January and July in each year, with coupons attached. The sale under the mortgage took place on default of the payment of the first instalment of interest, six months after it was executed. Barnes, the mortgagee, acted as auctioneer, and bid off the property himself, as trustee for the bondholders, who soon after organized the Milwaukee & Minnesota Railroad Company, one of the defendants in this suit. As appears from the proofs at the time of this sale, there had not been \$200,000 advanced on the entire issue of the two millions of bonds; indeed, the actual amount is but little over \$150,000. Five hundred and fifty thousand dollars of the bonds do not appear to have been negotiated at all, which were held in trust and never used, and \$103,000 had been returned and canceled, making in the aggregate \$653,000. Four hundred thousand were given to Chamberlain to secure a note of the company for \$20,000, which he sold at auction, and which were bid in, principally by the directors, at five cents on the dollar. Three hundred and ten thousand dollars of the bonds were given to secure a loan of \$15,500, and which came into the hands of the same persons, or their friends, for about five cents on the dollar.

It is charged in the bill, and the proofs are very strong in support of it, that this note to Chamberlain for \$20,000, and the loan of \$15,500 to secure the payment of which these bonds were given — \$400,000 in amount for the first sum, and \$310,000 for the second — were made by the company for the purpose and with the intention of obtaining a division of them among the directors at merely nominal prices. It is very fully established that this was, in point of fact, the result of the two transactions.

§ 1646. *Fraud in fact. A false notice of sale—that there was a large amount of bonds outstanding and a considerable sum due for interest—vitiates the sale.*

We have looked with some care into the proofs and into the brief of the learned counsel for the defendants, to ascertain the portion or amount of these bonds, or of the stock of the Milwaukee & Minnesota Company, into which some of them were converted, that are now in the hands of *bona fide* holders, and we find no evidence in the record tending to show any amount beyond the sum already mentioned, less than \$200,000. These were the only outstanding bonds existing at the time of the foreclosure and sale for which value had been paid; the remainder of the two millions of dollars were either in the hands of the directors or under their control, and not negotiated, or they were in their hands under the fraudulent arrangements we have already stated, at nominal prices. Nor do we find that the present holders of the bonds or stock of the company are in any better or more favorable condition than those who organized the defendants. The notice of sale set forth that the mortgage debt was two millions of dollars, and that \$70,000 of interest were due.

It needs no authorities to show that such a sale cannot be upheld without sanctioning the grossest fraud and injustice to the La Crosse & Milwaukee Company, the mortgagee, and its creditors. This deceptive notice was calculated to destroy all competition among the bidders, and, indeed, to exclude from the purchase every one, except those engaged in the perpetration of the fraud. The sale, therefore, must be set aside, and the Milwaukee & Minnesota Company be perpetually enjoined from setting up any right or title under it—the mortgage to remain as security for the bonds in the hands of *bona fide* holders for value, and that the judgment creditors, the complainants, be at liberty to enforce their judgments against the defendants therein, subject to all prior liens or incumbrances.

MR. JUSTICE MILLER dissented.

BARNES v. CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY.

(Circuit Court for Wisconsin: 8 Bissell, 514-522. 1879.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—This is a bill filed by the plaintiff to foreclose two mortgages executed to him as trustee, one in June, the other in August, 1858, by the La Crosse & Milwaukee Railroad Company, as still subsisting mortgages upon the property conveyed to secure the bonds issued under them; one mortgage was a supplement to the other. Prior to the date of these mortgages, the railroad consisted of two divisions, called the eastern and western divisions, and there were incumbrances upon the various parts of the railroad, consisting of mortgages, or deeds of trust, as well as of judgments, so that, at the time the mortgages were executed to the plaintiff, there were prior incumbrances upon both divisions. This was a mortgage upon the whole railroad from Milwaukee to La Crosse, as one entire road, subject of course to the prior incumbrances.

Under an act of the legislature of this state, the plaintiff foreclosed the mortgage (we can speak of it as one mortgage, because the supplemental mortgage was made simply in connection with the first mortgage). The act of February 8, 1859 (Laws of Wis., 1859, ch. 10, sec. 1), provided that, in case of the sale of a railroad in this state, by virtue of or on foreclosure of any trust deed or mortgage, the trustee might himself bid a certain percentage on the property, and become the purchaser. This, of course, was contrary to the general rule of law, which forbids a trustee, except under special circumstances, from becoming the purchaser under a sale made by himself. But the second section of the law provides that “the estate and title of any trustee named in such trust deed or mortgage, acquired by purchase at such sale, shall be held in trust for the holders of such outstanding bonds or obligations, in the same manner as if they had become the purchasers, in proportion to the amount of such bonds or obligations severally held by them.”

The sale was made by the trustee under the authority of this act, the effect of which was that it operated only as a foreclosure of the equity of the La Crosse & Milwaukee R. R. Company, and paid *pro tanto*, on the debt due to the bondholders, the amount of the bid which was made by the trustee, and, instead of holding a title subject to the equity of redemption, he became the owner, and had an absolute title to the property, but still as a representative of the bondholders. The case turns upon the validity of this sale made by the

trustee, and upon the effect to be given to it upon the allegations in the pleadings. After the sale was made and the property bought in by the trustee, he and the bondholders availed themselves of another statute (R. S. of Wis., ch. 87, sec. 1828, par. 10) of this state, which authorized the purchasers at a railroad sale to organize a new company, and gave them the right to construct and operate a railroad, thus creating an entirely new organization, springing out of the old one, and the result of the sale that was made. Accordingly, the trustee and the bondholders under the trust deed of 1858, availing themselves of this act of the legislature, proceeded to organize themselves into a new company, known as the "Milwaukee & Minnesota Railroad Company," and formed a new organization, and as such operated some portions of the road, and it was treated by all parties and by the courts, including the supreme court of the United States, as a duly organized company, clothed with all the rights, franchises and privileges of a railroad corporation under the laws of the state of Wisconsin.

Some time after this took place, certain creditors of the La Crosse Company, obtaining judgments after the date of the mortgage of 1858, filed a bill in the circuit court of the United States, for the district of Wisconsin, alleging that the sale made by the trustee under the act of the legislature of 1859 was fraudulent and void as against them. A decree dismissing the bill was rendered by the circuit court, and an appeal taken to the supreme court of the United States, where the decree of the lower court was reversed, and the sale made by the trustee was adjudged fraudulent and void, and the case remanded to the circuit court, with instructions to enter a decree in the case in conformity with the opinion of that court. A decree was accordingly entered declaring the sale fraudulent and void as against the judgment creditors; and also declaring, at the same time, in conformity with the opinion of the supreme court, that the mortgage was to remain as a valid security for the benefit of those who were *bona fide* holders of bonds under the mortgage, the amount being less than \$200,000, although the amount claimed as due, and for which the property was sold by the trustee, was a much larger sum.

The supreme court found that a large number of the bonds were fraudulent and void, and for that reason set aside the sale. *James v. Railroad Co.*, 6 Wall., 752 (§ 1646, *supra*). It is because the supreme court rendered this decree, setting aside the sale, that the bill has been filed by the trustee in this case, alleging that the mortgage is in full force, and that he has a right to come in and ask for a foreclosure of it, and to redeem from any prior liens that may exist against the property mortgaged, after proper deductions are made in consequence of the rents and profits which have been received by the parties who hold the property, from the operation of the road and otherwise. As I have said, the Milwaukee & Minnesota Company, operating portions of road, was treated as a corporation, with all its franchises and privileges, and in the proceedings which took place afterwards for the purpose of foreclosing incumbrances upon the property, prior to the date of the plaintiff's mortgage, the Minnesota Company was considered as representing the plaintiff and the bondholders under the mortgage of 1858, and was made a party to all the proceedings which subsequently took place, how numerous soever they were, where it was necessary that a subsequent incumbrancer should be made a party.

The Minnesota Company being thus treated, and regarding itself as clothed with all the muniments and privileges arising from this sale, was called upon at one time to pay a large sum of money, in order to redeem the property from

an incumbrance which was upon it, and, under the order of the court, paid over \$400,000. This was done before the decree of the supreme court declaring the sale fraudulent and void. After the decision of the supreme court, in *James v. Railroad Co.*, *supra*, the Minnesota Company filed a bill for the purpose of having the money which had thus been paid restored to it, on the ground that as a company it was destroyed by the decree of the supreme court, and that the money had been paid through mistake, and therefore it was entitled to recover it back. A demurrer was put in to the bill filed in the circuit court of the United States, and the demurrer was sustained and the case taken to the supreme court, and the decree of the lower court was affirmed, the supreme court holding that the Minnesota Company could not recover the money back. *Railroad Co. v. Soutter*, 13 Wall., 517. It is mainly in consequence of these supposed to be conflicting opinions of the supreme court of the United States, that the controversy arises in this case. It is claimed, on the part of the plaintiff, that the sale made by the trustee was an absolute nullity as to all the world—that it was the execution of a power in a way not authorized by the mortgage, and therefore was absolutely void, being in violation of the constitution of the United States, as the law of 1859, passed by the legislature of this state, impaired the obligation of the contract. It is, perhaps, not necessary, in the view which the court takes of the case, to decide this last question.

I have said that the only effect of the sale was to foreclose the equity of redemption of the La Crosse & Milwaukee Railroad Company, and to pay *pro tanto* the amount of the debt owing by that company to the extent of the bid made by the trustee. The trustee and the bondholders had the property which was covered by the mortgage. The sale had no other effect than that indicated. They were left with an absolute title to the property, instead of having a title subject to the equity of redemption. And it is to be observed that the La Crosse Company has never made any complaint whatever in regard to the sale. No objection has been interposed by it, so far as we know, during the twenty years since the sale, and nothing shows in any way dissatisfaction on the part of the La Crosse Company to the mode of foreclosing the mortgage, but it seems to have acquiesced in the proceeding. These being allegations that appear in the bill, the defendants come in and allege by plea that, upon the sale which was made, the reorganization of the Minnesota Company took place, and that the bondholders—all the bondholders—under the mortgage relinquished their bonds, as they were authorized to do by statute, and took stock of the Minnesota Company in their place, and so that, whatever view may be taken of the effect of the sale under some aspects, it was only invalid as against the judgment creditors who filed that bill; that it stood for all other purposes, and that it was entirely competent for the trustee and the bondholders, both agreeing to it, to convert the bonds into the stock of the Minnesota Company; that no one has a right to complain, not even the trustee; and consequently that the Minnesota Company was the proper representative of the trustee and the bondholders in the litigation which took place in so many forms afterwards; and we think that is a sound position, if the facts are as stated.

If true, however irregularly the sale may have been made by the trustee, however fraudulent it may have been as against the judgment creditors who filed the bill, still, if the bondholders have voluntarily converted their bonds into stock, it is not competent for the trustee to file this bill. The supreme court of the United States declared in its opinion, *James v. Railroad Co.* (and

the decree of this court conformed to that opinion), that the mortgage stood as a valid surety for the benefit of the *bona fide* bondholders; and therefore I think that neither the act of the legislature nor of the trustee, nor the conversion of their bonds into stock by a majority of the bondholders, nor the fact that the trustee transferred all his interest to the Minnesota Company, impaired the validity of the bonds which were held by other parties who did not assent (if any did not assent) to this purchase, and who did not convert their bonds into stock. But it is to be observed the plea alleges that they all did convert their bonds into stock, and so we hold that, if that be true, it is a valid answer to this bill, for the reasons already stated.

§ 1647. *Where judgment creditors succeed in setting aside a foreclosure sale and subjecting the mortgaged property to their judgments, such decree invalidates the foreclosure only as to such creditors.*

And we hold that the action of the supreme court and of the circuit court for the district of Wisconsin, in setting aside the sale by the trustee, had no other effect than to render it invalid as against the judgment creditors, and consequently, if the bondholders all came in and converted their bonds into stock, that put an end to the mortgage. That seems to be the opinion of the supreme court of the United States in the case of *Railroad Co. v. Soutter*, *supra*. The ground taken in the argument of that case by the counsel was, that the opinion of the supreme court, and the decree of the circuit court following it, rendered the whole sale absolutely inoperative as to all persons, and that the Minnesota Company had acquired no right, title or interest by virtue of what had taken place. The court said that "the complainants (the Minnesota Company) are wrong in asserting that the property was not theirs (under the sale). It was theirs. Their purchase was declared (in *James v. Railroad Co.*) void only as against the creditors of the La Crosse & Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good as against all the world. The property was theirs; but by reason of the fraudulent sale, it was subject to the incumbrance of the debts of the La Crosse Company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property, when they paid into court the money which they are now seeking to recover back. They are wrong also in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law."

So that there is an opinion of the supreme court of the United States, declaring what was the legal effect of the sale, which that court declared to be inoperative and void in the 6th of Wallace. We shall, therefore, without going further into the case, hold that the first plea is a valid plea to this bill. But we do not, in so holding, intend to foreclose the rights of any of the bondholders, either those who did not surrender their bonds and take stock, or those who did surrender their bonds and take stock, under the plan to organize the Milwaukee & Minnesota Railroad Company. Of course it is a question of fact, whether or not they did surrender their bonds and take stock. And we think, as stated before, that those who did not surrender their bonds and take stock, if there are any such, were not bound by what occurred, and that this mortgage is valid as to all such bondholders.

DYER, J., concurring.

JACKSON v. LUDELING — VICKSBURG, SHREVEPORT & TEXAS RAILROAD COMPANY v. JACKSON.

(9 Otto, 513-539. 1878.)

APPEALS from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.— This case, like *Parsons v. Jackson*, 99 U. S., 434, arises out of the supplementary proceedings which took place in the case of *Jackson et als. v. The Vicksburg, Shreveport & Texas Railroad Co.* (reported as *Jackson v. Ludeling*, in 21 Wall., 616; §§ 1636-40, *supra*), after our decision therein. In pursuance of the mandate in that case, the circuit court for the district of Louisiana made a further decree on the 22d day of March, 1875, containing, amongst other things, the following directions, that is to say:

"2. It is further adjudged and decreed that the writ of injunction directed by the decree issue to the parties to the deed of the 5th of February, 1866, executed to John T. Ludeling and his associates, and to all of the defendants in this cause, according to the directions of said mandate, and that they be required to cancel the said deed, and deliver the same as canceled to the master of this court hereinafter named.

"3. It is ordered that F. A. Woolfley be appointed special master to receive the said deed as canceled; to take the proofs of the bonds *bona fide* issued, etc.; that he take an account of the property embraced in the mortgage described in the bill executed to John Ray or bearer, which was not sold or disposed of prior to 23d December, 1865, and render the account between the plaintiffs and defendants provided for in the decree aforesaid. He will give notice to the holders of bonds, etc. He will give notice to the defendants, or their solicitor, of his taking the account, and for all purposes of his duties under this order he may refer to the testimony on file in the cause, and shall also report upon the sale of the property and the best mode of effecting it, so as to promote the interests of all concerned under the decree. He is authorized to make special reports from time to time to the court, and to ask for instructions.

"4. It is further ordered that John W. Greene be appointed receiver under the decree to collect, receive and hold possession of all of the estate, property and effects described in the mortgage aforesaid, executed to John Ray or bearer, by the Vicksburg, Shreveport & Texas Railroad Company, not sold or disposed of prior to the 23d of December, 1865, and to hold the same subject to the orders of this court."

To understand the questions that are raised on the present appeal, it is necessary briefly to rehearse the history of the case. The Vicksburg, Shreveport & Texas Railroad Company, on the 1st day of September, 1857, by an authentic act of mortgage, did grant to John Ray a first mortgage lien and privilege upon its entire railroad from the Mississippi river, opposite Vicksburg, by way of Monroe and Shreveport, to the boundary line of Louisiana and Texas, a distance of one hundred and ninety miles, more or less, including right of way, lands, property and franchises of every description, with all its rolling stock, machinery and effects, including also a land grant of over four hundred and twenty thousand acres — to secure the payment of a contemplated issue of two thousand bonds of \$1,000 each. A considerable portion of these bonds were issued; but the disturbances arising from the late civil war resulted in the destruction of the company's property, and default in the payment of interest

on the bonds. In the month of December, 1865, an order of seizure and sale was made by the twelfth district court of Louisiana, for the sale of the mortgaged premises, at the instance of one William R. Gordon, a holder of some of the bonds; and on the 3d day of February, 1866, the whole property was sold by the sheriff of the parish of Ouachita to John T. Ludeling and others, for the sum of \$50,000; and a regular act of sale was passed to them on the 10th day of February, 1866; and they thereupon took possession of the property, and commenced to reconstruct the same and put it in repair. A large number of the bondholders, however, on the 1st day of December, 1866, filed their original bill in this case, complaining that the said proceedings were irregular and fraudulent, and praying that the said sale might be set aside, and that the property might be again sold by virtue of the mortgage for the benefit of all the *bona fide* bondholders; and that the purchasers under the first sale might be decreed to account for all moneys received, or which they might have received, from the use of the property; and for an injunction and receiver. This bill was dismissed by the circuit court; but that decree was reversed by this court, and a decree made in favor of the complainants, establishing the mortgage, declaring the sale to Ludeling and his associates fraudulent and void, and setting it aside, and ordering an injunction against them to refrain from setting up any title by reason thereof. The cause was thereupon remitted to the circuit court with instructions to direct an account to be taken of all the property of the corporation, to appoint a receiver thereof, and to order the same to be sold for the benefit of the bondholders. It was further ordered and decreed that the defendants should account for all money and property received by them out of the property, or from its profits or income, receiving in their account such credits as, under the circumstances of the case, by the law of Louisiana, they were entitled to, and that they should pay and deliver to the receiver whatever on such accounting might be found due from them. A mandate was issued corresponding to this decree; and in obedience thereto the decree of the circuit court was made, which is first above recited. In pursuance of this decree an accounting was had, in which the amounts received by the defendants from the earnings of the railroad were stated and in which the defendants claimed large allowances for expenditures made by them in rebuilding and repairing the railroad and its appurtenances, and in providing it with rolling stock, machinery, etc. The plaintiffs resisted all claim for allowances to the defendants, beyond the necessary expenses of operating the road; and whether any, and what, allowances should be made to them is the principal question in the cause. The court below made such allowances, decreeing, amongst other things, as follows:

“*Third*, That the defendants have expended on said mortgaged property in the making of improvements and betterments thereon, which still remain upon said property ready to be turned over, the sum of four hundred and eighty-eight thousand one hundred and nine dollars and fifty-four cents (\$488,109.54), on which they are entitled to interest from the date of said expenditures, at the rate of five per cent. per annum, until said mortgaged property was placed in the hands of a receiver by this court; that defendants have received from the earnings of said property, over and above all sums paid out for maintenance of said property and running expenses, the sum of \$161,476.69, for which they should account, with interest at the rate of five per cent. per annum from the receipt of said sum; that the interest on said sum expended and said sum received by the defendants should be computed for the same period of time, or

what is equivalent thereto, the said sum received should be deducted from the said sum expended and the interest computed on the remainder; that after making said deduction the remainder is three hundred and twenty-six thousand six hundred and thirty-two dollars and eighty-five cents (\$326,632.85), which with interest added from the time when interest should be computed up to April 13, 1875, when the receiver of this court took possession of said property, amounts to three hundred and ninety-one thousand nine hundred and fifty-nine dollars and forty-two cents (\$391,959.42), for which sum defendants are entitled to compensation out of said property, to be raised in the manner hereinafter set forth.

“Fourth, That article 508 of the Revised Code of Louisiana, which authorizes the owner of property to require the removal or demolition of the improvements made in his land by a third person, or to keep them at the value of the materials and cost of the workmanship, is not applicable to this case, because the plaintiffs are mortgagees and not owners, and because the removal of many of said improvements is impossible, and because said improvements cannot be demolished without destroying the property of which they form a part, and therefore the claim to said election made by plaintiffs under said article of the code is disallowed.

“Fifth, That all of said mortgaged property, including the improvements placed thereon by the defendants, shall be set up at the price of \$833,098.38, the actual value thereof, as shown in the report of the experts, and that if this sum or a greater amount be obtained at the sale, the defendants shall be entitled to the sum of \$391,959.40, fixed as the value of their improvements and interest thereon, as settled in the third paragraph of this decree; and if the said sum of \$833,098.38 cannot be obtained, then they shall have in the same proportion of the sum actually obtained as that sum bears to the upset price aforesaid if any less amount shall be obtained.

“Sixth, That the holders of a majority of the bonds and coupons shall be at liberty to agree upon a committee to purchase the property for their account upon articles and terms of associations, and with concessions to any bondholder to become a party thereto at or within fifteen days from the day of sale. Should the purchase be made, the purchasers shall not be required to make a payment beyond the costs, charges, expenses of the sale, and the amount of the judgment in favor of the defendants hereinbefore stated, with five per cent. interest to the day of sale, which shall be a privilege upon the proceeds of sale, and the said purchasers shall be entitled to credit their bonds with the sums that may be due from the purchasers on them as a part of the payment.”

From this decree both parties have appealed, the complainants insisting: 1. That no allowance at all should have been made to the defendants for ameliorations and improvements. 2. That the allowances made are too great. 3. That interest should not have been allowed.

The defendants on the other hand insist: 1. That the allowances made are insufficient in amount. 2. That no allowance is made for improvements worn out in the service of the railroad. 3. That an insufficient amount of interest is allowed. 4. That no allowance is made for salaries and contingent expenses, taxes, etc. 5. That it does not enforce the right of the defendants to retain possession until their claim for improvements is paid. 6. That the account of earnings is incorrectly stated.

Other errors are assigned, but they are either included in those stated or are not of sufficient importance to require serious consideration.

Assuming that the determinations of this court in its former decree are not open to further question, and that the defendants acquired possession of the property by a proceeding which was founded in fraud, still it cannot be doubted that they supposed themselves to be the legal owners of the property by virtue of the judicial sale, and made the repairs and improvements in controversy under that idea. But as the vice of their title consisted in their own inequitable acts and proceedings, we think that they are to be regarded, in the language of the civil law, as possessors in bad faith. The common law allows nothing to the possessor in good or bad faith for expenditures made upon land from which he is evicted by superior title; but equity, in cases within its jurisdiction, allows the possessor in good faith both for repairs and improvements; but where the possessor (being a trustee) has been guilty of actual fraud, it makes him no allowance for improvements, but allows him compensation for necessary repairs. Lewin, Trusts, 466. The present case, however, is to be governed by the law of Louisiana, which is based upon the civil law, not precisely as laid down in the compilations of Justinian, but as interpreted in the jurisprudence of France and Spain; and has some peculiar rules on this subject. When Louisiana was acquired by the United States in 1803, it had been a colony of Spain for more than thirty years, except in the formal transfer to France at the time of our purchase; and the Spanish law was the common law of the territory until modified by subsequent legislation. In 1808, the first Civil Code was adopted, based partly on the Spanish Partidas and partly on the *projet* of the Code Napoleon, the completed code not having yet been received. In 1825, the Civil Code was revised, and was made to conform more closely to the French code, often copying its phraseology. The provisions of the code which have the nearest application to the present case are the same both in the code of 1808 and 1825, and are very nearly an exact copy of the corresponding provisions of the Code Napoleon, whilst they also correspond substantially with the Spanish law. They are as follows:

“Art. 508. When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or to compel this person to take away or demolish the same. If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained. If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby. Nevertheless, if the plantations, edifices or works have been done by a third person evicted, but not sentenced to make restitution of the fruits, because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, plantations or edifices, but he shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil. Art. 2314. He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property.”

These articles are substantially equivalent to articles 555 and 1381 of the Code Napoleon. They are also nearly equivalent to the laws of the Partidas. The latter divide ameliorations into three kinds,—necessary, useful and voluntary: *Necessary*, such as preserve the property and prevent it from going to ruin, as

repairs to a house, causeways to prevent inundations, etc.; *useful*, such as augment the value of the property and its rents, as the planting of trees or vines, the erection of a furnace, wine-press, barn or stable; *voluntary*, such as are made for ornament or pleasure. The Partidas declare that if the possessor in bad faith makes necessary repairs or does other things by which the estate is benefited, he may recover the expense thereof, less the amount of rents received, and will not be obliged to deliver the property to the owner until such compensation is made. But if he construct an edifice or plant seed, he can only deduct the expense from the fruits for which he is made accountable; or if he has defrayed expenses for works of profit and utility, and the owner is unwilling to reimburse him, he may carry away the additional works which he has erected. Partida III., title 28, laws 42, 44; Escriche, titles *Mejores* and *Poseedor de mala fe*.

From these laws it seems clear that for necessary repairs the possessor, even in bad faith, is entitled to full indemnity; and for useful improvements, he will also be entitled to full indemnity to the value of the materials and price of workmanship, if the owner elects to retain them; or the right to demolish them and remove the materials, if the owner shall elect not to retain them. The general principle upon which this law is founded is that no one should be made richer at the expense of another, even though the latter has acted in bad faith.

The question then arises how the laws which we have quoted are to be applied in a case like the present,—the case of a railroad which was in a state of ruin and dilapidation, and which the purchasers have repaired and put in working order. Are they to be indemnified in any way, or to any extent, for the expense which they have been at, or are they to lose it all? We have no great difficulty in considering the parties as holding the relation of rightful owners on one side, and ejected possessors on the other. Both claim under the same title—the mortgage; and the question between them was, whether the derivative title of the defendants was a valid one or not. The complainants, if not the owners, represent the owners, namely, the railroad company, which is conceded to be utterly insolvent and practically out of existence. So far as the parties are concerned, therefore, the laws above quoted may be regarded as applicable to them.

§ 1648. *In Louisiana a possessor in bad faith of railroad property is entitled to compensation for putting it into working order.*

But, in regard to the subject-matter, it seems almost impossible to apply them literally. It is not like the case of lands, either in the country or the town. These may be recovered and enjoyed by the owner, though the improvements erected thereon be demolished. But a railroad is not land; it is a peculiar species of property, of a compound character, consisting of roadway, embankment, superstructure and equipment. These constitute the *corpus* of the property. There is no room to exercise the election which the law gives to the owner, of keeping the ameliorations, or requiring the ejected possessor to demolish them. The demolition of the ameliorations would be the demolition of the thing itself. If any room for election does exist, it is virtually made in bringing the suit to recover the property. To carry out the spirit of the law, therefore, since we cannot carry out its letter, the other alternative, of allowing the defendants compensation for their ameliorations, seems to be the only course that is left. Its propriety in this case is corroborated by the fact that the property in its improved state has been taken possession of by a

receiver at the instance of the complainants, and has been used for their benefit for now nearly four years past.

In addition to these considerations, it is very questionable whether a large portion of what are called ameliorations in this case are not rather to be regarded as repairs. The railroad has been rescued from destruction and repaired by the defendants. These repairs were necessary in order to restore the property to its condition and quality as a railroad,—the thing which the mortgage contemplated, and which the complainants seek to possess under and by virtue of the mortgage. So far as the improvements may be regarded as necessary repairs, there is no question that the defendants would be entitled to compensation for their expenses in making the same. But as it is impossible to distinguish what might properly be called repairs from ameliorations, we think that the rule laid down in the law for the case where the owner elects to keep the constructions and works erected by the unlawful possessor may be equitably applied. This rule is that the latter shall be reimbursed the value of his materials and the price of the workmanship. This was the rule adopted by the circuit court, and we think that its decision in this respect was correct, except that, in an equitable application of the rule, the allowance made to the defendants should not exceed the value of the improvements. For this amount, therefore, with interest, less the fruits received, the defendants should have remuneration.

After a careful examination of the authorities bearing upon the case, we find nothing which, properly considered, derogates from this view of the case. The class of cases which comes nearest to the present is that of lands which have been cleared up, and brought to a state of cultivation by embankments and ditches; though even here there is a point of difference which it is material to notice, namely, that such clearings and reclamations of new land involve a change in its character, which was not produced by the rehabilitation of the railroad. The repairs made on the latter had the effect to restore the property to its first estate and use; and the expenditures for that purpose are such as the true owner must necessarily have made in order to have the property in the only form which its nature and uses admit of, and which the mortgage contemplated.

§ 1649. *Citations of Louisiana and other civil law authorities on the subject of compensation for improvements by possessors in bad faith..*

A leading case in Louisiana relating to clearing and reclaiming land is *Pearce v. Frantum*, decided in 1840, and reported in 16 La. Ann., 414. In that case, the defendant had settled on the land, supposing it to belong to the United States, and that he had a right of pre-emption to it; but it turned out to be an Indian claim under which the plaintiff's title was derived. Whether the defendant was a possessor in good or bad faith the court do not seem to have decided, and do not appear to have regarded it as material. The defendant cleared about one hundred and fifty acres of the land, and put up a very ordinary dwelling on it and some cabins. The clearing was the principal improvement; and with regard to the defendant's claim to compensation therefor, the court said: "The right of the defendant to be paid for the improvements by which the value of the premises was enhanced depends upon other provisions of law. It rests upon the broad principle of equity that no man ought to enrich himself at the expense of another. If, instead of recovering four hundred arpents of waste land, covered with heavy timber, the plaintiffs succeeded in establishing their title to that quantity, of which one hundred and fifty is ready

for the plow, together with the convenience of a dwelling and a gin, the result of the industry of his adversary, he cannot justly resist the latter's claim for remuneration. If the party evicted be entitled to be paid for edifices erected on the premises, of which the successful party has taken possession, no plausible reason can be perceived why he should lose the lasting conquest his industry has achieved over the forest."

On a reargument of the case the court, in support of the same views, further said: "The character of Frantum's possession, his liability to restore fruits upon eviction, and his right to be paid for useful improvements, are to be determined by the provisions of the code of 1808 and the Spanish law then in force. Admitting that the provisions of the code itself left it doubtful whether Frantum was or was not a possessor in bad faith, in that sense which would deprive him of a right to claim for improvements, yet, the forty-fourth law, twenty-eighth title, of the third Partida, appears fully to sustain the court in the position first assumed, to wit, that 'in respect to the right to be reimbursed for useful expenses, by which the property has been made more valuable to the owner, the code makes little or no distinction between the possessor in good or bad faith.' The words of that law of the Partida are: 'Men may incur expenses on account of other persons' houses or lands, not by erecting new works there, but by making necessary repairs, or by doing other things there by which the estate is benefited. In that case we say that if such expenses were necessary, they who made them may and ought to recover them back, while in possession of the estate upon which they expended them, whether they hold in good or in bad faith; and, though the owner may evict them by a judgment of the court, they will not be obliged to deliver him the house or estate until he shall have paid the expenses incurred on account of the same.'"

The court also cites Merlin as follows: "Merlin, after treating this subject *ex professo*, and in a manner as usual with that author, which leaves little to be said on either side, and after discussing the opinions of Cujas, Favre and other distinguished doctors, opinions not always in harmony with each other, sums up his conclusions in the following manner. . . . We may, therefore, lay it down as a settled rule that the proprietor who sues for an immovable (*un fonds*) never ought to enrich himself at the expense of the possessor, whether in good or in bad faith, no matter in what manner the maxim ought to be applied." *Repertoire de Jurisprudence*, verbo Amelioration, 16 La., 431. Quite a number of cases, which it is not necessary to quote, followed the general reasoning of this case. In *Beard v. Morancy*, 2 La. Ann., 347, decided in 1847, the court allowed a party compensation for improvements of the same kind as those in *Pearce v. Frantum*, made after judicial demand and after judgment of eviction; holding that they were necessary improvements, and that the rule of compensation should extend to such, though not to improvements merely useful. The court say: "But there can be no doubt that the party evicted is entitled to be paid for necessary improvements. The improvements in this case were clearings, levees and ditches, without which the land could not have been brought into cultivation, so as to yield the rents and profits which the plaintiff now claims."

If the supreme court of Louisiana was correct in this case in holding that the ameliorations made by the defendants were necessary improvements, taking into view the fact that the character of the property was changed thereby from its original condition, then, much more in the present case ought the improvements effected by the defendants to be regarded as necessary, resulting as

they did in the restoration of the property to its original and normal state. It is for the use by the defendants of these very improvements that the complainants are seeking, in this suit, for an account of fruits and profits of the estate. There is a series of cases, however, in which it is held by the supreme court of Louisiana that a person without title, going into possession of the public lands of the United States, cannot set up a claim for improvements against the government or its grantees. This was decided in *Jenkins v. Gibson*, 3 La. Ann., 203; in *Hollon v. Sapp*, 4 id., 519; and in *Jones v. Wheelis*, 4 id., 541. In *Hollon v. Sapp*, the court say expressly, "We are of opinion that this article of the code is not applicable to materials used and labor expended in making settlements upon the national domain. No right can be acquired in relation to the public lands except under authority of congress."

The case of *Gibson v. Hutchins*, 12 id., 545, is much relied on by the complainants, and in its general reasoning does undoubtedly overrule the doctrine of *Pearce v. Frantum*, though, as in *Jenkins v. Gibson*, *Hollon v. Sapp*, and *Jones v. Wheelis*, the title of the land was in the government when the improvements were made. The court say: "The mere possessor is presumed to have made such changes for his own amelioration, and to have received a sufficient reward in the immediate benefit which he reaps from the enhanced production of the soil. Perhaps the true owner would have preferred that the primitive forest should remain. Perhaps the ditching will not suit the purposes for which he wishes to use the land." It is evident from the reasons here given that the court regarded the change of the condition and character of the land as a material circumstance, and the suggestion is not without force, that the owner might have preferred that the original timber of the forest should not have been destroyed. The present case, as already intimated, is distinguishable from *Gibson v. Hutchins*, and others of like character, in that the character of the property is not changed by the improvements, but the property is restored to its original condition, purpose and use, and to the only condition and use which it is susceptible of, and which makes it what it is,— a railroad. It is this aspect of the present case which gives to a large portion of the improvements made the character of necessary repairs.

But the fact that the title to the land in the case of *Gibson v. Hutchins* was in the government when the improvements were made is sufficient, of itself, to place it in a different category from the present. The court, indeed, say: "He" (the defendant) "had no claim against the United States for improvements. He was rather indebted to the United States for the privilege of living so long undisturbed upon the public land. And the United States ceded its rights to the plaintiff's authors. They took it free from any legal demand against either the government or themselves for improvements." 12 La. Ann., 547. Reference is then made by the court to *Pearce v. Frantum*, and other cases, as being overruled. But one of the grounds for overruling them is stated to be that they sustained a claim for improvements against the United States. "The overruled cases," said the court, "conceded to a settler upon the United States lands, who possessed with the hope of securing a pre-emption, the right of retaining the land against a vendee or patentee of the United States government until such patentee should reimburse the settler the increased value of the property as resulting from improvements and expenses upon it during the settlement." It is true, the court adds, "we say in *Hemkin v. Overly*" (a case which seems not to have been reported) "that 'we are unable to recognize the doctrine that one who makes improvements upon

property to which he knows he has no title has any legal or equitable claim to reimbursement for such improvements.'” But with the feature referred to,—namely, the right of the government, present in the case of *Gibson v. Hutchins*, to which so much importance is given,—it is impossible to regard it as a decisive authority on the general question of a possessor's right to compensation for improvements which are inseparable from the land.

It must be conceded, however, that in several subsequent cases the supreme court of Louisiana has used expressions indicating an intention to adhere to the general views enunciated in *Gibson v. Hutchins*, and to hold that for improvements of the kind referred to the only compensation which the maker of such improvements can claim is the benefits which he has enjoyed from the use of them. Thus, in *Cannon v. White*, 16 La. Ann., 91, the defendant having been adjudged a possessor in bad faith, the court held that he was entitled to no other claim for improvements than those stated in the first three sections of the article of the Civil Code before recited. Art. 508. The improvements consisted of a clearing of two hundred and thirty acres of land, and of certain erections on the land, costing \$5,250. The clearing was set off in compensation of the fruits and cord-wood derived from the land cleared, which, the court said, would more than compensate for the clearing made. As to the erections, the plaintiff was decreed to elect in thirty days whether he would keep them and pay for their cost, or not; if he so elected, or made default, it was decreed that he should pay for them; on his refusal to retain them, the defendant was allowed to remove them in a reasonable time.

But in the case of *Stanbrough v. Wilson*, 13 id., 494, decided a year later than *Gibson v. Hutchins*, the defendant, who had purchased land at a probate sale, which was declared void, and which would probably place him in the category of a possessor in bad faith, was allowed compensation for his improvements, including over \$4,000 for clearing the land, and judgment was given in his favor for a balance exceeding \$5,000, over the rent of the property. And in the case of *D'Armand v. Pullin*, 16 id., 243, where the defendant had erected various improvements on land to which he had no just title, the court held that, under the code, the plaintiff had the right either to keep them, or to cause their removal or demolition; but also held that by executing a lease to the defendant for a few months, after having procured an adjudication of his title, he had elected to keep the improvements and must pay the defendant their cost.

The case of *Wilson v. Benjamin*, 26 id., 587, was decided at the same term with *D'Armand v. Pullin* (1861), and the judgment was affirmed on a rehearing in 1874. In that case the plaintiff, who had been a possessor in bad faith, sued for the value of his improvements, and it was held that his expenses in clearing the land should be set off in compensation for his detention thereof; and judgment was given in his favor for the value of his other improvements, consisting of erections on the land; and the court refused to charge him any rent therefor, because they were his own property. On the whole, we should infer the prevailing doctrine of the supreme court of Louisiana at present to be that for inseparable improvements on land, such as clearings, etc., made by a possessor in bad faith, he cannot recover any compensation from the owner; though he will not be accountable for the fruits derived from such improvements. But as before suggested, we do not think that the decisions referred to govern the present case. It is so different in its circumstances from the cases in which those decisions were made, that any attempt to carry out the spirit of

the code will require that those circumstances should be taken into consideration.

§ 1650. *The reconstruction of a railroad is so much in the nature of necessary repairs that compensation therefor is required, even to a mala fide possessor, by the spirit of the civil law.*

The character of the property,—a railroad,—so different from that of land; the character of the ameliorations made to it, partaking so nearly of that of necessary repairs; the acts and demands of the parties in this suit, wherein the plaintiffs seek possession of the ameliorations in question, and thereby in effect elect to retain them, and seek to charge the defendants for all the fruits and profits thereof; the fact that, at the instance of the complainants, and for their benefit, the property, with all its ameliorations, has been taken out of the defendants' hands and placed in the hands of a receiver; the fact that the plaintiffs, in getting possession of the property, cannot but come into the enjoyment of large expenditures which the defendants have made, and which, if they had not made, the plaintiffs, or the persons who may purchase the property, would have to make, and which they are now relieved from making; the fact, in other words, that the taking of the property in its present state would make the complainants so much richer as the improvements are worth,—all these things combined present a case so peculiar that we do not see how it is possible for the complainants, under any fair interpretation of the code, to avoid allowing the defendants the value of the improvements. On the contrary, we think that the code, interpreted according to its spirit and meaning, requires that the complainants should take the property, or rather that it should be sold, subject to the lien of the defendants for the actual expense which they have incurred in creating and putting into repair the works as they now exist, but not to exceed the actual value thereof.

We have not thought it necessary to discuss or review the commentaries on the French code cited by both parties, except in a single instance, which will be presently stated. We have examined them sufficiently to ascertain that they give us no clear light on the precise question in this case. They are not consentaneous even on the general question of inseparable improvements made to land. The references to the Roman law, even if otherwise applicable to the case, cannot be received against the positive laws of France and Spain, much less against the text of the Civil Code of Louisiana. It is this code, and the proper meaning and effect to be given to its provisions, adopting its spirit where the letter is imperfect, that must decide the case before us. It is conceded by many French juriconsults that the Roman law of Justinian refuses any reimbursement for improvements to a possessor in bad faith. But the French law has always been otherwise. See Denisart, *verbo* Ameliorations, vol. i, p. 495, where this subject is discussed.

Cujas thought the rule for reimbursement could be deduced from the general principle that no one ought to enrich himself by another's loss; and from the dispositions of the thirty-eighth law of the title *De Petitione Hereditatis*. Dig., lib. v, tit. iii. Pothier, expounding the old French law, says: "In our practice, it is left to the discretion of the judge to decide, according to the different circumstances, whether or not the owner ought to reimburse the possessor in bad faith for useful expenses to the amount that the property recovered is benefited thereby." And then he distinguishes between possessors in bad faith whose acts partake of a criminal character (such as usurping an estate without any title during the long absence of the owner), and those who have

taken a title which they knew was not valid, yet had some excuse for doing so (such as purchasing from a guardian, etc.). The former class should receive the utmost rigor of the law; the latter should be treated with indulgence, and should receive compensation for their ameliorations to the amount they have benefited the property. Pothier, *Traité du Droit de Propriété*, sec. 350. The Code Napoleon settled many uncertainties of the old law, and attempted to lay down a fixed rule; but, nevertheless, as we have seen, left the question of inseparable improvements somewhat at large.

Demolombe, one of the ablest commentators on this code, in vol. ix, sec. 689, has a very interesting article on this subject. He thinks that inseparable improvements are not provided for by article 555 of the code; but that the question of compensation therefor is to be governed by general principles of equity, to be drawn from other sources. He instances the case of a possessor in bad faith who has drained a marsh, cleared lands, dug ditches for irrigation, or who has caused paintings to be made or paper to be placed on the walls of a mansion, or who has performed any other like work of intrinsic amelioration. And he asks, Is article 555 applicable in such a case? After stating the argument on both sides of this question, he gives his own opinion in the negative. He says the article refers to works which the possessor may be compelled to remove; but such as those mentioned are not susceptible of removal; and the option given to the owner, either to keep them by payment, or to cause them to be removed, cannot be exercised. Besides, it would be a savage doctrine to hold that the possessor might in any case destroy such improvements, even though he should leave the property in its first estate. He therefore concludes that the specific case is unprovided for, and thinks that it is necessary to resort to analogies deduced from similar matters and to the general principles of the law; and that a solution of the case may be found in the *quasi* contract of agency. We find here, he says, two rules of equity, both equally certain:

First. That no one ought to enrich himself at the expense of another,—a rule which the law applies in the very case of the relations between the owner and possessor, even in bad faith. *Second.* That a third person cannot impose upon the owner of the soil, without his authority and against his will, expenses which he would not have made himself, and which exceed his means, and for the payment of which, if forced to it, he would have to sell an estate that he would prefer to keep.

In the combination and conciliation of these two rules, he thinks, we may find the solution of the difficulty. He then quotes to his purpose a law of the Digest (law 38, *De Rei Vindicatione*, book vi, tit. i), which he characterizes as full of good sense, equity, wisdom and practical knowledge of affairs. It is a passage from Celsus, as follows: "On another's land which you have unwittingly bought, you have builded, or made repairs; then you are evicted; a good judge will decide according to the *merits of the parties, and according to the circumstances*. Suppose the owner would have done the same thing, then let him reimburse the expense, as a condition of receiving his land; but only to the amount that it is benefited. If he is poor, and cannot pay without selling his home, you should be satisfied in being permitted to remove what you can of your improvements, leaving the estate in as good condition as if they had not been made. But it has been decided that, if the owner can pay what the possessor can get for them, if removed, he should have that privilege. And let nothing be done in malice, as by defacing plaster or pictures on the walls, which could do you no good, but only result in injury. If it is the owner's in-

tention immediately to sell the property, you will not be condemned to give it up until he has paid what we have said he ought to pay."

Considering the possessor in bad faith as a *quasi* agent in charge, and applying these principles, we must look, says Demolombe: *First*, to the *character of the possessor*: as whether he has taken a title which he knew to be invalid, but which he hoped to have confirmed, or whether he was a mere interloper, without title, taking possession in the absence of the owner. *Second*, to the *character of the owner*: as whether he would himself have been able and willing to make the improvements in question; whether they would be useful to him, considering his profession, habits, etc., and whether it was his intention to keep the property or to offer it for sale. *Third*, to the *nature of the improvements made*: as whether they have added to the income and to the actual value and salableness of the property, etc., or only to its ornamentation, etc.; also, whether the improvements have or have not been excessive and unreasonable.

The consideration of these three elements, giving due weight to each, will enable the judge to decide whether any indemnity should be given; what it should be; and how it should be paid, whether at once or on time, whether in a capital sum or in the way of rent. This is the substance of Demolombe's article. We can only say that, if it is a sound explication of the law of France, and, therefore, of the law of Louisiana (which in this matter is exactly the same as that of France), it is in direct accord with the result to which we have been brought in this case by the application of the principles which we suppose to be involved in article 508 of the Civil Code of Louisiana, interpreted according to its spirit and intent. If, by the course of decisions in Louisiana, it cannot be held to apply to the case of an ordinary immovable, it is at least applicable to such a case as that with which we are now dealing, considered in all its various circumstances.

§ 1651. *A possessor will not be allowed for improvements which were consumed under his own administration of the property.*

The other points raised in the case do not present much difficulty. We shall proceed to consider those which we deem material. *First*. The defendants complain that they were not allowed for the cost of those things which were consumed by them in the use, such as cross-ties, etc., which were worn out and had to be replaced. The court below only allowed them compensation for those things which were in existence when the railroad was turned over to the receiver, in April, 1875. This, it seems to us, is in strict accordance with the law. In ordinary cases of possessors in bad faith, the owner, according to article 508, has an election either to keep the constructions and works, or to require their removal. He certainly cannot keep nor require the removal of that which no longer exists. When he elects to keep them, as we suppose to be virtually the case here, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship. This evidently refers only to the materials which compose the things which are in existence at the time of making the election,—and that time, in this case, must be deemed to be the time of the delivery of the property to the receiver, which was on the 13th of April, 1875. We think the court was right in deciding that it was the improvements then in existence, the value or cost of which was to be allowed to the defendants.

§ 1652. *A possessor can only be allowed for the value of the improvements when they pass out of his possession, not their cost.*

Secondly. The defendants complain that the full first cost of the improve-

ments which were in existence was not credited to them in the decree; they contend that these improvements cost them at least forty per cent. more than their value at the time they were appraised by the experts, besides the sum of \$49,005, which the experts deducted for deterioration. The experts appraised these improvements in the fall of 1875, and estimated their then cash value at the sum of \$347,361.29. It was sufficiently shown that their original cost was considerably more than this. The master, from the evidence before him, estimated and reported that the cost of materials and workmanship was, on the whole, twenty-five per cent. more than their then value, the cost being much greater when the improvements were made than the same would be at the time of the appraisement, in consequence of the condition of the country after the war, the disturbance in labor, and the expansion of the currency. He therefore reported the cost at \$434,201.61. But as the experts had deducted \$49,005 for deterioration of iron rails whilst used by defendants, this sum added would make the whole first cost \$483,206.61. The court, in its opinion, considers the allowance of twenty-five per cent. as excessive, because, whilst prices were higher when the improvements were made, so also the currency was depreciated; and the court was of opinion that fifteen per cent. additional was sufficient. This would make the first cost of the improvements equal to \$399,465.48. But the decree allows the sum of \$488,109.54, which is more than forty per cent. greater than the amount of the appraisement. No explanation of this discrepancy has been made. It seems to be the result of some inadvertent error in making the computations. But, in our judgment, there should be no allowance for increased cost. We have proceeded on the principle of carrying out the spirit and equity of the law, since it cannot be carried out in the letter. Now, the letter gives the owner the option of requiring the improvements to be removed. This option is a means in the hands of protecting himself if the original cost is greater than the improvements are worth. As he cannot actually exercise it in this case, it would violate the spirit of the law to allow the defendants a greater sum. We think, therefore, that the appraised value of \$347,361.61 is all that can be allowed to the defendants.

§ 1658. *The rule as to interest.*

Thirdly. As to the question of interest. On this subject there does not seem to have been any distinct adjudication by the supreme court of Louisiana. In all the cases which we have examined, the rents, or fruits, have been deducted from the cost of the improvements, or *vice versa*, and judgment given for the balance, without any calculation of interest on either side, except where the possessor, in exoneration of the estate, has paid money which was a lien thereon. The question of interest does not seem to have been debated. But the French juriconsults, who have given special attention to this subject, agree that when the owner of the land compels the unlawful possessor to account for the fruits of his improvements, the latter is entitled to interest on their value,—on the principle that it would be unjust to charge him for the fruits of his own improvements without allowing him interest on their cost, provided it does not exceed the amount of such fruits,—not, indeed, as interest, properly so called, but as an equivalent *pro tanto* to the fruits received, in the account to be rendered thereof. They all agree, however, in saying that interest cannot be allowed beyond the amount of such fruits, and that it cannot be brought into compensation with the fruits of the original property. Demolombe on the Code Napoleon, vol. ix, art. 679; Aubry & Rau, Droit Civ. Fr., vol. ii, sec 204 b, p. 232 and note; Dalloz, vol. xxxviii, p. 273, tit. Propriété, art. 429.

In the present case the fruits were, in fact, the results of the improvements made. The property, when taken possession of by the defendants, was a ruin. They reconstructed it, and made it capable of producing what it did produce. According to the French rule, therefore, the defendants were entitled to interest on their expenditures in making the improvements in question, provided it did not exceed the fruits and profits with which they were charged. It is conceded that interest should only be charged at the rate of five per cent. per annum. The master estimates four and a half years as the proper average time for allowing interest. In this we concur. The interest, therefore, on the whole first cost of the improvements, without deducting for deterioration, would be \$108,721.48. This should be credited against the net earnings for which the defendants are held responsible, both being in the same currency. These net earnings were found to be \$161,476.69; and deducting the said interest therefrom, the remainder is \$52,755.21, which is to be deducted from the value of the improvements. Being so deducted, the balance is \$294,606.08.

This sum, according to our view, was the amount due to the defendants at the time when they delivered the property to the receiver, and not the sum of \$391,959.42, as stated in the decree of the circuit court, which should, therefore, be reversed, with directions to be corrected in respect to the amount, as now stated; which amount, with interest at the rate of five per cent. per annum from the time of delivering the property to the receiver, should be first paid to the defendants out of the proceeds of the sale of the property, before any payment made to the bondholders. But as it may be difficult for the bondholders, or other persons purchasing the property, to raise at once the whole amount due to the defendants, the court below should direct the property to be sold subject to the lien of the defendants for said amount with interest as aforesaid, and should allow a reasonable time to the purchaser, not exceeding nine months from the day of sale, to pay the same; with a condition annexed to said sale, that if the amount due the defendants be not paid within the time so limited, a resale of the property shall be made for the purpose of satisfying said amount due the defendants, with interest as aforesaid and expenses. The court should also direct that, subject to said lien, no bid be received for a less sum than will be sufficient as a fund to defray the costs, expenses and charges arising in the cause since the former decree of this court; which costs, expenses and charges, except the costs of the defendants for attorneys', counsel and witness fees, should be paid from said fund. The amount of said fund should be fixed by the court, and should be paid to the special master making said sale before adjudicating the property as sold to any bidder.

In view of the dispositions thus to be made in the decree, the defendants will not be concerned or interested in the accounts and transactions of the receiver; but any net earnings of the railroad, or proceeds of property, which shall have come into his hands as such receiver, after paying his expenses and compensation, will go to the benefit of the bondholders; and any deficiency of moneys in his hands to pay said expenses and compensation should be paid out of the said fund required to be paid in cash as aforesaid. As to the costs in the court below, incurred since the former decree of this court, the defendants should be decreed to pay their own attorneys', counsel and witness fees; and the residue of the costs, expenses and charges in the cause should be paid out of the proceeds of said sale from the fund before specified in that behalf.

We do not deem it necessary to discuss the remaining points which have been raised on either side. We have given them due attention, and do not regard

them as presenting any valid objection to the residue of the decree. The decree of the circuit court will be reversed, and the record remitted with directions to enter a decree in conformity with this opinion, each party to pay their own costs of this appeal; and it is so ordered.

§ 1654. *A possessor mala fide should not be allowed for improvements.*

Dissenting opinion by MR. JUSTICE FIELD.

I agree with the court that the decree should be reversed, but I do not agree with it in allowing the defendants compensation for expenditures and improvements upon the road whilst they were in control of it. This court has held, after elaborate consideration, that they were possessors in bad faith, having obtained control of the road fraudulently. I know of no law and no principle of justice which would allow them anything for expenditures upon property they wrongfully obtained and wrongfully withheld from the owners, who were constantly calling for its restitution. Why should the owners pay for expenditures they never ordered, or for the construction of works they never authorized? The defendants knew all the time the vice of their title; they knew they were not possessors in good faith; they concocted the scheme by which the fraudulent sale was made; and this court has so adjudged. In the courts that administer the common law the rights of the owner are paramount and exclusive. An occupant without title is not recognized as entitled to compensation for improvements. Heron, in his History of Jurisprudence, says: There is no case "decided in England, Ireland or the United States, grounded upon common law principles, declaring that an occupant of land, without a special contract, is entitled to payment for his improvements as against the true owners, when the latter had not been guilty of a fraud in concealing the title." p. 715.

And courts of chancery do not give to an occupant compensation for improvements, unless there are circumstances attending his possession which affect the conscience of the owner, and impose an obligation upon him to pay for them or to allow for their value against a demand for the use of the property. *Putnam v. Ritchie*, 6 Paige (N. Y.), 390; *Story*, Eq. Jur., sec. 799; *Mill v. Hill*, 3 H. L. Cas., 828; *Gibson v. D'Este*, 2 Y. & C., 542; *Mulhallen v. Marum*, 3 Dru. & W., 317. To a possessor whose title originates in fraud, or is attended with circumstances of circumvention and deception, no compensation for improvements is ever allowed. *Railroad Co. v. Soutter*, 13 Wall., 517; *Morrison v. Robinson*, 31 Pa., 456; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.), 388, 416; *Russell v. Blake*, 2 Pick. (Mass.), 505; *McKim v. Moody*, 1 Rand. (Va.), 58; *Morris v. Terrell*, 2 id., 6. The learned counsel for the appellants who argued this case showed, I think, conclusively, by reference to numerous adjudications and approved text-writers, that the civil law as enforced in Europe and in Louisiana draws the same line of demarcation between the possessor in good faith and the possessor in bad faith in allowing for improvements and expenditures on the property of another. Pothier, the great legal writer, referring to the rule that no man ought to enrich himself at the expense of another, upon which compensation for improvements is here claimed, says: "A *bona fide* possessor may properly oppose it against an owner, but it is not available to a *mala fide* possessor. The owner can reply to the latter that equity did not empower him to take possession of his land and to make thereon such changes as he desired and so put the owner to charges that were burdensome, and that he might not wish to bear, and which this possessor had no right to impose. If the latter suffers from the failure to reimburse him, he must blame himself,

as being in fault, and no one can complain of consequences he has brought upon himself." *Traité du Droit de Propriété*, sec. 350.

The civil law as thus stated corresponds with what a great chancellor of England said of the interference of equity to allow one the value of improvements on another's property. "If a person," he said, "really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such expenditures, without apprising the party of his intention to dispute his title, and will afterwards endeavor to avail himself of such fraud, the jurisdiction of equity will attach in such a case. *But does it follow from thence that if a man has acquired an estate by a rank and abominable fraud, and shall afterwards expend his money in improving the estate, that therefore he shall retain it in his hands against the lawful proprietor? If such a rule shall prevail, it will certainly justify a proposition which I once heard stated at the bar of the court of chancery, that a common equity of this country was to improve a man out of his estate.*"

I prefer in this case to stand by the ancient law, than to follow any new doctrines supposed to arise out of the character of railroad property. To me it seems that the peculiar character of that property requires the special application of the old law; for just in proportion to the value of this property is the temptation to get possession of it, and if plunderers can, when compelled to restore it, be allowed for their expenditures and alleged improvements, there will be an added incentive to plunder. I therefore dissent from so much of the decree of this court as allows for expenditures upon property, the possession of which the defendants did not obtain in good faith.

§ 1655. Entire property sold on default in interest.—Under a deed of trust of a railroad the entire property may be sold upon a default in the payment of interest before the principal is due, when the property cannot be divided and sold in parts without injury to the whole. *Wilmer v. Atlanta & Richmond Air Line R. Co.*, 2 Woods, 447 (§§ 1403-1409).

§ 1656. After a sale of the entire property upon such default, the proceeds are applied, in the first place, to the payment of the interest, and the remainder is brought into court to be disposed of under its direction. *Ibid.*

§ 1657. Earnest money.—It is proper for the court to require a purchaser, other than the trustee acting in behalf of bondholders, to pay in cash a part of his bid as earnest money. *Sage v. Central R. Co.*, 9 Otto, 834 (§§ 1674-80).

§ 1658. In sales of large railroad properties, it is a proper practice to require a deposit of \$50,000 when the bid is made, and the payment of a like amount when it is accepted. *Turner v. I. B. & W. R'y Co.*, 8 Biss., 380 (§§ 1609-20).

§ 1659. Any great delay in taking proceedings against an alleged fraudulent foreclosure should be excused by averments in the petition which should be proved. *Farmers' Loan & Trust Co. v. Green Bay, etc., R. Co.*, 6 Fed. R., 100 (§§ 1468-73).

§ 1660. Compromise of mortgage debt.—Holders of mortgage bonds of a railroad need not discharge their lien till they have received the full amount of their bonds, principal and interest; but if by way of compromise they accept less in full discharge of their claim, whatever remains of the mortgaged property belongs absolutely to the corporation as a trust fund for its creditors. *Railroad Co. v. Howard*, 7 Wall., 392 (§§ 1848-54).

§ 1661. A contract for the foreclosure of a railroad mortgage, though unauthorized, must stand after it has been carried into effect by the consent of all parties interested. *Ibid.*

XVI. RIGHTS OF PURCHASERS AT FORECLOSURE SALE.

SUMMARY—Scheme for reorganization upheld if equitable, § 1662.—Bondholders purchasing with bonds, § 1663.—Purchaser takes only the property decreed to be sold, § 1664.—No right to earnings, § 1665.—Taxes on property sold, § 1666.—When court may direct trustee to purchase for reorganization, § 1667.

§ 1662. A scheme of reorganization which does not contemplate a complete absorption of all the property of a company by the secured creditors and the stockholders, but provides in an

equitable manner for the unsecured creditors, is not fraudulent as against such creditors, and will be upheld. *Hancock v. Toledo, Peoria & Warsaw R. Co.*, § 1668.

§ 1668. Bondholders purchasing at a foreclosure sale have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the balance in bonds, so far as to cover their own proportion of such balance. Where a large part of the bondholders had agreed to purchase the railroad, or to reorganize the company without a sale, the court allowed the non-subscribing bondholders within a certain period to participate in the purchase on equal footing with the others. *Duncan v. Mobile & Ohio R. Co.*, §§ 1669, 1670.

§ 1664. A purchaser at a foreclosure sale of a railroad takes only the property which the decree directed to be sold. He has no claim to a fund which was not ordered to be sold, and which the master did not attempt to sell. *Osterberg v. Union Trust Co.*, §§ 1671-1673.

§ 1665. The purchaser at a judicial sale has no right to any part of the earnings of a railroad while it remains in the possession of the receiver after the sale and before its confirmation, while indulgence is extended to the purchaser in making the required payments. The road in the mean time is in the custody of the receiver, and its earnings belong to the bondholders. *Ibid.*

§ 1666. The purchaser cannot retain from his bid at a judicial sale a sum sufficient to pay taxes which have become a lien upon the property. The lien for taxes does not stand on the footing of an ordinary incumbrance, but attaches to the *res*; and the purchaser, in the absence of any agreement, takes the property subject to such lien. *Ibid.*

§ 1667. An agreement in a railroad mortgage that a majority of the bondholders may require the trustee, in case of a foreclosure, to buy for their benefit inures to the benefit of all the bondholders; and the court may direct the trustee to bid at the sale, and may provide for a complete execution of the trust. The court may in such case authorize a reorganization according to the terms and conditions imposed by such majority if the rights of the minority are not interfered with. *Sage v. Central R. Co.*, §§ 1674-1680.

[NOTES.— See § 1681.]

HANCOCK v. TOLEDO, PEORIA & WARSAW RAILROAD COMPANY.

(District Court for Illinois: 9 Federal Reporter, 738-743. 1882.)

Opinion by BLODGETT, D. J.

STATEMENT OF FACTS.— This is a bill filed by Jonathan Hancock as a judgment creditor of the Toledo, Peoria & Warsaw Railroad Company, in behalf of himself and all other creditors of that company, against said company and Morris K. Jessup, Robert C. Martin, Charles E. Whitehead, William L. Putnam and Henry Hill, a committee of the creditors of said company. The bill, in substance, charges that complainant, on the 23d of November, 1875, recovered, in the circuit court of Peoria county, in this state, a judgment against the Toledo, Peoria & Warsaw Railroad Company for \$3,835.35; that the railroad of the Toledo, Peoria & Warsaw Railroad Company was heavily incumbered with mortgages and other liens, and that proceedings had been instituted and were pending for the foreclosure of the mortgage liens on the property, and that the property was in the hands of a receiver appointed by this court under such foreclosure proceedings; that, pending these foreclosure proceedings, and on or about the 13th day of June, 1877, an agreement was entered into between the holders of the mortgage bonds and other creditors of the corporation, whereby it was provided that defendants Jessup, Martin, Whitehead, Putnam and Hill should be appointed a purchasing committee; that such committee should obtain a decree of foreclosure in the suit then pending, under which, all and singular, the railroad, rights, privileges, franchises and property of the company should be sold, and the same should be purchased at such sale by the committee, for and in behalf of all the holders of bonds, stocks and indebtedness of the company; that a new corporation should be organized, under the laws of the state of Illinois, to own, operate and control such railroad franchises and property, which should bear the name of the Toledo, Peoria & Western

Railroad Company; that the holders of the bonds, indebtedness and stock of the old company should deliver the same to the Farmers' Loan & Trust Company of New York, subject to the order of the committee; that the committee should convey the title to the railroad, its franchises and appurtenances, so purchased by them, to the new corporation, and the new corporation should make a mortgage on the same to secure four thousand five hundred bonds of \$1,000 each. Also a second mortgage to secure \$3,900,000 — \$2,900,000 of which should be called "*first preferred income bonds*," to be issued in sums of \$1,000 each; \$1,000,000 of said bonds to be called "*second preferred income bonds*," to be issued in sums of \$1,000 each; and that the new corporation should also issue thirty thousand shares of stock, of the par value of \$100 per share, making a total of \$3,000,000 stock; that the holders of the mortgage bonds of the old company should receive, in place of their old securities, the new bonds, secured by the first and second mortgages, at certain rates fixed by the agreement; that the holders of the floating debt of the old company (which means, we assume, the unsecured indebtedness of this company, including this complainant) should receive, on surrender of their evidences of indebtedness, "*second preferred income bonds*" of the new company at par, to the full amount of their respective debts, and interest; that the holders of the first preferred stock of the old company should receive, on the surrender of the stock certificates to the committee, stock of the new company to the amount of fifty per cent. of their old stock. Holders of the second preferred stock should receive stock of the new company to the amount of thirty per cent. of the old stock, and holders of the common stock of the old company should receive twenty-five per cent. in stock of the new company.

In his original bill, complainant stated the substance of this agreement in a very meager and imperfect manner, because, as he charged, the agreement was in the hands of defendants, and he was unable to procure a copy. He has since obtained a copy of the agreement, and filed an amendment to his bill, with a copy of said agreement, so that the agreement itself is now before the court for construction. The bill charges that this scheme or plan of reorganization is fraudulent as against the creditors of the old company, and seeks to have the stock of the new company, provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of complainant's judgment, and that of such other creditors as shall come in and be made parties thereto.

The solicitor for complainant insists that he makes just such a case here as was shown in *Railroad Co. v. Howard*, 7 Wall., 392 (§§ 1348-54, *supra*). That case involved a contract made under circumstances similar to this, between the bondholders and stockholders of the Mississippi & Missouri Railroad Company of Iowa, whereby the road of the company was to be sold under a decree of foreclosure to be procured and bid in by a committee for a fixed sum, \$5,500,000, which was to be distributed among the bondholders and stockholders in such proportions that the stockholders should receive sixteen per cent. of the par value of their stock, either in money or bonds. This agreement was attacked by the holders of certain unsecured indebtedness of the company, on the ground that it was fraudulent as against them.

The supreme court held that plan of reorganization void as against the unsecured creditors, because it made no provision for the payment of the unsecured creditors, saying: "Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected

or refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation; and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage, as in this case, may exact the whole amount of the bonds, principal and interest, or they may, if they see fit, accept a percentage as a compromise in full discharge of their respective claims; but whenever their lien is legally discharged, the property embraced in the mortgage, or whatever remains of it, belongs to the corporation."

§ 1668. *Circumstances under which a holder of an unsecured debt of a corporation fails to make out a case of fraud against the plan proposed for a reorganization of the corporation.*

It will be seen that while the Mississippi & Missouri Railroad Company was largely indebted to certain unsecured creditors, no provision was made under the scheme of reorganization for any payment or security to the unsecured creditors. The plan contemplated a complete absorption into the purchasing committee, or their successors, of the entire property of the company, free from all liens and liability for the debts of the old company, but in no manner contemplated that the holders of unsecured indebtedness were to be paid in full or in part, or in anywise provided for; while the stockholders, who only in equity held their interest, subject to the debts of the company, were to have about \$550,000 divided among them. Here, however, express provision is made for the holders of all the floating debt by giving them, in lieu of and substitution for their evidences of debt against the old company, second preferred income bonds of the new company equal to the amount of such floating debt and interest. This income bond is, by the terms of agreement, a higher grade of security than the stock of the old company; that is, the stockholders get no dividend until the interest on these bonds is all paid. The stockholders are placed behind the holders of these bonds, and the plan seems to fairly contemplate the protection of all classes of creditors of the old company in the equitable order of their priority. It was the evident purpose of the parties to this agreement to place these floating debt-holders in at least as good a relation to the new company as they bore to the old company. They got for their unsecured indebtedness something which at least bears the semblance of a security. It was a second mortgage bond. No complaint is made of anything inequitable in the provision by which the holders of the mortgage debt should be paid in full in the manner provided in the agreement; nor is there any suggestion that there was any fraudulent collusion between the bondholders and stockholders to defraud the unsecured creditors.

It would seem almost obvious, from a statement of the amount of bonded and unsecured indebtedness of this old company, that it could not have been anticipated that this railroad property would or could have been sold for cash; or, if a cash sale had been insisted upon, it would only have partly paid the holders of the first mortgage bonds. The plan adopted had what seems to have been a due and equitable regard for the interests of all classes of creditors and stockholders, and it does not seem that upon the statements in this bill any injustice was intended or has been done to this creditor. He undoubtedly has been offered much more than he could have got had the holders of the secured indebtedness insisted upon their full payment, as they would seem to have had

the right to do. If this bill had shown that this creditor had accepted the provision made for him under the scheme or plan of reorganization, or had accepted the income bonds he was entitled to receive, and there was still a balance of his debt left unliquidated, he might, under the authority of the case which has been referred to, have had a right to call upon the stockholders to surrender the stock which it was provided they should receive as a part of this scheme. But it is not necessary to discuss that; and I refer to it only for the purpose of showing that he makes no such statement. He does not show he has accepted the provision which was made for him, and has come into the scheme for the purpose of obtaining payment, as the other creditors of this corporation did, and as he might have done. If he had exhausted his remedy he might have had a different standing with reference to the stockholders. It is true, the contract provides that all those who come into this scheme shall contribute ratably to the expenses necessary to complete this plan of reorganization. This does not seem inequitable, but on the contrary, just and equitable, between the parties. All classes of the creditors of this company seem involved in a common misfortune, and it seems to me but right that they should share in the expenses of a plan which had for its purpose the benefit of all.

The bill is therefore dismissed for want of equity.

DUNCAN v. MOBILE & OHIO RAILROAD COMPANY.

(Circuit Court for Alabama: 3 Woods, 597-602. 1879.)

STATEMENT OF FACTS.— This was a bill to foreclose a mortgage on the Mobile & Ohio Railroad Company. It appeared that the majority of the bondholders had agreed to reorganize the company.

§ 1669. *Bondholders have an equitable right to purchase mortgaged property and pay a proper proportion of the purchase money in bonds.*

Opinion by BRADLEY, J.

Bondholders secured by a common mortgage have equal rights in the common security, proportional to the amount held by each. If the mortgaged property be sold to a stranger, the proceeds are equally distributed and perfect justice is done to all. If bondholders purchase the entire property, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the balance in bonds, so far as their own proportion of such balance extends, for it is to come to them. But it is evident that those who singly, or in combination, hold a large portion of the bonds, have a great advantage over the minority; for they can pay their own proportion of the purchase money, which is much the largest, in bonds, and have only a small amount of cash to pay, whilst the minority can only pay a small proportion in bonds, and have a large amount to pay in cash, which, as a generality, they are totally unable to pay. This practically puts it in the power of the majority to get the property at a large sacrifice, and turn the minority off with a mere pittance. This is inequitable, and to be avoided if possible. Perhaps the most equitable mode of disposing of the property (when practicable), when it cannot be sold for cash to an amount sufficient to pay the bondholders, is to decree a strict foreclosure, in which all will participate alike, or to make a sale for the equal benefit of all the bondholders who choose to come in and participate. A strict foreclosure may be attended with difficulties in those states where a mortgage is a mere security, and does not give a legal title, besides which, it places the property in the hands of a vast number of beneficiaries

whose consent may be very difficult to obtain in perfecting a new organization for conducting the business. A sale for the benefit of all is attended with the difficulty of determining who shall make the bid. The court has sometimes authorized the trustees of the mortgage to bid for the bondholders. In this case, it is obvious that one class or the other of the bondholders would be dissatisfied with any selection of trustees which the court might make.

To decree that all the bondholders shall be allowed to participate in any sale that may be made would practically nullify an auction sale. Who would bid on such terms?

In this case, it has been brought to our notice that a scheme for reorganizing the company, or the interests represented in its property, has been agreed to and subscribed by about seventy-eight per cent. (in interest) of the first mortgage bondholders. We have examined this scheme, and if not perfectly equitable, we are unable to point out any want of fairness in it. It would give to those who have not joined in it, should they do so, about twenty and one-half per cent. interest in the entire purchase; whilst if all first mortgage bondholders (including the Tennessee bonds in the number) were placed on an exact proportionate division, the non-subscribing interest in the purchase would amount to about twenty-one and five-eighths per cent. But they run the risk of the Tennessee bonds being placed ahead of the others. If the latter were given the preference, then, subject to that incumbrance, the non-subscribing interests would, by an equal division with the others, take about twenty-four and eight-tenths per cent. of the purchase, which is probably less advantageous to them than the proposed plan of reorganization would be.

Looking at the difficulties which beset the subject on every side, we think that if we allow the non-subscribing bondholders to participate in the purchase of the property, should it be made in behalf of the reorganizing combination, on an equal footing with those who have joined it, that we shall have done all that we can do under the circumstances to protect their interests. The parties representing the reconstruction scheme, through their counsel, have offered to allow them to come in, and to extend the time for doing so until the 1st of August. We suggest that this time should be extended to the day of sale of the property. We perceive that the trustees have the power to do this — and keep the agreement on foot by extending the time sixty days at a time. We have, therefore, proposed an additional proviso to the decree to carry out this view. We hope that it will be acceded to by the counsel for the complainants and those representing the reconstruction scheme. We do not wish to dictate these terms to the parties who propose to purchase, but suggest that, in our judgment, the interest of all parties would be subserved by an arrangement of this sort.

WOODS, J., concurred.

FIXING AMOUNT OF APPEAL BOND.

§ 1670. *Amount of appeal bond.*

Opinion by BRADLEY, J.

An appeal being granted and allowed in these cases from the decree rendered therein on the 15th day of June, 1877, the question is raised as to the amount of the appeal bond to be given by the appellants, they being the plaintiffs in the second and third suits, and defendants in the first. The decree appealed from sustained the claim of Alexander Duncan, as holder of certain first mort-

gage coupons to the amount of over \$500,000, to come in *pari passu* with the first mortgage bondholders, and directs a foreclosure of the first mortgage and a sale of the mortgaged property to pay the bonds secured thereby, and also certain other bonds given for interest, amounting in the aggregate to about \$10,000,000. Purchasers are, by the decree, allowed to pay the purchase money in bonds and coupons to the extent of their proportionate interest as bondholders in the whole amount of first mortgage bonds. About four-fifths of the bondholders have agreed to and subscribed a scheme for reorganizing the company and purchasing the road.

The court has allowed the remaining bondholders until the 1st of September to join in said scheme. A portion of the bondholders, holding less than one-tenth of the entire mortgage interest, are dissatisfied with the decree, and promote the appeal. The property being in the hands of a receiver, and not producing much, if any, more than the expenses and necessary repairs of the road, the bondholders to whom the property or its proceeds really belongs will be kept out of possession for two or three years by the intervention of the appeal. This delay in obtaining possession of the property or its proceeds we regard as calculated greatly to injure them. By having immediate possession they could make the necessary improvements and connections required for making the property much more remunerative, and could manage it much more to their advantage generally than a receiver can do. Or if the property were immediately sold, they would be in possession of the interest of the purchase money, of which they will now be deprived for two or three years by the appeal. In our judgment, therefore, an appeal bond for \$100,000 is very moderate in amount.

The appellants contend that on the principles of the decision of the supreme court in the case of *Jerome v. McCarter*, 21 Wall., 17, a bond for \$100,000 is greatly in excess of what should be required. They insist that, in contemplation of law, possession by a receiver is equally beneficial to those who are interested in the property, as possession by the parties themselves. Whilst this may be the case with regard to dead property, or even real estate generally, we think it is not so where the property, like a railroad, is perishable in its character, and has to be managed, worked, repaired and taken care of, in order to preserve it. We think that the owner is a better manager than a trustee or receiver, who is hampered and restrained in his management, and cannot take advantage of all those means and opportunities which the owner could do for rendering the property most profitable and productive.

On these grounds, we think that the damage sustained by the delay will be much more than the mere costs and expenses of the suit, and that the actual loss and injury to the owner, or in this case the bondholders, may be taken into consideration by the court in fixing the amount of the bond, and that loss and damage, we think, will not be less than the amount we have required. The most forcible difficulty which presents itself to our minds is the measure of damages which would be applicable in a suit on the bond. Would it be admissible for the plaintiffs to show a loss to the bondholders by reason of advantages lost for the cause above referred to? Of this there may be a question. But our opinion is, on the whole, that such a damage would be the subject of a recovery. If damages are really sustained, there seems no good reason why they should not be recovered.

Woods, J., concurred.

OSTERBERG v. UNION TRUST COMPANY.

(3 Otto, 424-429. 1876.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.— A mortgage was given by the Rockford, Rock Island & St. Louis Railroad Company to secure certain bonds, and suit to foreclose was brought by the trustee, June 11, 1874. The property passed into the hands of a receiver in the following October. The receiver took possession of the road and operated it, and on July 11, 1875, a decree was entered directing a sale of the road and certain real estate. The master gave notice at the sale that a sufficient amount of the proceeds would be retained to pay the taxes for 1873 and 1874. The appellant became the purchaser, and on May 27, 1876, the sale was confirmed and a conveyance directed. Lynde and Curtis had become sureties on appeal bonds for the company, and certain lands covered by the mortgage were conveyed, and certain moneys deposited, for their indemnity. Part of the land was sold and the proceeds converted into government bonds. The sureties were afterwards discharged from liability, and the money and bonds came to the hands of the receiver, and were by him paid into court and ordered to be distributed among the creditors. The lands that were sold were not mentioned in the decree, and those that were not sold were conveyed under the order of the court. The receiver did not pay the taxes for 1875.

Opinion by MR. JUSTICE DAVIS.

We are unable to perceive that the appellant is entitled to the relief which he seeks.

§ 1671. *A lien for taxes does not stand on the footing of an ordinary incumbrance. It attaches to the res, and the purchaser at a judicial sale takes it subject to this lien.*

1. The taxes for 1875 were, at the date of the decree, a subsisting lien upon the mortgaged property, and he had not only constructive but actual notice of its existence. It is true that the title of a purchaser at a judicial sale under a decree of foreclosure takes effect by relation to the date of the mortgage, and defeats any subsequent lien or incumbrance. A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title. But if the doctrine were otherwise, and if the rule of *caveat emptor* had no application to this case, we are not aware of any principle which would justify withholding from the mortgagee any of the moneys derived from the sale of the mortgaged property, with a view to the application of them to satisfy such a lien. This is not a controversy between incumbrancers. It is, in effect, a proceeding by a purchaser at a judicial sale to apply a portion of his bid to the partial discharge of an incumbrance to which he admits that the property in his hands is subject. Even if the law had not imposed on the purchaser the burden of discharging it, the terms of sale, as announced by the master, clearly did so.

§ 1672. *A purchaser at judicial sale has no right to earnings while the property is in the hands of the receiver, unless he has complied with his contract of purchase.*

2. He has no rightful claim to any part of the earnings of the road whilst

it remained in the possession of the receiver, nor is he in a position to question the orders of the court as to the application of those earnings. The road would have been surrendered to him at an earlier date had he punctually complied with the terms of the sale; but the court, under the peculiar circumstances of the case, extended to him an indulgence in making the required payments. In the mean time the road remained in the custody of the receiver, and its earnings were devoted to the payment of current expenses and other meritorious claims.

§ 1673. *A purchaser at a judicial sale takes only the property offered for sale.*

3. Nor has the appellant a right to the money and government bonds which came to the hands of the receiver from Henry Curtis and Cornelius Lynde. So soon as they were relieved from the trust upon which these persons held them, they belonged in equity to the bondholders. The purchaser could acquire no right to them, as he bought only the property which the decree directed to be sold; and it did not order the sale of this fund, nor did the master attempt to sell it. If the deed of the receiver to Osterberg is broad enough in its language to cover this fund, it is to that extent void, as he was only authorized to convey the property previously described in the decree and sold by the master at the sale.

Decree affirmed.

SAGE v. CENTRAL RAILROAD COMPANY.

(9 Otto, 384-348. 1878.)

APPEAL from U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—This proceeding was commenced by a bill filed at the suit of Charles Alexander and others, holders of bonds secured by a first mortgage or deed of trust of the Central Railroad Company of Iowa, praying for an account, for the appointment of a receiver, and for a foreclosure of the mortgage. The bill was filed to October term, 1874, in the circuit court. It made the railroad company and the Farmers' Loan & Trust Company of New York, who were the trustees named in the mortgage, parties defendant. Subsequently, at the same term, the trustees, who were also trustees under second and third mortgages, filed their original bill, as well for the benefit of the complainants in the first bill as for all other bondholders, praying also for an account, for a receiver, and for a foreclosure. By order of the court, these two bills were consolidated, and the hearing of the case proceeded until the 22d of October, 1875, when a final decree was made, directing, *inter alia*, a sale of the mortgaged premises. On the 15th of January, 1876, Russell Sage, James Buell and N. A. Cowdrey, on their petition, representing themselves to be holders of some of the mortgaged bonds secured by the first mortgage, were permitted to intervene as parties, to prosecute an appeal to this court for the protection of their several interests, against the decree of October 22, 1875. They have accordingly appealed; and as their appeal was not made a *supersedeas*, and the decree was executed by a sale, they have entered a second appeal from the confirmation of that sale.

Directing our attention first to the appeal from the decree of October 22, 1875, it is observable that it raises no question respecting the validity or amount of the debts due by the mortgagors and secured by the several mortgages, nor any respecting the order in which they are entitled to payment. There is

some complaint that the court, before the final decree was entered, directed certain payments to be made by the receiver for locomotives and rent of cars used upon the road, either by the receiver or before his appointment. Whether these orders were correct or not, we will consider hereafter. The appellants do not complain that the decree of the court has not determined correctly the amounts due upon the several mortgages, and marshaled them in their proper order of priority. Nor do they insist that it was not proper for the court, in view of the facts as they appeared, to order a sale of the mortgaged property. Their complaint is rather respecting the disposition which the court decreed to be made of the property, in case the trustees of the mortgage should become the purchasers. To understand those dispositions, and the reasons why they were ordered, it is necessary to observe carefully the provisions of the deed upon which the bill was founded, and which, therefore, properly affected the decree. Some of them are quite peculiar. The first mortgage was given to the Farmers' Loan & Trust Company of New York, to secure the payment of bonds of the railroad company to the amount of \$3,776,000, with interest thereon. It covered the entire corporate property of the mortgagor, constructed or to be constructed, and all its franchises and privileges,—all its property that might thereafter be acquired, including machinery, locomotives, rolling stock, tools and supplies, as well as the net income of the mortgagor. It contained also the usual stipulation made in railroad mortgages, that in case of default in the payment of interest the principal should fall due; that the trustee, on the written request of a majority of the holders of the bonds, should be authorized and empowered to take possession of the property, and sell it at public auction. It is unnecessary to refer to the other provisions, except the following, which are special and unusual, and have a material bearing upon the decree of which the appellants complain. These we quote at large:

“And it is further covenanted and agreed by and between the parties hereto, that in case of any judicial foreclosure sale, or other sale of the premises embraced in this mortgage, under the decree of any court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of a majority of the then outstanding bonds secured by this mortgage shall in writing request the said trustee or their successor, they are authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds secured by this mortgage. And having so purchased said premises, the right and title thereto shall vest in said trustees, and no bondholder shall have any claim to the premises or the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation, to be formed for the use and benefit of the holders of the bonds secured hereby, and the said trustee may take such lawful measures as deemed for the interest of said bondholders, to organize a new company or corporation for the benefit of the holders of the bonds secured by this mortgage. Said new company or corporation shall be organized upon such terms, conditions and limitations, and in such a manner, as the holders of a majority of said outstanding bonds secured by this mortgage shall, in writing, request or direct, and said trustee so purchasing shall thereupon reconvey the premises so purchased by them to said new company or corporation.”

It was a mortgage containing these stipulations that the circuit court was called upon to enforce. And the several bondholders claiming under the mortgage held their interests subject to this controlling power given to the majority of all the holders.

There were two subsequent mortgages of the same property, given by the railroad company to the same trustee, to secure the payment of other bonds. These were set forth in the bill; and when the consolidated case was ripe for a decree, it appeared that there was due from the company for principal and interest of the first mortgage debt the sum of \$4,623,334.99 in gold, with interest from October 15, 1875; upon the second mortgage, \$1,136,216.86; and that there were \$420,000 of bonds, secured by the third mortgage, outstanding. The court therefore decreed that the mortgagors should pay within ten days the sum due to the bondholders under the first mortgage; and if they failed to pay, that the mortgagees under the second and third mortgages and the judgment creditors, or any of them, in the order of their respective liens, should pay the same; and that in default of said payment by any of said parties, their equity of redemption in the premises should be foreclosed.

Had this been all, the result would have been a strict foreclosure. The master to whom the case had been referred had found and reported that the property would not sell at the date of his report (October 11, 1875) for more than forty cents on the dollar of its indebtedness, and this report had been confirmed. It was therefore manifest that neither the railroad company nor any of the lien creditors subsequent to those holding under the first mortgage could or would pay the \$4,620,334.99 thereby secured. But a strict foreclosure was undesirable for all the parties. Not only would it have cut off entirely the bondholders secured by the second and third mortgages, whose interests were before the court, and which it was bound to protect as far as possible, but it would have made the large number of bondholders under the first mortgage practically tenants in common of the railroad property. The inconveniences of such a result are obvious enough. A sale, therefore, was for the interest of all, and to that no one objected. Indeed, it was contemplated as possible in each of the three mortgages. The bondholders, through their trustee, had made arrangements in view of such a contingency. They had agreed what should be the effect and consequence of a judicial sale. All of them had taken their bonds with knowledge of the agreement and subject to it. What that agreement was, what purpose it was intended to subserve, against what mischief it was proposed to guard, and by what mode it was stipulated the object intended should be accomplished, it is very important to consider. By the agreement, the entire body of the bondholders consented to place their interests, to a certain extent, under the control of a majority of their number. Their trustee was authorized to purchase the property at the judicial sale, should one be ordered, and convey it to a new corporation, to be formed for their benefit, provided a majority of them should, in writing, request such a purchase. They had agreed to more than this. They had consented that the new corporation should be organized upon such terms, conditions and limitations, and in such manner, as the holders of a majority of the outstanding bonds secured by the mortgage should, in writing, request or direct. This consent and agreement, this deposit of power in the majority, was contained in the mortgage under which the appellants claim. The purposes sought to be accomplished by it are manifest.

First. It was designed for protection against the perils of a forced sale of an unsalable property for cash. It was well known that at judicial sales of railroads for cash there is little likelihood of obtaining a bid for a sum at all commensurate with the value of the property sold, or with the amount of incumbrances upon it. The amount required is so large, usually, that it is beyond

the reach of ordinary purchasers. In such a case as the present, the first mortgage bondholders are the only party that can become the purchasers, and they only, because they need not pay their bid in cash.

Secondly. The agreement looked farther. It provided for the contingency of a purchase by bondholders under the mortgage. But such a purchase could not inure equally to the benefit of all, unless all were parties to it. There is almost a certainty that in foreclosure sales of a railroad, especially when the mortgage debts exceed the market value of the property, as in this case, the purchaser will be an association of some of the bondholders secured by the mortgage, who buy with the intention of organizing a new company to hold the property for their interests. Where the bondholders are numerous, diversities of views respecting the new organization may be expected, and they generally arise. Very rarely do all the bondholders unite in making the purchase. Frequently there is more than one combination, and a strife between them to secure the advantage hoped for from the purchase and consequent control of the property. The result is that those who do not belong to the successful combination are excluded from those advantages, and are not placed upon an equal footing with the others.

Thirdly. Another evil, that observation shows to be very frequent, is that the arrangements for purchasing the mortgaged property and organizing a new company, desired by the majority of the bondholders, and which would be for the equal benefit of all, are resisted by a small minority, unless they, the minority, are paid in full, or superior advantages are conceded to them, at the expense of their fellows.

§ 1674. *An agreement embodied in a mortgage, that a majority of the bondholders might require the trustee in case of a foreclosure to buy for their benefit, inures equally to the benefit of such bondholders.*

It was in view of all this that the first mortgage bondholders entered into the agreements contained in the mortgage,—the agreements which we have quoted. They provided that there should be no judicial sale for cash, unless the amount bidden at the sale should equal the sum due and secured by the mortgage. Instead of such a sale they provided a method by which all the bondholders with equal rights might effect a reorganization of the indebted corporation, and become the owners of the franchises and property mortgaged. This mode was the creation of a new corporation in which the property should be vested, for the equal benefit of all the holders of the bonds, thus preventing any minority or any bondholders from demanding that their wishes and interests should be given a preference to those of others in like condition, or that they should be paid in whole, or in part, in cash. So the agreement was, in part intended to guard against the evils resulting from the want of unanimity among those whose rights were exactly the same, and the possible necessity of raising money to pay off non-assenting holders of the bonds. It was to secure the common interests of all the bondholders, in such a manner that none should obtain an advantage over the others, that it was agreed the purchase might be made by the trustee on account of all, and that the subsequent disposition of the subject of the purchase should be for the common benefit of all. To carry out these intentions a majority of the bondholders was empowered to act controllingly for the entire body, in matters respecting the purchase and disposition of the property purchased, subject to the limitation that the purchase, if made by the trustee, should be for the use and benefit of the outstanding bonds; that the property should be conveyed to a new company which should

be organized for their benefit, on such terms, conditions and limitations as the holders of a majority of the outstanding bonds should request or direct. The agreement, though unusual, was a reasonable one. While it prevented a small minority of the bondholders from forcing unreasonable and inequitable concessions from the majority, it did not empower that majority to crush out the rights of the minority, or subject them to any disadvantage. It authorized only such arrangements as would inure equally to the benefit alike of the majority and the minority.

§ 1675. — *the court in such case may direct the trustee to bid at the sale, and may provide for a complete execution of the trust.*

Such was the contract and such the power conferred upon a majority of the bondholders. It was such a contract which the bills brought before the circuit court for a decree. In view of its provisions we cannot think it was error to decree, as the court did, that the mortgaged property should be sold to the highest and best bidder, and that the trustee should be authorized and directed to bid at the sale, as trustee for the first mortgage bondholders, at least the amount of principal and interest of the first mortgage bonds. The decree went farther. At the time when it was made it appeared that a large majority of the first mortgage bondholders had, in writing, requested and directed the trustee, if becoming the purchaser, to convey the property to a new corporation, organized substantially on the terms, conditions and limitations prescribed in the decree which the court made. The request was an attempted exercise of the power conferred upon that majority by the mortgage. The trustee, the *cestui que trust*, and the trust itself, were before the court, and the court undertook a complete execution of the trust. It decreed as follows:

"That if said trustee, as aforesaid, shall become the purchaser of said property at such sale, the title shall pass absolutely to said trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second and third mortgage bondholders, creditors and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage, and of this decree, and to be approved by a majority of said first mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first mortgage bondholders in such manner as the majority of such first mortgage bondholders shall indicate and provide, and in which the second mortgage bondholders shall receive a second class of stock for the full amount, principal and interest, of said second mortgage bonds; and in which corporation the third mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in which the stockholders of the defendant shall receive common stock at the rate of \$1 in the new corporation for every \$3 of stock held by them in the defendant corporation."

§ 1676. *It is competent for a court of equity to decree a foreclosure sale although a strict foreclosure was prayed for.*

Against this part of the decree the appellants present several objections. They urge that it was unauthorized by the prayer in the bill of complaint, and was not responsive thereto. It is true the bill contained no specific prayer for such directions; but beyond the relief specifically asked, the complainants prayed for such other and further relief as the nature of the case should require, and as might seem meet to the court. The specific relief sought was a

strict foreclosure; but under the prayer for general relief it is not questioned that the decree for a sale was appropriate. And as the deed of trust was made a part of the bill, and provided what should be done in case the trustee became the purchaser at the sale, it does not appear to be going outside of the case to enforce the agreement contained in the deed, into which the railroad company, the trustee, and, through the trustee, all the bondholders had entered.

A second objection is that in this part of the decree the court attempted to force inconsistent duties and trusts upon the trustee, different from those the parties had established by contract under seal, viz., by the mortgage deed. The meaning of this is, as we understand it, that the decree directs a disposition of the property variant from the one stipulated for in the deed of trust. At first sight this objection seems to be not without merit. But after a careful examination of the deed, bearing in mind also the purposes sought to be accomplished by it, the mode prescribed for the accomplishment of those purposes, the powers vested in the majority of the bondholders, and the subordination of the trustee to those powers, we are unable to say that the decree was unwarranted. We cannot say that the majority transgressed the power they possessed, in their arrangement for the organization of the new company, and, consequently, that the decree of the court carrying out that arrangement directed a disposition of the property different from that to which all the bondholders had assented. The primary object of the deed was to secure to the bondholders a prior right to the entire property,—the subject of the trust,—so far as it was needed for the full payment of the bonds. The decree preserves this right in all its entirety. It directs that in the new corporation to which the trustee is ordered to convey, the controlling interest and power of management shall be given to the first mortgage bondholders in such manner as the majority of them shall indicate and provide. It subordinates to their rights all the interests of the second and third mortgagees, as well as those of the general creditors and the stockholders of the railroad company, foreclosing entirely the equity of that company.

§ 1677. *The court may in such case authorize a reorganization of the company according to the terms and conditions imposed by such majority.*

The agreement in the deed of trust (a similar one being also in the second and third mortgages) contemplated a substantial reorganization. It was for this that the power was given to the majority of the bondholders. The power was coupled with a large discretion. The majority was authorized to define the "terms, conditions and limitations" under which the new company should be organized. What those should be was thus left to the discretion of the donees of the power. "Terms, conditions and limitations" are broad words. Let it be conceded that the new organization must be for the benefit of the holders of the first mortgage bonds, how can we say it is not for the benefit of those holders that entirely subordinate interests are conceded to junior lien creditors and to the stockholders of the former corporation? How can we say that such a concession was beyond the discretion with which the agents of the bondholders, that is to say, the majority, were clothed? Such concessions are generally made in reorganizations of railroad companies, and they are regarded as beneficial to the joint lienholders. They prevent delay and expenditure arising out of litigation between creditors, which are sometimes almost ruinous, and they lessen the risk of redemptions. The majority were empowered to direct the terms and conditions under which the new corporation should exist, and hold the property conveyed to it, as well as the limitations within

which it might act. It is not intended that the majority could postpone the rights of any minority of the bondholders to those of other creditors, or allow any interference with those rights. Nothing of the kind has been done. Under the agreement, the appellants, as well as the other bondholders, had, in case of a purchase by the trustee, no claim to the property purchased or to the proceeds thereof, "except for their *pro rata* share of the proceeds as represented in a new company," to be formed in the manner, and upon such terms and conditions, and with such limitations, as a majority of their associates may direct.

Upon the whole, therefore, we think the decree of the court, in the particular we are now considering, is consistent with the agreement of the bondholders contained in the deed of trust, and, therefore, that this objection of the appellants should not be sustained.

§ 1678. *It is proper for the court to require a purchaser other than the trustee to pay in cash a part of his bid as earnest money.*

We see no error in the decree, so far as it required any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to pay at once in cash a part of his bid as earnest money. Such other purchaser, of course, must be a cash purchaser, at least to the extent of the sum due on the first mortgage. It was, therefore, no hardship to require an immediate payment by him of a part of his bid, and the order that he should make such payment was a protection against false or unreal bids. That the same requirement was not made of the trustee was very proper, for the reason that a purchaser by the trustee required no payment of money, beyond a sum sufficient for costs, unless the bid exceeded the sum due on the first mortgage, the purchase being made for the first mortgage bondholders.

§ 1679. *Case cited.*

The appellants further object to certain orders made by the court for payment by the receiver to John S. Newberry *et al.*, to Isaac M. Cate *et al.*, to Mowery Car Company, and to Haskell, Barker & Co., for rolling stock, furnished under lease or otherwise, for the railroad. These orders were no part of the decree of October 22, 1875. These orders were made prior to that time, when the appellants were not parties to the suit, except through their trustee. They did not intervene and become parties until after the decree of October 22d was made. Then they were permitted to become parties "so far as to prosecute, if they so elected, for the protection of their several interests therein, an appeal to the supreme court from the decree entered October 22, 1875." They asked for nothing more. They prayed for no appeal from any prior orders, and certainly they cannot be permitted now to object to orders made prior to that decree,—orders from which they have not appealed. But if this was not so, it would be sufficient to say that the orders were not erroneous. They were within the rules we announced in *Fosdick v. Schall*, 99 U. S., 235 (§§ 1547–49, *supra*), and it is sufficient to refer to that case for their justification.

The appellants further object that the eighth paragraph of the decree was erroneous. That paragraph is as follows: "*Eighth*, that the right of the several parties to this suit claiming liens by judgment or otherwise upon the property of defendants, and of the several parties claiming rights or equities in and to said property, or any property in the use of said railroad company, or any part thereof, by virtue of contracts, or cases whereby material, labor or property has been furnished for or placed upon said defendant's road, shall not be affected by this decree, the same being taken subject to the rights and equities of said parties as the same may be established and declared hereafter by this court."

This order relates to the effect of the decree, and not to the effect of a sale made under it, as the appellants seem to think. It reserves certain rights claimed for further adjudication. It cannot well be understood without reference to the nature of the claims and their condition when the decree was made. This appears in the report of the master, to which there was no exception in these particulars. The claims were judgments amounting in the aggregate to about \$13,000, recovered against the railroad company for injuries to persons and property, and which were liens prior to the mortgages. From some of these appeals had been taken. There were also judgments inferior to the liens of the three mortgages, and other judgments not claimed to be liens at all, and there was a floating debt. It was impossible to determine definitely the extent of the rights of these various claimants, when the sale was ordered, and no one could have been injured by reserving them for subsequent adjudication. This objection, therefore, has no weight.

One other remains. The appellants assign for error that the decree is in one particular illegal, incongruous and contradictory, in this: that while in the first paragraph the right of redemption is barred as to the railroad company, the defendant, the second and third mortgage bondholders, and the judgment creditors, it is given in the seventh paragraph to the second and third mortgage bondholders, the general creditors, and the stockholders of the defendant company, "thus apparently denying the right of redemption to the railroad company and to the judgment creditors." The assignment does not complain that a right of redemption was given to those to whom it was accorded. It rather complains that it was denied to the railroad company and to the judgment creditors. If such be the meaning of the decree, how can the appellants complain of it? To them it works no injury, and those who might complain have not appealed. Besides, if the other portions of the decree are correct, as we have endeavored to show, redemption by anybody is, to say the least, extremely improbable, if not impossible. We cannot avoid the conviction that this assignment of error is not the assertion of a real grievance.

The appellants are the holders of about six per cent. of the first mortgage bonds. They are endeavoring to overturn an arrangement agreed to by a large majority of the bondholders appointed by themselves to make an arrangement for the reorganization of the debtor company,—an arrangement sanctioned by the court, which does not lessen their security or postpone them to any other bondholders, but which preserves to its fullest extent all the rights assured to them by the mortgage. They ought not to succeed without the most substantial reasons. We do not find such reasons in the record, and the decree of the circuit court is affirmed. Of the second appeal, that taken from the decree of August 31, 1877, confirming the master's report of the sale, little need be said. The errors assigned to it are substantially the same as those we have considered in the former case, and held to be insufficient to justify a reversal of the decree of October 22, 1875. There are two or three other objections, only one of which, however, requires any notice. The others are wholly without merit.

§ 1680. *Where a judicial sale is ordered to be advertised in a named paper, it is a sufficient compliance with the order to advertise in a paper in which it has been merged.*

It is objected that the decree and order required notice of the sale to be advertised in a newspaper printed in the city of New York, called the "Financier," as well as in other newspapers; that the master did not advertise the sale in that newspaper, nor report his inability to find any such newspaper to

this court, in which the former appeal was then pending, and therefore did not comply with the order of the court. At the time when the sale was made there was no *superseedeas* in existence, and before the sale was advertised it was represented and made to appear to the circuit judge that the "Financier" had been merged into the "Public," or that its name had been changed to the "Public." He therefore, on the 8th of January, 1877, ordered that the notice of sale be inserted in the "Public" with the same effect as if the name of the paper had not been changed, and he directed the order to be entered of record. The sale was thus accordingly advertised.

Now, whether the judge had authority to make such an order in a recess of the court, it is not worth the while to inquire, for if he had not, advertisement in the "Public" was a substantial compliance with the original order. If the name of the "Financier" was merely changed, the identity of the newspaper remained, and the order was to advertise in that newspaper. And so if the "Financier" was merged into the "Public," its subscribers and readers, to whom the advertisement was addressed and required to be addressed, were reached by it, as they would have been had there been no merger or change of name. The purpose of the order to advertise in that newspaper was publicity, and to reach those persons who saw the paper. That purpose was not defeated by a change of name or a union with another newspaper. This objection, therefore, is formal rather than substantial. The case requires nothing more.

Decree affirmed.

CLIFFORD, MILLER and HARLAN, JJ., dissented.

§ 1681. A new corporation formed by purchasers is not liable for the debts of the old corporation, unless these debts have been expressly assumed. *Sullivan v. Portland & Kennebec R. Co.*, 4 Cliff., 212 (§§ 1621-28); *S. C.*, 4 Otto, 807 (§§ 1629-30).

D. CHATTEL MORTGAGES.

- I. NATURE OF, IN GENERAL, §§ 1682-1687.
- II. FORM AND EXECUTION, §§ 1688-1725.
 - 1. *The Parties*, §§ 1688-1700.
 - 2. *Description of the Property*, §§ 1701-1706.
 - 3. *The Debt Secured*, §§ 1709-1723.
 - 4. *Execution and Delivery*, §§ 1724, 1725.
- III. MORTGAGES OF FUTURE PERSONAL PROPERTY, §§ 1726-1748.
 - 1. *At Law*, §§ 1726-1738.
 - 2. *In Equity*, §§ 1734-1748.
- IV. RECORDING, FILING AND RE-FILEING, §§ 1744-1805.
 - 1. *Effect of*, §§ 1744-1767.
 - 2. *Requisites of a Valid Record*, §§ 1768-1789.
 - 3. *What Instruments within the Recording Act*, §§ 1790-1798.
 - 4. *Re-filing*, §§ 1794-1796.
 - 5. *Law of the Place of Contract*, §§ 1797-1801.
 - 6. *Actual Notice*, §§ 1802-1805.

- V. FRAUDULENT MORTGAGES, §§ 1806-1827.
 - 1. *Fraud Arising from the Mortgagor's Continued Possession without Record*, §§ 1806-1812.
 - 2. *Frauds under Statute and at Common Law*, §§ 1813-1818.
 - 3. *Fraudulent Preferences under Bankrupt and Insolvent Laws*, §§ 1819-1821.
 - 4. *Fraud Arising from the Mortgagor's Possession after Default*, §§ 1822-1827.
- VI. MORTGAGES OF MERCHANDISE WITH POWER OF SALE IN THE MORTGAGOR, §§ 1828-1846.
- VII. RIGHTS AS BETWEEN THE PARTIES, §§ 1847-1860.
- VIII. MORTGAGES OF SHIPS, §§ 1861-1871.
- IX. PAYMENT AND DISCHARGE, §§ 1872-1875.
- X. FORECLOSURE IN EQUITY AND SALES UNDER POWERS, §§ 1876-1884.

I. NATURE OF, IN GENERAL.

§ 1682. A writing which does not convey the title not a mortgage.—At law a contract to buy machinery for a manufacturer, and furnish him with raw cotton, and charge an agreed price per yard for the cloth made by it, and credit him, towards payment for the machinery,

with a share of the profits from the sale of the cloth, does not amount to a mortgage of the machinery by the manufacturer to the purchaser, because the manufacturer conveys to the purchaser no title to the machinery. But if a further memorandum be attached to such a contract, to the effect that the machinery is only holden by the purchaser as collateral security for the advances made, and that it is to be given up to the manufacturer on his refunding such advances, the transaction may be considered an equitable mortgage. *Almy v. Wilbur*,* 2 Woodb. & M., 871.

§ 1683. Equity will reform an instrument intended to conform to a previous agreement, if, by mistake of the draftsman as to fact or law, it does not fulfil or violates such intention and agreement. So if the mistake is the result of ignorance of some material fact, and exists not in the instrument but in the agreement itself, relief will be granted. *Hunt v. Rousmaniere*,* 1 Pet., 1.

§ 1684. But where parties by advice of counsel decide that a debt owed by one to the other shall not be secured by a bill of sale or mortgage of certain vessels, but that it shall be secured by an irrevocable power of attorney, authorizing the creditor to sell the vessels and apply the proceeds to the payment of the debt, and the power is annulled by the death of the debtor, a court of equity will not direct a new security to be given or declare a lien upon the property, though it be clear that the parties acted under a misapprehension of the law as to the nature of the security afforded by the power of attorney. The court has no power to make agreements for parties and then compel them to execute the same. *Ibid*.

§ 1685. Bill of sale with lease back.—Where one loans money and takes a bill of sale of personal property, the borrower taking back something in the nature of a lease, agreeing to pay a certain sum for the use of the property and remaining in possession, both the bill of sale and lease being unrecorded, the transaction is in effect a mortgage, and is invalid as to creditors. *In re Gurney*, 7 Biss., 414.

§ 1686. Conditional sale.—An instrument whereby title is to pass to a purchaser on condition of his paying for the property, although it be actually delivered to the purchaser, is a conditional sale and not a mortgage. *Rogers Locomotive Works v. Lewis*, 4 Dill., 158.

§ 1687. An instrument conveying property, but to be void upon the payment of a note therein described, is a mortgage, and not a conditional sale. *Dean v. Nelson*, 10 Wall., 158 (§§ 1124-28).

II. FORM AND EXECUTION.

1. The Parties.

SUMMARY — Mortgage by partner in name of a corporation, § 1688.

§ 1688. When persons who assume to be a corporation, though they be in fact only partners, authorize an agent or one of their number to execute a mortgage of their real and personal property, and he accordingly executes a deed in the name of the assumed corporation and affixes thereto its seal, the deed is a valid mortgage of the personal property. Those parts of the deed which refer to the corporation, including the corporate seal, may be rejected as surplusage, though the seal of one partner to a deed, with the assent of his co-partners, binds the firm. *Anthony v. Butler*, §§ 1639-1693. See §§ 1697-1699.

[NOTES.—See §§ 1697-1700.]

ANTHONY v. BUTLER.

(13 Peters, 428-435. 1839.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is brought before this court by a writ of error to the circuit court of Rhode Island. The defendant, Cyrus Butler, commenced an action of replevin against the plaintiff in error, for various articles of personal property specified in the writ of replevin, and claimed by him under a mortgage dated the 20th day of November, 1837. The defendant had taken possession of the property, by virtue of an execution directed to him as marshal, on a judgment against the mortgagors. On the trial, certain exceptions were taken to the rulings of the court, which bring the questions decided before this court.

The mortgage was executed by one Daniel Greene, as the agent of the Union Steam Mill Company, said company being a manufacturing corporation, conveying to the plaintiff below certain lands, with a woollen mill, and other buildings, with the machinery in said mill, etc. And the incorporating act, and several acts amendatory thereto, were read in evidence. And also a deed from William P. Salisbury to the said Greene, dated the 18th May, 1837, conveying all his interest in the real and personal property of the Union Steam Mill Company. And it was proved that Daniel Greene, who executed the deed first aforesaid, was, and had been from the time of the formation of said company, the general agent, and, as such, had made all purchases and sales for the company; and that the deed was executed by him with the consent and authority of said company, and also by and with the consent and authority of the persons who, at the time of the execution thereof, were members of said company. The court decided that the existence of the said corporation was not so proved as to entitle the deed to be read to the jury as the deed of the said corporation; but that the deed was good to convey a valid title to the articles named in the writ of replevin. To this decision the counsel for the defendant excepted.

And it was further objected to said deed, that it did not appear that the same had been recorded prior to the defendant's levy on the articles by the writ of replevin, in conformity to the statute on the subject. The counsel for the plaintiff produced and read to the court an indorsement on the back of said deed, signed by the clerk of the town of East Greenwich, in the words and figures following, to wit: "Lodged in the town clerk's office, to record, November 20, 1837, at 5 o'clock, P. M., and recorded same day in the records of mortgages in East Greenwich, book No. 4," etc. It was proved that the said clerk kept a book in which all mortgages of personal property only were recorded; and all other mortgages, which included real estate, were recorded in other books kept in the office. After the deed was recorded, it was taken away by the plaintiff below; and afterwards, on the 14th November, 1838, was returned by him to said office, when it was recorded in the book kept for mortgages of personal property. And the court decided that said certificate was sufficient evidence that the deed was duly recorded. To which decision the defendant excepted.

The above exceptions present two points for examination: 1. Whether the mortgage deed was valid. 2. Whether it was duly recorded.

To the decision of the court, that the evidence did not show that the stockholders had organized themselves under the act of incorporation, so as to enable them to execute a corporate deed, there was no exception. This ruling of the circuit court, is not, therefore, brought before this court.

The deed of mortgage purports to be executed by the corporation. The Union Steam Mill Company is the name of the corporation, and on the face of the deed the company is stated to have been legally incorporated. Daniel Greene, as the agent of the company, and in its name, signed the deed, and affixed to it the seal of the corporation. And the counsel for the plaintiff in error insist that this mortgage can only be operative as the deed of the corporation. That if it be not the deed of the corporation, it is no deed. And that in no sense can it be considered the deed of the stockholders of the Union Steam Mill Company, as partners, independent of the act of incorporation. This, it is said, would be giving a different effect to the deed from that which was intended by the parties who executed it. They bind themselves as corporators,

and convey, as such, the property of the corporation; and to hold that the deed binds them in any other capacity, or conveys the property in any other, would not only essentially vary the terms of the deed, as clearly expressed upon its face, but it would be a fraud against the creditors of the company. And it is also insisted, that the deed, being under seal, and executed by only one of the partners, cannot bind the company.

From the record it appears that this company did business before the act of incorporation was passed, and that Daniel Greene acted as its agent. And that after the deed of William P. Salisbury, conveying to the company all his interest in the property, in May, 1837, Daniel Greene and R. W. Dickinson composed the stockholders of the company. And it appears, after they assumed their corporate functions, much formality was observed in the record of their proceedings. Greene acted as chairman and Dickinson as secretary; motions were made, and, as it would seem, were unanimously decided. A special meeting of the stockholders was called on the subject of executing the mortgage, by a formal note, addressed by R. W. Dickinson, as clerk, to Daniel Greene, and another to himself. In their business proceedings generally, as well as in the execution of the mortgage, these individuals assumed to act as a corporation. But they were not authorized to act in this capacity. This fact must be taken as granted, at least so far as the decision of the present case.

§ 1689. *Where persons make contracts, by agent or one of their number as corporators, and all consent, the contract binds them although there be no corporation.*

And here a question arises whether the acts of these individuals, in their assumed characters as corporators, are void. May they hold themselves out to the world as entitled to certain corporate privileges, when they were not so entitled, and afterwards avoid their contract on this ground? This would be a somewhat new, and certainly a most successful, mode of practicing fraud. It would be enabling a party to take advantage of his own wrong. As the present controversy involves only the right to the personal property named in the deed of mortgage, it is not necessary to consider the validity of that instrument beyond the effect it has on this property. It is a well-settled rule, though a very technical one, that one partner cannot bind his copartner by deed. And it is equally well settled that one partner may dispose of the personal property of the firm. In this case, had an absolute sale and delivery of this property been made by Greene, no one, in the absence of fraud, could have questioned the title of the purchaser. But the mortgage was executed under seal, and Greene, it is alleged, could not bind his partner by deed.

§ 1690. — *they are bound as partners, although the deed was executed in the assumed corporate name.*

That these individuals, not being responsible on their contracts as a corporation, are liable as copartners, is too clear to admit of doubt. The property of the company, both real and personal, was vested in them, and they controlled its entire operations. The mortgage deed was executed on the 20th of November, 1837. And it appears from the record that Greene and Dickinson unanimously resolved that the mortgage should be executed by Greene as agent of the corporation. And it was accordingly executed on that day.

§ 1691. *Partner may bind copartner by deed.*

Now, that one partner may bind his copartner by deed, if he be present and assent to it, is a well-established principle.

§ 1692. *A resolve to make a deed, and the making of it by one partner, are prima facie evidence of due execution.*

The signature and seal of Greene are affixed to the mortgage, and that this was done with the assent of his copartner, Dickinson, is unquestionable. But was Dickinson present at the execution of the mortgage, and did he then assent to it? We think the facts in the record will warrant such a conclusion. The resolve of the partners to give the mortgage, and the execution of it, bear the same date, and may well be considered the same transaction. This seems to be the fair result of the facts stated, and must be received as *prima facie* evidence of the due execution of the deed. These facts are liable to be rebutted by any one who questions the validity of the deed.

§ 1693. *Parts of a deed which do not vitiate it may be rejected as surplusage.*

All those parts of the deed which refer to the corporation, including the corporate seal, may be rejected as surplusage, which do not vitiate it. They are considered as merely descriptive, and being false in fact, can have no effect on the deed.

§ 1694. *Seal of one partner binds both.*

The seal of one partner to a deed, with the assent of the copartner, will bind the firm. From these considerations, we think the circuit court did not err in receiving the mortgage deed in evidence; treating it as a valid instrument, as it respects the rights involved in this suit.

2. Was this mortgage duly recorded? By an act of the legislature of Rhode Island, passed at the January session, 1834, entitled "An act to prevent fraud in the transfer of personal property," it is provided that no mortgage of personal property, except as between the parties, shall be valid, unless possession accompany the deed, or it be recorded in the office of the town clerk. In the second section, it is made the duty of the clerk to record such mortgages in a book kept for that purpose. It appears from the evidence that the town clerk kept a book in his office in which he recorded all mortgages of personal property, and all other mortgages which included real estate, or real estate and personal, were recorded in other books kept in said office, in one of which this mortgage was recorded. And the question is, whether such a registration is sufficient under the statute.

§ 1695. *Where a recording act required mortgages of realty and personalty to be recorded in separate books, a mortgage of both could be recorded in the record for real estate mortgages.*

The object of the recording act is to give notice to subsequent purchasers. The statute undoubtedly requires the clerk to record mortgages for personal property only, in a book kept for that purpose. This being the requirement of the law, to which the clerk strictly conformed, there could be no uncertainty in searching the record for a personal mortgage. But it seems that the statute did not expressly provide in what book a mortgage like the one under consideration, for both real and personal property, should be recorded. And it appears that it was the usage of the office to record such mortgages in the book which contains mortgages for real estate. Now, if this be insufficient, nothing short of recording such a deed in both books could be held a compliance with the statute. And can this be necessary? The conveyance of the personal and real property is so blended in the mortgage as to be inseparable. To require a double record would seem to be an unreasonable construction of the statute, as it cannot be necessary to effectuate its object. Both records are kept in the same office, and by the same person, who performs the duties of the office, and

must always be well acquainted with its usage. Any inquiry of the clerk for the record of a mortgage like the one under consideration would as certainly lead to it, under the usage, as if it were recorded in both books. If this mortgage had been recorded in the book for personal mortgages, the same strictness as now contended for might be urged against such record book, as it would not then be kept exclusively for personal mortgages.

§ 1696. *The clerk's certificate of the registry and time is evidence thereof.*

We think that this mortgage has been recorded in a book kept, though not exclusively, for the purpose of recording mortgages which convey real and personal property, and that it is within a fair construction of the statute. We think also that the circuit court did not err in deciding that the certificate of the clerk was sufficient evidence that the mortgage deed was duly recorded. The judgment of the circuit court, not being erroneous, is affirmed with costs.

§ 1697. A mortgage by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property for the payment of partnership debts is for the benefit of the partners, and they may waive it. The giving of such a mortgage is itself a waiver. *In re Kahley*, 2 Biss., 383, 385.

§ 1698. One partner may execute a valid mortgage of partnership goods to secure a partnership debt, though executed under seal, it not being necessary to execute such mortgage under seal. *Hawkins v. First National Bank of Hastings*, 1 Dill., 462; S. C., 2 N. B. R., 337.

§ 1699. If one partner, being authorized to execute a mortgage of personal property, affix his own name and seal to a mortgage whose *testatum* clause sets forth that the firm by such partner, one of the firm, had thereto set their hands and seals, the instrument may be regarded as the deed of all the partners, upon proof of such partner's prior authority, or of the subsequent assent of the other partners. *Gibson v. Warden*, 14 Wall., 244.

§ 1700. A mortgage by a corporation "*ultra vires*" is a fraud on its general creditors, who can set it aside. In New York, a mortgage by a manufacturing corporation is valid if consented to by two-thirds of the stockholders. A corporation having the power to convey its personal property has the power to mortgage it. A mortgage is none the less a conveyance because it is defeasible. The greater includes the less, unless the less is expressly excluded. *Moran v. Strauss*, * 6 Ben., 249.

2. Description of the Property.

SUMMARY — *Description sufficient which enables one to distinguish the property*, § 1701.

§ 1701. A mortgage of a specified quantity or number of logs is valid, if it provides a way of separating them from a mass of like property. Thus a description of logs as the northern one million two hundred and fifty thousand feet, lying in a certain creek, and marked with a certain mark, to be ascertained by commencing at the rear or northerly end of said logs and counting along the stream until the requisite number should be counted and set apart, is sufficiently definite. A creditor of the mortgagor having seized the logs on execution, the mortgagee was allowed to recover them because the mortgage described them with a certainty sufficient to enable creditors of the mortgagor to distinguish the property intended to be mortgaged, and to identify it. *Merchants' National Bank v. McLaughlin*, §§ 1702-1705.

[NOTES.— See §§ 1706-1708.]

MERCHANTS' NATIONAL BANK OF ST PAUL v. McLAUGHLIN..

(Circuit Court for Minnesota: 1 McCrary, 258-263. 1890.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.— This action is brought against the defendant sheriff to recover damages for the conversion of personal property, consisting of logs and lumber manufactured therefrom. The sheriff defends under a seizure by virtue of certain writs of execution issued upon judgments obtained against the firm of McCaine Bros. & Barteau, and also sets up proceedings instituted by laborers in the employment of this firm, as lien claimants under the laws of

the state of Minnesota. Briefly, the sheriff, in his answer, says the logs and lumber were not the plaintiff's property, and were not in its possession or under its control, but were owned by McCaine Bros. & Barteau; and that executions came into his hands against said firm, and that he had levied upon the logs and lumber as their property. The plaintiff claims the right to the possession of the property by virtue of a chattel mortgage, and on default of the mortgagor to pay the money secured thereby.

§ 1702. What is a sufficient description of logs in a chattel mortgage.

The mortgage is in the form usual in this state. It is a sale of certain logs with conditions, and, in case of default, the mortgagee had the right to take possession and sell, subject to redemption by the mortgagors. It is executed by McCaine Bros. & Barteau to the plaintiff. It acknowledges an indebtedness to the plaintiff of \$3,000; and, for the purpose of securing this indebtedness, grants, bargains, sells and mortgages the property described therein as follows: "All and singular, such and so many of all those certain logs belonging to said parties of the first part now lying and being in the north fork of Grindstone creek (so called), in the town of Hinckley, county of Pine and state of Minnesota; and being those certain logs now lying in and along said stream, ready to be driven out when the stage of water will permit, and marked 1 y 1 [read notch y notch], as are described and designated, as follows, viz.: The northerly, or rear, one million two hundred and fifty thousand (1,250,000) feet of said logs, to be ascertained by commencing at the rear or northerly end of said logs, as the same are situated in the said north fork as aforesaid, and running along said stream in a southerly direction, and taking, counting and including all of said logs until the full number of one million two hundred and fifty thousand feet thereof shall have been so counted, taken and set apart; the logs so counted and ascertained to be the logs covered, and intended to be covered, by and included in the mortgage." The usual condition of defeasance upon payment precedes the following covenants and agreements: "It is hereby mutually covenanted and agreed between the parties hereto, that, if default shall be made in the payment of said sum of money, or any part thereof, or the legal interest thereon, at the time or times when, by the conditions aforesaid, the same shall become payable; or if any attempt shall be made to remove or dispose of said property, or any part thereof, by the said parties of the first part, or any other person; or if the said party of the second part shall, at any time, deem itself insecure, that, thereupon and thereafter, it shall be lawful for, and the said parties of the first part do hereby authorize, the said party of the second part, its successors or assigns, or its authorized agent, to enter upon the premises of said parties of the first part, and any other place or places where the said goods and chattels, or any of the same, may be, and remove and sell and dispose of the same, and all of the equity of redemption of the said parties of the first part therein, at public auction, with notice, as by the statute in such case made and provided, and on such terms as said party of the second part, or its successors or assigns, may see fit, and out of the proceeds thereof to retain the amount which shall then be owing to the said party of the second part, as aforesaid, its successors or assigns, together with all reasonable charges, costs and expenses attending the same, rendering to the said parties of the first part, or their legal representatives, the surplus moneys (if any there shall be), after paying such mortgage debt, interest and costs in full. And until default is made, as aforesaid, or until any attempt shall be made to dispose of or remove the same, or any part thereof, the said parties of the first part may continue in

the peaceable possession of all the said goods and chattels, all which, in consideration thereof, they engage shall be kept in as good condition as the same now is, and taken care of at their own proper cost and expense."

It is insisted by the defendant that the mortgage is void for incompleteness and uncertainty in the description of the property mortgaged. There is no controversy about the delivery of the mortgaged property at the time the mortgage was executed. The law prescribing the record and filing of the mortgage was followed. The mortgagee never had possession of the logs. They were left in the river where the mortgagor had transported them. Default was made in the payment of the money secured by the mortgage, and by its terms the right of possession was thenceforth in the plaintiff, and it can maintain this suit. The only question presented is whether the logs are described and designated with such certainty as to enable third parties and creditors of the mortgagors to distinguish the property intended to be mortgaged and identify it. If the property or subject-matter is described so that it may be identified by the terms of, or language used in, the mortgage, and other evidence admissible in such cases, it is sufficient. *Herman on Chat. Mort.*; *Pomeroy on Cont.*, 226; 20 *Wis.*, 187; 22 *Wis.*, 134. Until the mass of logs were intermixed and driven into the pond by the mortgagors, it was possible for the mortgagee to have taken possession of the specific quantity of logs described and located as the northerly or rear one million two hundred and fifty thousand feet of the logs lying in the north fork of Grindstone creek.

In the case of *Richardson v. Alpena Co.*, cited by defendant (8 *Cent. L. J.*, 297), the particular logs mortgaged were not described or designated in any respect from the mass bearing the same mark. They were described as a given number of feet of logs, board measure, situated in a stream containing a very large quantity of the same mark, and it was impossible to tell from what part of the mass they should be taken. Here the mortgage fixed the location of the particular logs and furnished *data* for separating them. The written description identified specifically the property mortgaged. It was a transaction made in good faith, and the mortgage was duly registered. It was not necessary to measure or separate them by a boom or other artificial boundary in order to make the mortgage valid, nor were the logs required to be measured before the mortgage took effect. The clause in regard to "taking and counting the logs" makes the description more certain by furnishing *data* by which the location could be determined. A surveyor of logs, or person skilled in their mensuration, with the mortgage before him, going, at the time it was executed, to the Grindstone creek and examining the logs in the north fork, could ascertain accurately the specific logs mortgaged, which is all that is required to make the mortgage sufficiently definite and certain.

§ 1703. *When the right of possession of a mortgagee in a chattel mortgage accrues.*

There is some conflict in the evidence about the surrounding facts and circumstances. It is claimed the agent of the mortgagee agreed to permit the mortgagors to drive the entire lot of logs to their mill and manufacture and sell them. The evidence, however, does not satisfy my mind that such was the understanding. If I am right in my construction of the mortgage, then, manifestly, so far as the executions are concerned, the sheriff cannot hold the property by virtue of any rights of the judgment creditors as against the plaintiff. The absolute right of possession of the mortgaged property belonged to the plaintiff on default by the mortgagors, which was prior to the seizure

by the sheriff upon the executions. Authorities are numerous. See *Edson v. Newell*, 14 Minn., 228, and citations.

§ 1704. *Rule where there are two funds available to a creditor.*

Can the sheriff avail himself of the rights which the statute gives certain laborers to secure liens and preferences for services performed? There is some doubt about the construction of the statute of Minnesota, and the nature of the proceedings necessary to establish and perfect the lien given by it. It is not necessary, in determining this case, to consider the rights of claimants under this statute. If the claim is an equitable one, then, conceding that the lien claimants, by serving notice upon the sheriff, did all that is necessary to preserve their liens under the statute, it cannot avail the sheriff to defeat the plaintiff's right to the property mortgaged. The money in the hands of the sheriff far exceeds the amount of plaintiff's claim, and the overplus is more than enough to secure payment for the services of the workmen, who urge prior liens under the statute; and, if it is admitted that these workmen have a first lien on all the logs cut, or lumber manufactured, including the logs mortgaged to the plaintiff, the lien not being upon any specific portion, the rule prevails that where there are two funds to which the other lien claimants can resort, while the plaintiff has only one of these, the former must enforce their lien on the fund to which the latter cannot have recourse. This doctrine shuts out the defense set up under the statute. The sheriff cannot avail himself of his relationship to the claims of the workmen on the fund or money in his hands, for it is more than enough to pay them, and the plaintiff's rights are superior to those of the judgment creditors.

§ 1705. *Confusion of goods.*

The logs were not intermixed with the consent of the plaintiff, and, the confusion existing on account of the wrongful acts of the mortgagors, the innocent party will not suffer thereby. Judgment will therefore be entered in favor of the plaintiff.

§ 1706. *Property not included.*—A mortgage of "all the goods and merchandise in the store" does not include fixtures. *In re Eldridge*, 2 Biss., 366.

§ 1707. *A mortgage of all the stock in trade in a certain store is a sufficient description of the goods to convey the title.* If there were other circumstances tending to impeach the fairness of the transaction, and to indicate a design to cover property and keep it from creditors, the want of greater particularity in the description might fairly be urged as a circumstance of suspicion. *Jones v. Sleeper*,* 2 N. Y. Leg. Obs., 131, 134.

§ 1708. *Identifying stock of goods.*—Where a mortgage was made of a stock of goods and additions thereto, and subsequently the mortgagor made a second mortgage of his stock of goods, in a controversy between the first and second mortgagees, it was held that the mortgagor was a competent witness to identify the goods covered by the first mortgage. *Wagner v. Watts*, 2 Cr. C. C., 169, 171.

3. *The Debt Secured.*

SUMMARY—*Particulars need not be set forth*, § 1709.

§ 1709. *A mortgage made to secure a debt of a specified amount is valid if made in good faith, though the debt is in fact represented by seven notes, none of which are described. The identity of the debt may be established by parol, though, in making the proof, the debt must come fairly within the general description.* *Wood v. Weimar*, §§ 1710-1716.

[NOTES.—See §§ 1717-1723.]

WOOD v. WEIMAR.

(14 Otto, 786-797. 1881.)

ERROR to U. S. Circuit Court, Western District of Michigan.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This was a suit in replevin begun by Wood, the mortgagee of a stock of goods in a hardware store at St. Joseph, Michigan, against Weimar, a sheriff who had seized the mortgaged property under certain writs of attachment, issued by the circuit court of Berrien county, Michigan, against Charles A. Stewart, the mortgagor. The case was tried by the court under a stipulation of the parties waiving a jury, and comes here on the facts and a bill of exceptions. The facts are very inartificially presented; a part appearing in the findings of the court incorporated into the opinion of the judge and mixed up with his reasoning in deciding the case, and the rest in two stipulations filed in the progress of the trial, one of which was omitted from the record as originally sent here, but has been brought up since. An objection is made to our considering these stipulations; but we think the case stands upon agreed statements as to part of the facts and findings as to the rest.

The facts thus appearing material to the questions presented by the assignments of error may be stated as follows: On the 25th of May, 1875, Stewart mortgaged his stock of goods to Wood to secure the payment of a debt of \$10,465.46, and interest, on or before November 25, 1875. This was done in good faith and without any intention to hinder or defraud creditors. The mortgage was filed in the town clerk's office the day it was executed, in accordance with the requirements of the Michigan statute. The mortgaged property remained in Stewart's possession after the mortgage, and he continued his sales from the stock in the usual course of business. There was no express agreement between the parties that this might be done, neither was it prohibited. The mortgage contained the usual power of sale in case of default, and authorized the mortgagee to take possession at any time, if he deemed himself insecure.

The mortgage purported on its face to be executed to secure a debt owing to Wood. The debt was represented by seven notes, none of which were described. Of these notes, five only actually belonged to Wood. The five all bore date May 25, 1875, the same as the mortgage, and were payable to Wood's order. One for \$1,263.43, payable one month after date, with interest at ten per cent., and another for \$250, also payable one month after date, with interest from June 22d at ten per cent., were taken in good faith for interest supposed to be past due on a mortgage of lands in Berrien county for \$5,000, dated December 22, 1868, and payable in five years, executed by Stewart to one Terwilliger. This mortgage, together with the note it secured, Wood bought in good faith, supposing it to be valid and subsisting, on the 1st day of May, 1875, after its maturity, and paid for it \$5,000 and accrued interest. Both the note and mortgage were delivered to him when his purchase was made, and he had them with him at the time the chattel mortgage was taken. Stewart gave the notes to Wood under the impression that he owed the interest they represented, and the transaction securing their payment by the chattel mortgage was in entire good faith.

Full payment of interest to June 22, 1872, was indorsed on the Terwilliger note on the 29th of August of that year. On the next day, the 30th of

August, Terwilliger released twenty acres of land covered by the mortgage; and on the 19th of October afterwards there was recorded in the records of Cook county, Illinois, what purported to be a deed, with covenants of warranty, except as to certain incumbrances, dated September 21, 1872, and executed by Charles A. Stewart to Terwilliger, conveying one undivided half of certain lands in Chicago, "in consideration of the sum of \$5,000, which is paid by way of the release of a mortgage for that sum, recorded in liber No. 4 of mortgages in the office of the register of deeds of Berrien county, . . . the receipt whereof is hereby acknowledged." There was no other evidence except the record tending to show that this deed was ever delivered to Terwilliger, or that he knew of its being recorded. Wood had no knowledge of the deed when he bought the mortgage. The note was never surrendered to Stewart, and the mortgage was never discharged on the records of Berrien county. When Wood took the chattel mortgage, he understood that Terwilliger claimed to own an interest in the Chicago lands in common with Stewart; and on the 27th of May, two days after the chattel mortgage was executed, Stewart made another deed to Terwilliger for an undivided half of the Chicago lands, which he delivered to Wood as agent for Terwilliger. In connection with these facts, the court below said in its findings: "But although there is some confusion about the facts as to whether the mortgage debt of \$5,000 was understood by Stewart and Terwilliger as having been paid, on the whole evidence it should be regarded as paid as to creditors."

To prove the deed from Stewart to Terwilliger, bearing date September 21, 1872, a copy from the records of Cook county, certified by the recorder under his seal of office, was offered in evidence. There was no other authentication. This deed was objected to, "for that it was incompetent, immaterial and irrelevant." The objection was overruled and the deed admitted. Exception was taken, which was in due form embodied in a bill of exceptions, and made part of the record. As to two other of the notes to Wood, one for \$800, and the other for \$1,890, the first payable one month from date, with interest at ten per cent., and the other one month from date with interest at the same rate after June 18th, it was found that after the commencement of this suit, Wood realized from other securities, which he held for the payment of the debt of which these notes represented the interest, enough to satisfy both, less the sum of \$477. As to another note given to Wood for \$669.91, payable in six months from date, no special facts are found.

The sixth note was for \$3,300, payable one day after date, January 1, 1873, with interest at ten per cent., to the order of Elizabeth Stewart. The payee of the note had died intestate before the execution of the chattel mortgage, and no administrator had been appointed on her estate. She left no creditors, so far as the proof shows, but several heirs. One of the heirs was Cornelia Stewart, and all the others united in an assignment of this note to her. Wood was in some way related to Elizabeth and Cornelia Stewart, and Cornelia Stewart had indorsed the note to him to collect or get security. When he took the chattel mortgage he had the note and the assignment from the heirs in his possession. There was due on the note at the time \$4,092.12, and Charles Stewart wished to secure it by the chattel mortgage. What was done was for the benefit of Cornelia Stewart. The seventh note belonged to Harriet A. Stewart; but upon this no questions arise here, as the judgment below was in favor of Wood for all he claimed.

When the attachments under which Weimar claims were put on the prop-

erty, Charles A. Stewart was in possession. The attachment was not made subject to the chattel mortgage; and in the pleadings in this case it is insisted by the sheriff that the goods were not the property of Wood, and that the chattel mortgage was without consideration, and void as to creditors. The value of the property taken by the replevin was \$8,870.46. The attachments were served on the 15th of July, and were for debts amounting in all to \$7,601.77. On the 11th of October, 1875, Wood demanded the goods of the sheriff, who then had them in possession, but the delivery was refused. This suit was begun on the same day, but after the demand and refusal. Weimar at the trial waived a return to him of the goods, and prayed a judgment for their value.

Upon this state of facts the court below ruled: 1. That replevin would not lie in favor of a mortgagee against a sheriff for personal property covered by a chattel mortgage, seized under an attachment against the mortgagor, while the mortgagor was in possession, and that consequently Weimar was entitled to a judgment, the only question being as to the amount of his recovery; 2. That Wood could claim nothing under the chattel mortgage on account of the notes given for what was believed to be past-due interest on the Terwilliger debt; 3. That his lien on account of the two notes of \$800 and \$1,890 could only be enforced for \$477, the balance that remained due after deducting what had been realized from the proceeds of other securities since this suit was begun; and 4. That he could claim nothing on account of the Elizabeth Stewart note, as, until administration on her estate, and distribution, her next of kin had no right or title to the note, legal or equitable, which they could convey for collection or otherwise, and that consequently there was no one capable of taking or holding security for it.

The result was that the lien of Wood, under his mortgage, was fixed at \$3,295.36. This amount he was allowed to retain out of the value of the goods in his hands, and a judgment was given against him in favor of Weimar for the balance, being \$5,575.10 and costs. To reverse this judgment against him the case has been brought here by Wood. The errors assigned present for our consideration the foregoing rulings below and the exception to the admission in evidence of the deed recorded in Cook county.

§ 1710. *In Michigan replevin will lie at the suit of a mortgagee of chattels against an officer who levied upon them while they were in the possession of the mortgagor.*

As to the right to bring an action of replevin. Practically this involves only a question of costs; for in the progress of the cause Wood was given the same kind of relief he would have been entitled to if the court had held that his suit was properly brought. By a statute of Michigan (C. L. of 1871, sec. 6754), "when either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

Confessedly Wood was only a lien-holder. The goods were delivered into his possession under the writ, and their value was agreed on. Weimar did not ask their return, but was content with a judgment for the value of what had

been wrongfully taken from him. His interest in the property was only that which the attaching creditors could subject to the payment of their debts. Another provision of the Michigan statute is (*id.*, sec. 6759), that "whenever the defendant shall be entitled to a return of the property replevied, instead of taking judgment for such return, . . . he may take judgment for the value of the property replevied, in which case such value shall be assessed on the trial, or upon the assessment of damages, as the case may be, subject to the provisions of section 29 of this chapter. Section 29, here referred to, is the same as section 6754, *supra*. As the court below found as a fact that Wood had a valid mortgage, it proceeded, notwithstanding the suit was improperly brought, to ascertain the amount and value of his lien and adjudge accordingly. This is all that could have been done if the ruling had been the other way upon the right to maintain the action.

If this were all there was in the case we should, under our uniform practice, decline to consider it. No writ of error lies from a judgment as to costs alone. *Canter v. American & Ocean Ins. Cos.*, 3 Pet., 307; *Elastic Fabrics Co. v. Smith*, 100 U. S., 110. But there are other questions, and this may, therefore, properly be taken up. Since the judgment below, the supreme court of Michigan has held, in *King v. Hubbell*, 42 Mich., 597, that although goods mortgaged could be taken under an attachment if in the possession of the mortgagor, the officer must surrender them to the mortgagee on demand, after his inventory and appraisement have been completed, unless the attaching creditors dispute the validity of the mortgage. This clearly implies that replevin will lie if a delivery to the mortgagee is refused when properly demanded. We hold, therefore, on the authority of that case, that there was error in deciding that the action was improperly brought.

§ 1711. *A mortgage to secure the amount actually due is good although the items are not set out.*

Before taking up the questions arising on the assessment of damages, it is necessary to consider some objections which have been urged to the mortgage. It has been found as a fact that the mortgage was executed in good faith to secure what were supposed at the time to be valid and subsisting obligations, and with no intent to defraud other creditors. We are therefore to enter on our inquiries with this established. It is insisted, however, that notwithstanding the good faith of the parties, the mortgage is invalid, because it does not truthfully describe the indebtedness secured. It is conceded that the real transaction was not set forth in detail. The amount of the indebtedness the parties intended to secure is correctly stated, though the several items which made it up are not specified. They were, however, identified at the trial, and the honesty of the transaction established. In *Shirras v. Caig*, 7 Cranch, 34 (§§ 556-558, *supra*), where a mortgage purported to secure a debt of £30,000, due to all the mortgagees, but was in fact intended to secure different sums due at the time to particular mortgagees, and advances afterwards to be made and liabilities to be incurred to an uncertain amount, Mr. Chief Justice Marshall said: "It is not to be denied that a deed which misrepresents a transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in

fact injured and deceived by the misrepresentation." Here it has been found that all was fair. It was material for creditors to know the amount of the indebtedness secured, and the property covered. These are truly stated. To enforce his mortgage, the mortgagee must prove his debt, and he can recover only to the extent of what he proves. If the items which make up the debt are particularly described in the mortgage, it may save trouble in establishing the facts; but if there has been no fraud, and subsequent creditors have not been injured by the omission of specifications, identity may be established by parol. In making the proof, the debt must come fairly within the general description which has been given; but if it does, and the identity is satisfactorily made out, the mortgage will be sustained where good faith exists.

It matters not in this case that the notes actually intended to be secured became due at different dates, and not at the time fixed by the mortgage. Suits might be brought on the notes when they matured, for the recovery of the debt; but the mortgage could only be enforced according to its terms. Possession might be taken under the mortgage when necessary for the preservation of the security; but no sale of the mortgaged property could be made until after the condition was broken; that is to say, until after a failure to pay on the 25th of November.

§ 1712. *The law of Michigan as to recording and filing mortgages.*

It is also claimed that the lien of the mortgage was lost after the suit was begun, because of a failure to comply with the requirements of the recording acts. These acts prescribe that where mortgages of chattels are not accompanied by immediate delivery and followed by an actual and continued change of possession, they shall be void as against creditors and subsequent purchasers in good faith, unless copies are filed in the proper office. Another provision is that every such mortgage shall cease to be valid as against creditors and subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall annex to the instrument on file an affidavit setting forth the interest which the mortgagee has, by virtue of his mortgage, in the property mortgaged. The goods in this case were replevied before the year expired, and while the mortgage was in full force under the recording acts. The possession of the property was then taken by Wood. After that the recording acts did not apply, unless the property was again put into possession of the mortgagor. Nothing of this kind appears in the findings, and the presumptions are all the other way. We conclude, therefore, that at the time of the replevin the lien of the mortgage was valid and subsisting to the extent of the debt secured by it as established by the findings.

§ 1713. *Notes taken for past-due interest, when payment.*

This brings us to the questions arising on the assessment of damages. 1. As to the notes given for the interest on the Terwilliger mortgage. The court found as a fact that the Terwilliger note was "paid as to creditors." By this we understand that, as between Stewart and Terwilliger, the debt had been satisfied, and that there was consequently no consideration for the interest notes given Wood. Such being the case, he could not enforce those notes against creditors. Although Stewart might, if he saw fit, recognize the debt in the hands of Wood, and pay it if the rights of creditors did not intervene, as against creditors an agreement to pay would not be binding. The court has found the transaction fair and *bona fide* as between Wood and Stewart. This saves the mortgage as to the remainder of the indebtedness secured, but does

not make the notes themselves of any avail against the attaching creditors. We cannot consider the evidence on which this finding was made. That was the province of the court below.

§ 1714. *Where the objection to the admission of a deed was grounded on its irrelevancy, a question as to its authentication cannot be raised here.*

In this connection it is proper to consider the exception which was taken to the introduction in evidence of the deed from Stewart to Terwilliger. The language of the exception, as recorded in the bill of exceptions, is as follows: "To the reading in evidence of which deed, plaintiff, by his counsel, objected, for that it was incompetent, immaterial and irrelevant." It is now insisted that "the attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form, and by the proper officer, as required by the act of congress of March 27, 1804, prescribing the mode in which the public records in each state shall be authenticated, so as to take effect in every other state." This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly. It is clear that the ruling complained of in this case was in respect to the effect to be given the deed when proved, and not to the form of making the proof. We see no error in the judgment below as to this item in the claim for allowance under the mortgage.

§ 1715. *Where, after replevin by the mortgagee, payments were made on the mortgage debt, he cannot enforce his lien beyond the amount due when judgment was rendered.*

2. As to the notes of \$800 and \$1,890. It is insisted by Wood that collections made by him on the mortgage debt since the commencement of the suit cannot be taken into account in stating the amount of his lien; and, if they could, that what was realized by him from his other securities should be applied on the principal of the debt rather than on these notes, which represent only the interest. Wood ought not to be permitted to enforce his lien on the goods he holds, or their value, beyond the amount which is actually due him on the mortgage debt when the judgment is rendered. The judgment must be such as shall "be just between the parties." If, when the suit was begun, his lien was equal to the full value of the property, and it was reduced by payment afterwards, he must account in the judgment for what is left after his debt is eventually satisfied, but will be protected in respect to costs.

From the finding it may fairly be inferred that the entire debt, principal and interest, was paid from the proceeds of the other securities, except the sum of \$447. Certainly there is nothing inconsistent with such a presumption. Before a judgment can be reversed because it is not supported by the findings, the error must be apparent. All intendments are in favor of what has been done. This assignment of error has not been sustained.

§ 1716. *The distributees of a deceased holder of a note may transfer the equitable title thereto, there being no administrator and no creditors.*

3. As to the Elizabeth Stewart note. The court has distinctly found that this was a valid debt, which Charles A. Stewart wished to have secured by the chattel mortgage. There was no fraud intended; but, on the contrary, everything was done in good faith. Inasmuch, however, as Mrs. Stewart was dead

and no administration had been granted on her estate, it was decided that Wood had no lien on the property for the security of this note. In this we think there was error. There can be no doubt, from the facts as found, that in equity the debt was owing to Cornelia Stewart. There were no creditors, and all who would have been distributees under an administration of the estate of Elizabeth Stewart had assigned to her their interest in the note. This assignment, with the necessary authority from Cornelia Stewart, Wood had in his possession. There can be no doubt that if Charles Stewart had taken up the old note, and given another to Wood or Cornelia Stewart in its place, the new note would have been good as against every one but a creditor of Mrs. Stewart. So, too, if he had actually paid the debt instead of securing it, his creditors could not complain. Such being the case, we do not see why the security he gave may not be enforced. He owed the debt and had the right to provide for it without waiting for administration on the estate of Mrs. Stewart, if it could be done with safety. Of that he was to judge, if he acted in good faith, and not his creditors. All they can ask is that his property shall not be charged with its payment more than once. While, therefore, Wood, as the indorsee of Cornelia Stewart, may not have had the legal title to the note, he certainly held the equitable title, which Charles A. Stewart was at liberty to recognize if he would. Having recognized it in good faith and acted accordingly, his creditors cannot interfere. He was at liberty to select such trustee as he chose to hold the security he desired to give. If there was fraud or bad faith the case would be different. The court has found against any such claim, and in our judgment a valid lien was created on the property in favor of Wood for the benefit of Cornelia Stewart, whose interests he rightfully represented, and whose trustee he was.

The judgment will be reversed and the cause remanded, with instructions to enter a judgment in favor of Wood for the costs of the suit, and against him for only \$1,482.98, the difference between the value of the mortgaged property and the amount due on the mortgage debt, including the amount adjudged in his favor below and the Elizabeth Stewart note; the judgment so to be rendered to bear interest from and after the 12th day of June, 1878; and it is so ordered.

§ 1717. *Antecedent debt.*—A chattel mortgage to secure an antecedent debt is founded upon a good consideration. *Machette v. Wanless*,* 2 Colo. T'y, 169; *City National Bank v. Goodrich*,* 3 Colo. T'y, 139; *In re Wiley*, 4 Biss., 171, 173.

§ 1718. *Description of debt.*—A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness. *Machette v. Wanless*,* 2 Colo. T'y, 225.

§ 1719. *Contingent debt.*—An extension of time on notes indorsed by the mortgagor is a valid consideration for a mortgage given by him to secure his contingent liability. *The Dubuque*, 2 Abb., 20, 31.

§ 1720. *Contingent liability.*—A mortgage given to secure a contingent liability as indorser becomes valid on the happening of the contingency fixing the liability of the indorser. *Ibid.*

§ 1721. *Future advances.*—Mortgages may as well be given to secure future advances and contingent, as those which already exist, and are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 448.

§ 1722. A mortgage to secure advances, made and to be made, is valid as to such advances as are made before the liens of third persons attach. *United States v. Lenox*, 3 Paine, 180; *Ex parte Ames*, 1 Low., 561.

§ 1723. A mortgage of chattels to secure an existing debt is not invalidated by a further proviso intended to cover future advances. *Lawrence v. Tucker*,* 23 How., 14.

4. *Execution and Delivery.*

§ 1724. *Seal.*—A chattel mortgage under the statutes of Ohio need not be sealed. The term mortgage does not import or imply that a seal is necessary. A chattel mortgage is only a bill of sale with a defeasance, and a seal has never been held necessary to the validity of a bill of sale. *Gibson v. Warden*, 14 Wall., 244.

§ 1725. The date of an acknowledgment of a mortgage or the time of its record will serve to fix the date of execution as not later than such time. *Merrill v. Dawson*,* *Hemp*, 563.

III. MORTGAGES OF FUTURE PERSONAL PROPERTY.

1. *At Law.*

§ 1726. A deed of trust was made to secure a debt, the mortgagor remaining in possession. Subsequently another deed was made, reciting that a part of the goods mentioned in the first deed had been sold and others substituted in their place, and that it was given upon the goods then in the house, except those mentioned in the first deed, and such as might be acquired out of the proceeds of the same, or for the purpose of replenishing the stock. *Held*, that the second deed protected goods purchased since its date out of the profits or proceeds of goods which had been acquired between the dates of the two deeds. *Letourno v. Ringgold*,* 3 Cr. C. C., 108.

§ 1727. But it was held that it did not protect such goods as may have been purchased since its date out of the proceeds or profits of the goods conveyed by the first deed and sold since the date of such second deed. *Ibid*.

§ 1728. A mortgage of a stock of goods, and all additions to the same that might afterwards be made, is not void for uncertainty, but it does not at law pass the goods acquired by the mortgagor subsequently to the date of the mortgage; and therefore, where a second mortgage was made covering part of the original stock and additions thereto, and the second mortgagee sold the entire stock, it was held that the first mortgagee could not recover from him in *assumpsit* for any part of the proceeds of the subsequently acquired goods, whether such additions to the original stock of goods consisted of goods bought with the proceeds of the sales of the original stock, or of goods exchanged for the same. *Wagner v. Watts*, 2 Cr. C. C., 169, 171.

§ 1729. A mortgage of an unfinished locomotive, which is in course of manufacture, covers the additions thereto made up to the time of the mortgagor's bankruptcy, even though the materials be not included in the mortgage. *Ex parte Ames*, 1 Low., 561.

§ 1730. A mortgage of slaves covers the children of the slaves born while the mortgage is in force. *Fowler v. Merrill*, 11 How., 875 (§§ 1877-80).

§ 1731. Under the law of Wisconsin, a mortgage of personal property does not carry after-acquired chattels. As to such property it is in the nature of a revocable license to take possession. *In re Eldridge*, 2 Biss., 362, 364.

§ 1732. The rights of creditors under the bankrupt law, as regards the validity of a mortgage of the debtor's property, must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. *Ibid*.

§ 1733. In Wisconsin, a mortgage of after-acquired property being invalid, the mortgagee cannot, by taking possession of such property, hold it as against the mortgagor's assignee in bankruptcy. The scope and spirit of the bankrupt law could thereby be easily evaded. *Ibid*.

2. *In Equity.*

SUMMARY — Mortgage of crops not raised, §§ 1734, 1735.

§ 1734. The owner or lessee of land may mortgage his crop before it is raised. *Ellett v. Butt*, §§ 1736-38.

§ 1735. A statute of Mississippi, providing that it should be lawful to mortgage any crop of cotton, to be produced within fifteen months from the date of such mortgage, was merely declaratory of what the law was before its passage, with a limitation that the crop must be produced within a given time. A mortgage made before such statute, of a crop to be produced in the future, was valid in that state. *Ibid*.

[NOTES.—See §§ 1739-43.]

ELLETT v. BUTT.

(Circuit Court for Louisiana: 1 Woods, 214-220. 1871.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The bill alleges, in substance, that on September 4, 1866, William Sillers, of the state of Mississippi, was seized in fee of the "Asia" plantation, situated in Bolivar county in that state, and that on the 1st day of January, 1867, by a writing of that date, he leased said plantation to one John H. Graham for one year for a rent reserved of \$7,000, one-half to be paid on the 1st of October by a draft drawn by Graham in favor of Sillers on the defendants, who were commission merchants and factors in the city of New Orleans, and the other half on November 1st, to be evidenced by the note of Graham payable to Sillers and falling due on that day. Graham, by the stipulations of the lease, pledged and mortgaged the crops grown on the plantation during the year 1867, to the faithful performance of his covenants therein written, and authorized Sillers and his assigns on thirty days' notice to seize and sell the same for cash, the said sale to raise money sufficient to pay all arrearages of rent. That the lease was duly executed and recorded.

That Sillers and Graham met in the city of New Orleans on the 8th of February, 1867, for the purpose of procuring the acceptance of defendants of the draft to be given by Graham on them by the terms of said lease, and the said lease and mortgage was then and there exhibited to the defendants, and was read and considered by them and the terms thereof fully understood and a counterpart thereof left with them. That with full notice that Sillers had the first lien on the crop of Graham, they accepted said draft, and the same has been paid and satisfied. That Graham also delivered to Sillers the note for \$3,500 provided for by said lease, due November 1, 1867. That said mortgage contained in said lease became, by the laws of Mississippi, a lien upon Graham's crop superior to all claims of other creditors of Graham, and of any claim of defendants against him. That Graham cultivated the plantation under said lease during the year 1867, and planted, matured and gathered a crop of cotton amounting to forty-nine bales of four hundred and fifty pounds each.

That on the 4th day of September, 1866, the circuit court of Claiborne county, Mississippi, rendered a judgment against Sillers, in favor of the present complainant, for \$10,103.89, which, being duly recorded on September 14, 1866, became a lien upon the "Asia" plantation. That on the 28th of April, 1867, an execution issued on said judgment was levied on said plantation, and the same was sold by the sheriff, at public auction, to complainant, on the 3d day of June, 1867, by virtue of said execution, and the plantation was conveyed to him by the sheriff by deed of that date. That at the time of said sale, Graham was in possession of said plantation under said lease, and the effect of the sale was to substitute complainant in the place of Sillers as landlord of Graham, and to entitle complainant to the rent of the plantation which had not yet fallen due. That Sillers, knowing the legal effect of said sale and conveyance, indorsed and delivered the said note of Graham to complainant, who is now the holder and owner thereof, and entitled to pursue all remedies for its collection that Sillers might. That, in the fall of 1867, the defendants, through an agent sent for that purpose to the plantation, received from Graham forty-nine bales, the crop of cotton produced by him on said plantation during that year, and shipped the same to New Orleans, and sold and disposed of the

same to their own use, well knowing that the same was subject to the lien of complainant. The cotton was middling cotton, and worth, at the time it was taken by defendants, twenty-five cents per pound. That on the shipment of the first twenty-seven bales complainant notified defendants by letter that he claimed the cotton, and should hold them responsible for its proceeds.

The bill prays for an account of the amount for which said cotton sold, to be estimated at the highest price reached by cotton since the asportation thereof by defendants, and before final decree, and that defendants may be required to pay the value thereof so estimated to be applied on the amount due complainant on the note of Graham.

The answer of defendants admits that they saw and read, in February, 1867, the lease made by Sillers to Graham, but avers that Sillers stated that the part thereof by which he secured a lien on Graham's crop for the payment of rent was not valid and binding by the laws of Mississippi, and that he released the same so far as it affected them. They deny that the lease to Graham operated as a lien upon the crop. They deny that the cotton shipped by Graham was shipped through the intervention of their agent. They deny that they had any notice of complainant's claim on the cotton until the receipt of his letter dated November 25, 1867. They further say that in February, 1867, they entered into a contract in writing with Graham, by which they agreed to advance to him \$5,500 in supplies for his plantation, besides accepting the said draft for \$3,500, and Graham agreed to ship to them the cotton grown on the Asia plantation to be sold, and that they should have a lien upon the same to repay the said advances. And that this agreement was recorded in Bolivar county, Mississippi, on February 20, 1867.

Complainant files the general replication. The first question presented by these pleadings is, Did Sillers, by the document called a lease and mortgage, secure a lien upon the crop of Graham for the payment of the rent?

§ 1736. *Construction of the Mississippi act of February 18, 1867, authorizing mortgages on crops to be grown after the execution of the mortgage.*

The legislature of Mississippi, by an act approved February 18, 1867, subsequent to the date of Sillers' lease, provided that it should be lawful to convey, by way of mortgage or deed of trust, any crop of cotton, etc., being produced or to be produced within fifteen months from the date of such mortgage. The defendant draws the inference from this act that such a mortgage was not valid before the date of the act. We think the act to be merely declaratory of what the law was before its passage, adding a limitation that the crop mortgaged must be produced within fifteen months. If property not *in esse* or in the ownership of the mortgagor can be mortgaged, and that question we will consider presently, there surely can be no reason why a crop to be produced during the current year might not be mortgaged. Such a contract is not immoral, against public policy, or fraudulent. If the parties are capable of contracting, such a contract, if made on valuable consideration, has all the elements of a binding contract.

§ 1737. *The owner or lessee of land may mortgage his crop before it is raised.*

Can property to be acquired *in futuro* be incumbered by mortgage? The authorities answer this question in the affirmative. In *Pennock v. Coe*, 23 How., 117 (§§ 1305-1309, *supra*), the point was made that a person cannot grant what he has not got. But the court said "that the principle has no application to the case before us. The mortgage here does not undertake to grant *in presenti* property of the company not belonging to them or not in existence

at the date of it, but carefully distinguishes between present property and that to be afterwards acquired," and the court held that a grant can take effect upon the property when it is brought into existence and belongs to the grantor in fulfillment of an express agreement founded on a good and valid consideration, where no rule of law is infringed or the rights of a third party prejudiced. So in *Mitchell v. Winslow*, 2 Story, 631. Mr. Justice Story says: It seems to me a clear result of all the authorities, that whenever the parties by their contract intended to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches as a lien in equity or charge upon particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto, under him, either voluntary or with notice. See, also, 2 Story's Eq. Jurisprudence, sec. 1021; Cross on Liens, 187, 188 *et seq.*; *Prebble v. Boghurst*, 1 Swanst., 309; *Needham v. Smith*, 4 Russ., 318; 1 Powell on Mortgages, 190; *Metcalf v. Archbishop of York*, 1 Myl. & C., 553; *Field v. Mayor of New York*, 2 Seld., 179. The doctrine is too well settled to be now questioned.

We have, therefore, reached the position that the contract by which Graham mortgaged his crop for 1867 to Sillers was a valid and binding contract between the parties. It was also binding against those who had notice of it. The sole purpose of the contract was to give Sillers a lien superior to the claims of others, for, without the contract, Graham's crop would have been liable to be seized in payment of his debt to Sillers. It is unnecessary to decide what effect as to notice the recording of the mortgage had, for the fact is admitted by defendants' answer that, in February, 1867, they had actual notice, having read the contract and being furnished with a counterpart of it. The evidence is also clear to the point that defendants had this actual notice before they contracted with Graham, and before his execution of a mortgage to them upon the same crop.

The next question is one of fact. Did Sillers, in his conference with the defendants on the 6th of February, 1867, agree to release his lien upon Graham's crop secured by his lease and mortgage? The defendants aver in their answer that he did. This is new matter, not responsive to any allegation of the bill, and it is incumbent on defendants to establish it by proof. They have offered no evidence to support this averment. On the contrary, it is flatly contradicted by Sillers, and Graham testifies that, in his conference with defendants in February, 1867, it seemed to be the understanding of all parties that Sillers would have a lien on the crop for his rent. The conclusion from the testimony is therefore inevitable, that Sillers did not agree with defendants to waive his lien upon the crop of Graham. We have, then, reached this further ground, that Sillers, having a contract with Graham giving him a lien on Graham's crop, gave actual notice thereof to defendants, and did not waive his rights under his contract. His lien, being older than the lien of defendants, is superior in equity, and, as between Sillers and defendants, Sillers had the right to have the crop of Graham applied first to the payment of the debt secured by his lien.

§ 1738. *The assignment of a note secured by a mortgage is, in equity, an assignment of the mortgage.*

The next question is, Have the rights of Sillers been transferred to Ellett, the complainant? Unquestionably, Ellett, on his purchase at sheriff's sale of the "Asia" plantation, became entitled to all the rent which fell due

after the date of his deed, whether it had or had not accrued before the sale, even without the transfer of the note given by Graham for the rent. But Sillers indorsed and transferred the note of Graham secured by the mortgage, and delivered the mortgage itself to the complainant. According to all the authorities, this transfer vests in the transferee the rights of the mortgagor to the security. The assignment of a note secured by a mortgage is, in equity, an assignment of the mortgage, unless there is some special provision of the parties to the contrary. *Johnson v. Hart*, 3 Johns. Cas., 322; *Lawrence v. Knapp*, 1 Root, 248. So that a mortgagee, who has assigned absolutely the note secured by the mortgage, need not be made a party to a suit by the assignee for payment of the note out of the mortgaged premises. *Kent, J.*, in *Johnson v. Hart*, 3 Johns. Cas., 322.

The complainant then stood in Sillers' shoes. He was entitled to have Graham's crop first applied to the payment of the note assigned to him by Sillers. His lien was the elder and better one. The defendants, through their agent Ruhl, as the testimony abundantly shows, carried off the entire crop and appropriated its proceeds to their own use. Having done this with full knowledge of the prior lien, they must account to complainant for the value of the crop at the time of its asportation, with interest from that date. This is the rule of damages in trover and trespass *de bonis asportatis*, and should be applied here as the measure of the complainant's claim. The decree must be for complainant. If the parties cannot agree upon the amount, the case must be referred to a master to report upon that matter. (a)

§ 1739. A mortgage of after-acquired chattels is good. It is essential, however, that the after-acquired chattels intended to be covered by the mortgage should be definitely pointed out, so that they may be distinguished from other chattels of the same kind; but it is sufficient that the ship, mill, or place into which they are to be brought, or the farm or land upon which the future crops are to be raised, is described. *Brett v. Carter*, 2 Low., 458, 461.

§ 1740. A mortgage of future additions to a stock of retail goods is, in equity, a valid mortgage of such goods as may be afterwards purchased and added to the stock by the mortgagor. *Ibid.*

§ 1741. A mortgage of future machinery, tools and stock in trade to be put into a factory is good and valid against the mortgagor. Such a mortgage has no operation to transfer *in presenti* property in things not *in esse*; but it operates by way of present contract to take effect and attach to the things assigned when and as soon as they come *in esse*; and it may be enforced as such a contract *in rem*, in equity. *Mitchell v. Winslow*, 2 Story, 630.

§ 1742. A grant to take effect upon property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement, is valid if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third persons are not prejudiced. *Beall v. White*, 4 Otto, 382, 387.

§ 1743. A mortgagee of after-acquired property of the mortgagor is to be preferred to general creditors of the latter when there is no fraud. *National Shoe & Leather Bank v. Small*, 7 Fed. R., 887 (§§ 1749-50).

IV. RECORDING, FILING AND REFILING.

1. *Effect of.*

SUMMARY—*Mortgage not filed valid against mortgagor's assignee in bankruptcy*, § 1744.—*Mortgagee not responsible for fraudulent devices of mortgagor*, §§ 1745-1747.

§ 1744. A chattel mortgage not filed in accordance with the registry laws of a state, but valid as between the parties, is valid as against the mortgagor's assignee in bankruptcy. *Platt v. Preston*, § 1748.

§ 1745. A mortgagee does not become responsible for fraudulent devices of mortgagors to keep the mortgage from record if he does not participate in them. *National Shoe & Leather Bank v. Small*, §§ 1749, 1750.

(a) Affirmed in *Butt v. Ellett*,* 19 Wall., 544.

§ 1746. The fact that a mortgagee has negligently failed to record his mortgage until his debtors have become insolvent does not render it invalid as against the debtor's assignee in insolvency, or against his general creditors, if it could not be objected to as being a preference at the time of its execution. *Ibid.*

§ 1747. The mortgagee not having had any fraudulent intent in not recording his mortgage, the assignee in insolvency of the mortgagor acquires no greater equity than the insolvent had after giving the mortgage. *Ibid.*

[NOTES.— See §§ 1751-1767.]

PLATT v. PRESTON.

(District Court for New York; 8 Federal Reporter, 394-396. 1880.)

Opinion by CHOATE, D. J.

STATEMENT OF FACTS.— This is a bill in equity, brought by the assignee in bankruptcy of one Neumann against William J. Preston, Montz Weinfeld and Anthony J. Diekelman, to set aside, as fraudulent against the creditors of the bankrupt, a chattel mortgage given to the defendant Preston, a lease to the defendant Weinfeld, and a general assignment made to the defendant Diekelman, all of which are alleged to have been made and executed in pursuance of a common fraudulent purpose, and as parts of a single scheme to defraud, hinder and delay creditors. The defendants Preston and Weinfeld appeared and defended upon the merits. Diekelman died, after appearing to resist an application for an injunction, and the suit has been revived against his administrator, who, on the 5th day of August, 1879, appeared in the cause by his solicitor, but no answer has been put in for him, nor has any order been entered taking the bill *pro confesso* as against him. Upon the issues raised by the answer of Preston and Weinfeld, which deny all the allegations of fraud contained in the bill, the proofs have been taken, and the cause has been heard on the pleadings and proofs.

§ 1748. *Failure to file a chattel mortgage does not avoid it as respects an assignee in bankruptcy.*

The supreme court of the United States, in the case of *Steward v. Platt*, 19 N. B. R., 347, having decided that the failure to file a chattel mortgage pursuant to the statute of the state of New York does not, *per se*, avoid the mortgage in favor of an assignee in bankruptcy, there is no question to be determined, under the answer of the defendant Preston, except whether the mortgage was, in its inception, fraudulent in fact as against creditors. The opinion expressed when the case was before the court upon an application for an injunction *pendente lite*, that the proofs then produced would not justify a finding that "the mortgage was not, in its inception, made in good faith, otherwise than as it may have been intended to keep it secret as regards creditors," is fully confirmed by the proofs now taken; and I am entirely satisfied that the mortgage was given and received in good faith, as security for an existing debt, and for future advances, without any purpose or intention of delaying, hindering or defrauding creditors, and not in contemplation of bankruptcy on the part of the mortgagor, and that the omission to file the same was not with any such fraudulent purpose or intention, or for the purpose of keeping it secret from creditors, but because the mortgagee was advised that it was unnecessary to file it if he had, as in fact he had, confidence in the personal integrity of the mortgagor. In respect to the lease executed by the bankrupt to the defendant Weinfeld, the proof now is that the rent reserved was a full and adequate rent for the use of the premises. Previous to its execution Weinfeld had become the purchaser of the machinery and chattels connected with the brewery,

under the sale to enforce the chattel mortgage. The proof is that the negotiations between the bankrupt and Weinfeld for the making of the lease were all subsequent to this purchase. There was no fraud in making it, nor any injury done or intended towards creditors. Weinfeld's only object in taking the lease was to make an economical use of the property he had on the premises.

These conclusions necessarily dispose of the bill as against Preston and Weinfeld. There is an entire failure to prove as against them the fraud alleged, which is the basis of the suit. The suspicious circumstances shown upon the motion for an injunction have been explained, or have become immaterial, upon the case now made by the testimony. See 19 N. B. R., 241. If, as claimed by the complainant, Weinfeld removed and sold certain beer from the brewery, which, under the contract between Preston and the bankrupt, referred to in the chattel mortgage, did not belong to Weinfeld as the purchaser of the chattel mortgage and assignee of the contract, but to the bankrupt's estate, the complainant's remedy is not by this suit in equity. Whatever trespass Weinfeld may have committed in this respect appears to have been actuated, not by a fraudulent purpose in respect to creditors, but by a misapprehension as to his own title. It is not intended to be intimated that Weinfeld had not a perfect right, as assignee of Preston's beer contract, to take and sell all the beer on the premises; but that question does not arise in this suit, and is not passed upon. The bill must, therefore, be dismissed as against Preston and Weinfeld, with costs. As to the administrator of Diekelman, no decree can be made in the present state of the record, and the bill, as to him, is retained for further proceedings. Decree accordingly.

NATIONAL SHOE & LEATHER BANK OF AUBURN v. SMALL.

(District Court for Maine: 7 Federal Reporter, 837-843. 1881.)

Opinion by Fox, D. J.

STATEMENT OF FACTS.—This bill is instituted by two national banks located in Androscoggin county, in this district, against L. L. Small, the assignee, under the insolvent law of this state, of the estates of Joshua M. and Mary A. Wagg, and Nathaniel I. Jordan, assignee of Samuel P. Irving and Hartwell K. Wagg, copartners in the shoe business at Auburn, under the style of Irving & Wagg, praying to be subrogated to the rights of Joshua M. and Mary A. Wagg under a certain chattel mortgage made and executed to them by Irving & Wagg on the 10th of July, A. D. 1879, to secure said Joshua M. and Mary A. Wagg the payment of certain sums loaned by them to Irving & Wagg, and also to save them harmless from all liability on account of any indorsements made or to be made by them for the benefit of said Irving & Wagg; the complainants having afterwards discounted for Irving & Wagg their notes, indorsed by Joshua M. and Mary A. Wagg, upon which they are chargeable as joint promisors, and which are overdue and unpaid. The holders of certain other notes of Irving & Wagg, upon which Joshua M. and Mary A. Wagg are liable as indorsers, are also made parties defendant to this proceeding.

The assignee of Irving & Wagg appears, and in his answer admits — That the claimants are the holders of the "paper of Irving & Wagg, as set forth in their bill; that a mortgage was made by them to Joshua M. and Mary A. Wagg, but that said mortgage was not recorded until August, 1881, and that at the time of its execution [as he alleges] it was fraudulently agreed by the parties to said mortgage that, notwithstanding said mortgage was to be given as afore-

said, it should be held secret, and should not be recorded; that Irving & Wagg might nevertheless continue manufacturing and purchasing on credit to be obtained from parties who would be ignorant of the existence of said mortgage, and who would rely on said property as unincumbered for the payment of the debts to be so contracted, and that in the event said Irving & Wagg should at any future time become insolvent, said mortgage should be put upon record, and said future creditors thus deprived of the means of obtaining payment of their several debts; that in pursuance of this fraudulent agreement the mortgage was kept secret, and Irving & Wagg continued in business, purchasing on credit from parties who gave credit to them mainly on the fact that their property was unincumbered property."

It appears that Irving & Wagg failed July 12, 1880, owing nearly \$20,000, the most, if not all, of which debts were incurred subsequent to the giving of the mortgage. The mortgage purports to convey all the stock,— "Raw or in process of manufacture, now in their shop, with all the machinery and furniture, and other personal property of whatever description, belonging to the mortgagees, now in their shop; also all stock and materials now on hand, or which may be hereafter purchased by us and put into said shop for the purpose of being manufactured into boots and shoes."

The condition of the mortgage is—"That if said Irving & Wagg shall well and truly indemnify and save harmless said Joshua M. and Mary A. Wagg from and against any and all liability to which they or either of them may be subjected by reason of having indorsed a certain promissory note of even date herewith, given by said Irving & Wagg to John W. May, for the sum of \$600, payable in one year, with interest, semi-annually, at seven per cent., and shall also pay to said Joshua M. and Mary A. Wagg, or to either of them, any and all moneys which they, or either of them, may hereafter loan to said firm, and shall also save them harmless from liability on any note or notes hereafter indorsed by them for the benefit of said firm, and shall keep said property insured in the sum of at least \$2,000, for the benefit of said Joshua M. and Mary A. Wagg, then this bill of sale should be void."

May is one of the defendants, and so is James S. Jordan, who subsequently loaned \$1,000 to Irving & Wagg on their notes, indorsed by Joshua M. and Mary A. Wagg. It is shown that Irving & Wagg commenced business in May, 1879, with a capital only of some \$700, borrowed of Joshua M. Wagg by his son, Hartwell, who was a member of the firm. In July, the firm being in need of money, Hartwell K. Wagg applied to John W. May for a loan of \$600, proposing to give the note of the firm, indorsed by his father and mother, saying that he intended to secure them for this and any other liabilities they might afterwards incur by a mortgage of the firm property. Hartwell soon after informed his father what he proposed doing, and that he would give him the contemplated security, which should also cover about \$900 previously loaned by the father. The father assented to the arrangements, and when spoken to by May about it, told him "to make it all right so as to secure them," authorizing him to take the mortgage and keep it for him till he called for it. May then upon made the \$600 loan to the firm, taking their note, indorsed by to file M. and Mary A. Wagg. This mortgage was signed by Irving & Wagg, in the presence of May, and witnessed by him. From all the testimony I am satisfied that, at that time, the mortgagors expected that the mortgage would not be immediately recorded; but as it would injure their credit, and they then hoped to continue in business, they intended it should be on that account with-

held from the record for the time being, and were to be informed when it was placed on record.

Irving's testimony is "that Hartwell Wagg agreed with him, at the time he signed the mortgage, that the mortgage should not then go on record, as it would affect their credit, and that he should be informed when it should be put on record." Hartwell Wagg, in his examination, also states "it was kept from record until August, 1880, to help the credit of Irving & Wagg." There can be no doubt, therefore, that the mortgagors expected that the mortgage would not be recorded immediately, and were apprehensive of serious consequences to their credit if it should be done. Whatever might have been the expectations of the mortgagors in this behalf, and however fraudulent may have been their purpose and design, the rights of the mortgagees—there having been a complete execution and delivery of the instrument by its makers to May, for the benefit of the mortgagees, and having subsequently incurred liabilities as indorsers, within the condition of the mortgage, to the amount of near \$4,000—are not to be impaired by fraudulent purposes of the mortgagors, unless the mortgagees in some way became parties thereto and assented to such fraudulent purpose. This is most positively and directly denied by both of the mortgagees, who assert that nothing was ever said, by either of them, about withholding the mortgage from record; that they never made any such agreement with either Irving or Wagg, and never had any such understanding, but were at full liberty to record the same at any moment; and in this respect these statements are corroborated by the testimony of May, who declares that he never made any such agreement, and that, at the time the mortgage was executed and delivered to him by the mortgagors, there was nothing said about not recording it; that after the instrument was completed, in a day or two, he informed Joshua M. Wagg he held the paper for him, and his impression is that he told him it should be recorded, to which Joshua made answer for him to keep it, and he would call for it.

§ 1749. *A mortgagee not responsible for fraudulent devices of mortgagor to keep the mortgage from record if he does not participate in them.*

It is claimed that if it should be conceded that the mortgagees were not personally parties to an agreement not to record the mortgage, that they are still to be held chargeable by reason of the arrangement to this effect between the mortgagors thereby to sustain their credit and defraud subsequent creditors; that Hartwell was the agent of the mortgagors in procuring the mortgage from the firm, and that whatever fraud was contemplated by the firm, and whatever was done by them in accomplishing it, must be held committed by their agent in obtaining the mortgage, and is as fatal to their rights as if they themselves had personally participated in the transaction. The evidence, however, fails to establish any such agency or authority of Hartwell thus to act in behalf of his parents. It does not appear that he had authority in their behalf to procure the mortgage and enter into any agreement or understanding that they would withhold the mortgage from record. When he applied to May for the loan of \$600, he told him he would procure the indorsement of his parents, and would secure them for this and any other liabilities they might incur for the firm, and he afterwards so informed his father. But May, and not Hartwell Wagg, was the agent of the mortgagees to receive delivery of the mortgage, and he was expressly instructed by Joshua M. Wagg "to make it all right so as to secure them," and was further directed "to take the mortgage and keep it for him;" and May says the mortgage was executed

and delivered to him by the mortgagors, nothing being said about its being kept from registry. The mortgage, therefore, was a complete and perfect instrument, which the mortgagees could record at any moment that they deemed it for their interest so to do. Such are the averments in the answers, and they are fully sustained by the weight of the evidence. Some circumstances are relied upon as in conflict with the answers, but they are of little moment, and should have no effect to control the sworn statements of the mortgagees found in their answers to the bill, and their testimony as witnesses. The charge, therefore, in the bill, that there was an agreement that the mortgage should be withheld from record and kept secret, and thereby a fraudulent credit obtained for the mortgagors, is not sustained by the testimony, and the case is simply one where a party has negligently failed to record his mortgage until his debtors had become insolvent, and falls within the principle sanctioned by the United States supreme court in *Sawyer v. Turpin*, 91 U. S., 121.

§ 1750. *Mortgagees of after-acquired property are to be preferred to general creditors, there being no fraud.*

It is urged that if the court is not satisfied that there was an agreement by the parties thereto to withhold the mortgage from record, still in fact the result has been to give the mortgagors a false credit,—to hold them out, to those who were dealing with them, as being the absolute owners of their shop without incumbrance,—and that injustice will result to those who had since dealt with them on credit if the property is allowed to pass under the mortgage, and is not distributed equally among all the firm creditors; that the leading rule in equity is that a party who asks equity must do equity; and as by the decisions in this state after-acquired personal property does not at law pass under a mortgage, although such may be its purport, and these complainants are compelled to come into equity for relief, they should not be allowed to appropriate the stock purchased since the mortgage, but the same in justice and equity ought to be distributed *pro rata* among all the creditors. But a complete answer to this view is that the mortgagees, not having had any fraudulent intent in not recording their mortgage, the assignee in insolvency of the mortgagors acquired no greater equity than the insolvents had after giving the mortgage; and having expressly stipulated by their mortgage that any property they should afterwards acquire should pass to the mortgagees, and be held by them as security, the mortgagees thereby acquired a greater equity to appropriate such after-acquired property to their security, if occasion should arise, than the general creditors who were without contract for any security.

Fraud not being established, the case must be governed by *Mitchell v. Winslow*, 2 Story, 631, and the mortgagees must be held to have acquired, by the terms of their mortgage, a better right to the after-acquired property than the general creditors of the insolvent, and of this security the holders of the paper from liability on which the mortgage was intended as a protection, when the makers and indorsers are insolvent, can avail themselves upon the principle of subrogation, as was decided by this court in *Matthews v. Abbott*, November, 1878. Decree for complainant.

§ 1751. In Colorado a mortgage of personal property which is not delivered to the mortgagee must be acknowledged and recorded according to statute, but it is good as against the mortgagor without such acknowledgment and record. *Machette v. Wanless*, * 2 Colo. T'y, 169.

§ 1752. In Massachusetts a mortgage is good between the parties to it, although it does not conform to the requirements of the statute relating to acknowledgment, record, or the like. *Winsor v. McLellan*, 2 Story, 492.

§ 1753. In Virginia, under the statute of 1792, a mortgage of personal property, such as slaves, was required to be recorded in the general court, or in the court of the district, county, city or corporation in which the grantor resided; and if recorded only in the court of the county in which the slaves happened to be, the mortgagor residing in a different county, it was void as against a creditor of the mortgagor. *Bond v. Ross*,* 1 Marsh., 816.

§ 1754. Under the Virginia "Act concerning conveyances," a chattel mortgage admitted to record on the oaths of only two subscribing witnesses is void, even as against creditors with notice. *Hodgson v. Butts*,* 3 Cr., 140.

§ 1755. An assignee in bankruptcy takes only the title of his assignor. A mortgage of chattels, though not recorded, is good against the mortgagor's assignee in bankruptcy. *In re Griffiths*, 1 Low., 431; *In re Bruce*,* 16 N. B. R., 318; *National Bank of Fredericksburg v. Conway*,* 14 N. B. R., 518; *In re Dow*,* 6 N. B. R., 10. See DEBTOR AND CREDITOR.

§ 1756. A chattel mortgage executed and delivered without fraud to secure purchase money, although not filed as required by the laws of the state prior to the filing of the petition in bankruptcy, but duly filed prior to the appointment of an assignee, and where there were no judgments against the bankrupts, is sufficient to give a lien upon the mortgaged property which must be recognized in bankruptcy. *In re Collins*, 8 Ben., 59, 60.

§ 1757. The assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed, subject to such liens or incumbrances as would affect it if no adjudications in bankruptcy had taken place; but it is to be remembered that the assignee represents the rights of creditors as well as the right of the bankrupt, and that any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee. *In re Wynne*, Chase's Dec., 227, 250.

§ 1758. A mortgage is good between the parties to it, although it does not conform to requirements of the statute relating to acknowledgment, record, or the like. *Stewart v. Platt*, 11 Otto, 731 (§§ 1773-81).

§ 1759. An assignee in bankruptcy or insolvency takes only the debtor's rights, in the absence of fraud in fact; and consequently is affected with all the claims, liens and equities which would affect the debtor if he were himself asserting his interest in the property. *Ibid.*

§ 1760. A chattel mortgage not filed in accordance with the registry laws, but valid and effective as between the parties, is equally valid and effective as against the mortgagor's assignee in bankruptcy. *Ibid.*

§ 1761. A chattel mortgage not filed in accordance with the registry laws, but valid as between parties, is valid as against the mortgagor's assignee in bankruptcy. The assignee gains no rights over those possessed by the bankrupt by reason of the assignment; the unfilled mortgage is void only as against the parties named in the statute, namely, purchasers in good faith or creditors who have obtained a specific lien by judgment. *In re Collins*, 12 Blatch., 548, 552.

§ 1762. Though not recorded before the bankruptcy.—A mortgage is effectual against an assignee in bankruptcy although it has not been duly recorded at the date of the bankruptcy. *Winsor v. McLellan*, 2 Story, 492; *Fletcher v. Morey*, 2 Story, 555; *Mitchell v. Winslow*, 2 Story, 630.

§ 1763. Except in cases of fraud, the assignee in bankruptcy or insolvency stands in no better situation than the bankrupt himself as regards mortgaged property; and the title of a mortgagee remains unaffected by the mortgagor's assignment in bankruptcy or insolvency, and unaffected by his discharge obtained in the proceedings. The assignment passes only the debtor's interest at that time. *Winsor v. McLellan*, 2 Story, 492.

§ 1764. A mortgage of fixtures as against the mortgagor's assignee in bankruptcy is a valid lien, although as against a prior mortgagee of the realty the fixtures would be real estate. If there be a prior mortgage of the land, and the prior mortgagee make no claim to the fixtures, or his mortgage be fully satisfied out of the land without resorting to the fixtures, the mortgagee of the fixtures has a valid security upon them. *Ex parte Ames*, 1 Low., 561, 567.

§ 1765. In Indiana an unrecorded mortgage of chattels not delivered is not valid against an assignee in insolvency of the mortgagor. He represents the creditors in the collection of the assets, and may sue in every case in which they might have sued. *Moore v. Young*, 4 Biss., 128, 135.

§ 1766. A mortgage, not valid as against creditors under the laws of the state under which the mortgagee has taken possession just after the mortgagor's bankruptcy, then having reasonable cause to believe the mortgagor insolvent, is not valid against the assignee in

bankruptcy. Such possession does not relate back to the date of the mortgage and give the mortgagee his rights as of that date. *Harvey v. Crane*, 2 Biss., 496.

§ 1767. A mortgage recorded only the day before the petition in bankruptcy was filed, if made upon consideration which passed at the time, is valid. *In re Perrin*, *7 N. B. R., 233.

2. *Requisites of a Valid Record.*

[See DEBTOR AND CREDITOR; FRAUD.]

SUMMARY — *Mortgage not properly filed is void as to creditors*, § 1768. — *By partners residing in different towns*, §§ 1769-71. — *Mortgage of stock of goods in Georgia*, § 1772.

§ 1768. A chattel mortgage in New York is void as to creditors and subsequent purchasers which is not "filed" in the county in which the mortgagor resides. *Stewart v. Platt*, §§ 1773-1781.

§ 1769. A mortgage made by joint mortgagors as partners residing in different towns must be recorded in each of the towns in which the mortgagors reside. *Ibid.*

§ 1770. Thus, where the mortgagors, who resided in Westchester county and were lessees of a hotel in the city of New York, made a mortgage of the furniture of the hotel, and this was duly filed in the office of the register of deeds for the city and county of New York, but was not filed in the towns where the mortgagors respectively resided with their families, as provided by the statute of New York, it was held that there was no effectual filing of the mortgage. *Ibid.*

§ 1771. The rights of the mortgagee in such case depend not upon the recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. *Ibid.*

§ 1772. Under the statutes of Georgia providing that a mortgage of a stock of goods shall attach to purchases made to supply the place of articles disposed of, and also providing for the recording of mortgages within three months, but making those not recorded within that time valid as to the mortgagor, and only postponed to liens or purchases made prior to the record of the mortgage, a mortgage of a stock of goods not recorded within that time is valid against the mortgagor's assignee in bankruptcy and against his general creditors, although he remained in possession with a power of sale, selling the goods and replenishing with new purchases; and it is immaterial that the claim is for goods sold to the mortgagor after the execution of the mortgage and before its record. *Johnson v. Patterson*, §§ 1782-83.

[NOTES.— See §§ 1784-1789.]

STEWART v. PLATT.

(11 Otto, 731-744. 1879.)

APPEAL from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.— Stewart leased a hotel in New York to three persons, named Leland, for a term of five years. To secure the rent they executed a mortgage on the furniture, etc., used and to be used in their hotel business, and they also conveyed to Stewart certain property in New York city and in Westchester county, New York, in which county they resided. There was a stipulation that the chattel mortgage on the furniture, etc., should be renewed annually so as to include all new furniture that might be added to the stock. This was done accordingly, but none of the mortgages were recorded in Westchester county, where the mortgagors lived. In 1871 the Lelands, having become much indebted, were declared bankrupt, and this suit was brought by their assignee in bankruptcy against Stewart, and a number of judgment creditors, seeking to have the chattel mortgages and the conveyance of real estate to Stewart declared void, as well as some recent judgments. They were held void accordingly, and Stewart's representative, he having died pending the proceedings, appealed. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE HARLAN.

The objects of this suit, so far as they concern the appellants, were: 1st. To obtain the distribution of the fund arising from the sale of furniture and other personal property in use in the Metropolitan Hotel, in the city of New York,

at the commencement of the proceedings in bankruptcy. The Lelands were lessees of that hotel under a written lease from A. T. Stewart, dated April 30, 1867, for a term of four years thereafter, at an annual rent of \$79,186, payable in equal monthly instalments. Upon the property thus sold Stewart held, as security for rent reserved by the lease, several chattel mortgages executed by the Lelands, the validity of which was questioned in this suit by the assignee in bankruptcy. 2d. To have a decree declaring sundry judgments against the bankrupts within four months prior to the adjudication in bankruptcy, as well as certain conveyances of real estate to Stewart, to be, as against the assignee, invalid under the provisions of the bankrupt law.

§ 1773. *Filing mortgages for record in New York.*

The first question to which we will direct our attention relates to those several chattel mortgages. The district and circuit courts concurred in opinion that they were not filed in the office designated by the statutes of New York, and, upon that ground, were ineffectual to give the security and lien contemplated by the parties, and void as against the assignee. By the laws of New York it is provided that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, should be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the act. The statute requires such mortgages to be filed in the town or city where the mortgagor, "if a resident of that state, shall *reside* at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument." In the city of New York, the mortgage is directed to be filed in the office of the register of said city; in other cities of the state, and in the several towns thereof in which a county clerk's office is kept, in such office; and in each of the other towns of the state, in the office of the town clerk thereof. Registers and clerks are required to file such instruments, presented to them for that purpose, and indorse thereon the time of receiving same, and keep them deposited in their offices for the inspection of the persons interested. It is further provided that every mortgage filed in pursuance of the statute should cease to be valid against the creditors of the mortgagor, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage, a true copy thereof, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him in virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then *reside*.

§ 1774. *A chattel mortgage by a firm must be filed in the county or counties in which its several members reside.*

The bankrupts resided with their families in the county of Westchester at the respective dates of the several chattel mortgages, but the business of the firm of Simeon Leland & Co., as lessees of the Metropolitan Hotel, was carried on in the city of New York, and all the property covered by the mortgages was in use in that hotel. The mortgages were filed in the office of the register of deeds for the city and county of New York, and were not filed in the towns where the lessees respectively resided with their families. The contention of

learned counsel for the appellants is that *the firm* was the mortgagor, that *its* residence or domicile was in the city of New York, and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word "reside" employed in the statute. It is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination. But no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside. The statute upon its face furnishes persuasive evidence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage and the place of the mortgagor's residence. If he be a non-resident of the state of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual *situs* of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors at the time respectively reside.

§ 1775. *Recitals of residence in a mortgage do not bind creditors or purchasers.*

Some stress is laid upon the fact that in each of the mortgages the mortgagors are described as "of the city of New York." If that is to be regarded as a representation by them that their fixed abode was in that city, it is obvious that the statute designed for the protection of creditors, subsequent purchasers and mortgagees in good faith cannot be thus defeated. Their rights depend not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing, otherwise the object of the statute would be frustrated by the mere act of the parties to the injury of those whose rights were intended to be protected. The recital of the residence in the mortgage "seems to be of no importance, and might for the matter of security be omitted altogether." Nelson, C. J., in *Chandler v. Bunn, Hill & D.* Supp. (N. Y.), 167. A good deal was said in oral argument as to the serious inconveniences which may result from any construction of the statute that requires chattel mortgages executed by a firm upon its property to be filed elsewhere than in the town or city where the property is used, and where the firm business is conducted. On the other hand, it is quite easy to suggest reasons of a cogent character why, in view of the manifest purpose of such legislation, the actual residence of the mortgagors should determine the place of filing. But these are considerations to be addressed more properly to the legislature of New York, with whom rests the power to make such alterations as experience may suggest to be necessary. The statute expressly declares that a chattel mortgage not filed as required by its provisions is void as to creditors and subsequent purchasers and mortgagees in good faith; and the circuit justice well said that the statute had "imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagors actually reside, as a preliminary to the validity of the mortgage. Whether this condition is wise or not, whether convenient or diffi-

cult of performance, is not for the courts to say. The statute exacts it, and the courts must see that it is performed." Upon this branch of the case, therefore, we concur in opinion with the circuit court.

§ 1776. *Judgment creditors who have sued out executions have liens prior to chattel mortgages not filed according to law.*

It follows, necessarily, from what has been said, that the circuit court rightly adjudged that creditors who obtained judgments and sued out executions against the Lelands, previous to the commencement of bankruptcy proceedings, had prior claims and liens upon the proceeds arising from the sale of the property covered by the chattel mortgages. But the final decree in the circuit court is erroneous in directing the residue of the proceeds of the sale of the mortgage property, after satisfying execution creditors, "to be paid to the assignee (in bankruptcy) for the purposes of the trust," and in charging that balance with the payment of the fees due counsel of the assignee.

§ 1777. *A chattel mortgage void as to creditors and purchasers is good between mortgagor and mortgagee.*

In *Yeatman v. Savings Institution*, 95 U. S., 764, we held it to be an established rule that, "except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *Brown v. Heathcote*, 1 Atk., 160; *Mitchell v. Winslow*, 2 Story, 630; *Gibson v. Warden*, 14 Wall., 244; *Cook v. Tullis*, 18 id., 332; *Donaldson v. Farwell*, 93 U. S., 631; *Jerome v. McCarter*, 94 id., 734 (§§ 1453-56, *supra*). He takes the property in the same 'plight and condition' that the bankrupt held it. *Winsor v. McLellan*, 2 Story, 492."

§ 1778. *An assignee in bankruptcy takes the property subject to all equities.*

The decree below is plainly in contravention of this rule. Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and the mortgagee. *Lane v. Lutz*, 1 Keyes (N. Y.), 213; *Wescott v. Gunn*, 4 Duer (N. Y.), 107; *Smith v. Acker*, 23 Wend. (N. Y.), 653. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided. It cannot be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens or incumbrances as would have affected it, had no adjudication in bankruptcy been made. While the rights of creditors whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter, representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors.

§ 1779. *The assignee for general creditors is postponed to the mortgagee of a mortgage not properly filed.*

The assignee can assert, in behalf of the general creditors, no claim to the

proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the bankrupt law. It results that the court below erred in directing the fees of the assignee's counsel to be paid out of the residue of the fund in court remaining after the claims of execution creditors were satisfied. To that balance the appellants are entitled without diminution, to be applied in payment of the rent remaining unpaid, after crediting thereon \$43,500, the agreed valuation of the real estate conveyed to Stewart, and to which we will presently refer in another connection. It was error to charge that balance with the payment of costs of fees of counsel, or any expense incurred by the assignee in bankruptcy in the administration of his trust.

We come now to the questions relating to the several conveyances of real estate made to Stewart in January and February, 1871, all of which were adjudged by the circuit court to be void as against the assignee in bankruptcy. It is important to consider the circumstances under which those conveyances were made. Early in the month of January, 1871, commenced a series of interviews between the lessees and Stewart, brought about, perhaps, by the demand of the latter, through his agent, for the settlement of rent in arrear, which then amounted to about \$50,000. The lessees desired a new lease at a reduced rent, while Stewart insisted upon the payment, or a satisfactory arrangement, of the rent due him. They confessed present inability to discharge the indebtedness in any other mode than by conveyances of real estate, which they urged him to take at fair valuation and give a new lease at reduced rent. They, in those interviews, expressed the utmost confidence that such an arrangement would relieve them from all immediate financial burdens growing out of the hotel business, and enable them to meet promptly thereafter not only instalments of rent, but all other engagements. Stewart finally agreed, for the accommodation of his lessees, to accept certain real estate, offered to him at the aggregate price of \$43,500, in satisfaction of a like amount of back rent, and, necessarily, in extinguishment to that extent of his mortgages upon the furniture and other property in the hotel building. He also signified his willingness to renew the lease to the same parties, at the reduced rent of \$65,000. In pursuance of this arrangement, the lessees, or some of them, caused conveyances to be made to Stewart of the real estate in question, consisting of a farm in Westchester county, and several houses and lots on Crosby, Jersey and Prince streets in New York city.

§ 1780. *Conveyances for value in good faith by debtors are valid although the grantors soon thereafter become bankrupt.*

We are all of opinion that the conveyance, dated February 1, 1871, by Mrs. Warren Leland and her husband of the farm in Westchester county, was unsailable by the assignee upon any ground whatever. That property was a gift from the husband to the wife at a time when his right to make it cannot be disputed. As early as 1868 it was distinctly separated from the mass of his property, and the title made to her for her benefit. There is no proof that the conveyance was with any intention to defraud his then existing or future creditors. Of those whose interests the assignee in bankruptcy here represents, or assumes to represent, none, except perhaps one, were creditors of Warren Leland at the date of that conveyance. The bill alleges that the bankrupts, or some of them, intended to give Stewart a preference over other creditors, and

to that end, it is charged, Warren Leland caused the conveyance to be made to his wife of the farm in question, "owned by the said Warren Leland, but standing in the name of his wife." But clearly it was not owned by the husband after the execution of the absolute conveyance of 1868. Her rights, by reason of anything appearing in this record, could not be disturbed by the husband's creditors who became such after the execution of the conveyance to her. She chose, in order to aid her husband, or for other reasons satisfactory to herself, to unite with him in the conveyance to Stewart, thereby surrendering her estate for the benefit of the husband's creditor. Suppose she had not so done, and that the title had remained in her name up to the time of the adjudication in bankruptcy. Would it be contended, for a moment, that the assignee in bankruptcy, or that the creditors of the bankrupts, becoming such after the execution of the conveyance, could have subjected that farm to the debts of Warren Leland against the consent of his wife? This question must, in view of the evidence, receive a negative answer, which shows, conclusively, that the appropriation of the wife's property, by the joint act of herself and husband, to the payment of the debt of a particular creditor of the latter, is not a matter of which the assignee in bankruptcy, or any subsequent creditor of the husband, can rightfully complain. The decree of the circuit court declaring the conveyance of that farm to Stewart to be void, and requiring Mrs. Stewart to convey to the assignee in bankruptcy, was, for the reasons stated, clearly erroneous.

§ 1781. *An insolvent may in good faith sell his property before bankruptcy proceedings are commenced against him.*

It remains to consider that part of the decree which declared the conveyances to Stewart of the houses and lots on Crosby, Jersey and Prince streets, in New York city, to be void. When these conveyances were agreed to be made, Stewart, as already stated, had an undisputed claim for rent in arrear amounting to over \$50,000. Under the provisions of the mortgages, a default in the payment of rent having taken place, Stewart, at the time the exchange was determined upon, could have taken actual possession of the mortgaged property and sold it for the best price he could obtain in satisfaction of his claim for rent. His right to possession for such a purpose could not have been questioned by any creditor of the lessees who had not, by previous judgment and execution, acquired a lien upon the mortgage property. *Burdick v. McVanner*, 2 Denio (N. Y.), 170; *Stewart v. Slates*, 6 Duer (N. Y.), 83; *Hall v. Sampson*, 35 N. Y., 274; *Ackley v. Finch*, 7 Cow. (N. Y.), 290; *Langdon v. Buel*, 9 Wend. (N. Y.), 80; *Patchin v. Pierce*, 12 id., 61. Instead of exercising that right,— a course which would have seriously endangered, if it had not utterly destroyed, the business and credit of the lessees,— Stewart, at their earnest solicitation, and for their accommodation, accepted real estate at a fair valuation in satisfaction of rent due and unpaid, thereby surrendering and extinguishing his lien to that extent upon the property described in the chattel mortgages. Of the \$43,500 at which the real estate received by Stewart was valued, \$19,500 represented the farm in Westchester county, which, we have shown, could not have been subjected to the claim of any creditors who became such after the conveyance to Mrs. Leland. In point of fact, therefore, only \$24,000 in value of real estate, belonging to the bankrupts, was received by Stewart, while he surrendered his claim and lien for rent to the extent of \$43,500. This was, in its substance and effect, a mere exchange of securities, not forbidden by the

letter or the spirit of the bankrupt law. In *Cook v. Tullis*, 18 Wall., 332, we said that "a fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the bankrupt act, either in its language or object, which prevents an insolvent from dealing with his property, selling it or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound in the misfortune of his insolvency to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously." Substantially the same doctrine was announced in *Clark v. Iselin*, 21 Wall., 360; *Sawyer v. Turpin*, 91 U. S., 114.

These principles would seem to be decisive of the case under consideration. While there is some conflict in the testimony as to certain matters, we have a strong conviction, from all the facts and circumstances established by the proof, that the transaction by which the real estate, at a fair valuation, was substituted for the lien, of like amount, upon personal property, was without any fraudulent purpose. The substitution was not made to give a preference to Stewart. The belief and hope of the bankrupts, expressed in decided terms to him, were that the substitution or exchange would enable them to remove all financial obstacles of a serious nature. They induced him, by earnest representations, to share these hopes. He delayed or forebore to exercise the right which, at the commencement of negotiations, he undoubtedly had, of taking the mortgaged property into his custody, and disposing of it in satisfaction of his claim for rent. That the arrangement in question did not substantially impair the value of the bankrupts' estate is abundantly clear. His lien, which was extinguished by the exchange, exceeded, in value, that portion of the real estate, embraced in the conveyances to him, which the creditors of the bankrupts could have reached under their executions. The fact that the mortgaged property brought only \$43,469.31 is relied upon to show that the exchange did impair the estate of the bankrupts. This argument proceeds upon the assumption either that when the exchange was determined upon he had not a lien upon the mortgaged property, as between him and the mortgagors, or that if he had, he would not have enforced it by taking the property into his custody upon a refusal of the lessees to make some satisfactory arrangement. But such assumption is without support in the law or the proof. Besides, the evidence leads to the conclusion that the mortgaged property sold, at public auction, for less than its fair value. While the witness, who made the inventory and appraisal, testifies that it sold for its full value, the auctioneer, who conducted the sale, testified that with proper appliances it would have brought fifty per cent. more. It is certain that it sold for much less than either the lessees or Stewart at the time of their negotiations supposed it to be worth.

For these reasons we are of opinion that the court below erred in adjudging the conveyances to Stewart of the houses and lots on Crosby, Jersey and Prince streets, in New York, to be void, requiring Mrs. Stewart to convey the same to the assignee in bankruptcy, and declaring his estate liable for the rents and profits of the same. Decree reversed, with directions to enter a decree in conformity with this opinion.

Opinion by MR. JUSTICE FIELD, JUSTICES SWAYNE and BRADLEY concurring.

I concur in the decree of reversal in this case, but I go further than the majority of the court. I think that the chattel mortgages were properly filed with the register in the city of New York. The mortgagors were partners doing business there. They are described in the mortgages as of that city. The property mortgaged was furniture in a hotel situated there, and it is to the records of the city that one would naturally resort to ascertain whether there were any liens upon it. The domicile of a firm, under the law requiring chattel mortgages to be filed in the county where the mortgagors reside, is, in my judgment, the place where it is located and carries on its business. I am of opinion, therefore, that the chattel mortgages in this case held the property against the judgments of the creditors.

JOHNSON v. PATTERSON.

(Circuit Court for Georgia: 2 Woods, 443-446. 1875.)

Opinion by Woods, J.

STATEMENT OF FACTS.— The facts are as follows: On February 13, 1873, Patterson made and delivered to Johnson his two promissory notes of that date for \$3,000 each, due respectively on the 1st days of October and November next following, and at the same time placed in the hands of Johnson planters' bonds to an amount exceeding \$6,000, with the promise that afterwards the bonds were to be returned, and a mortgage of his stock of goods was to be made by Patterson to Johnson, to secure the notes. This agreement was carried out by the execution and delivery by Patterson to Johnson, on March 27, 1873, of a chattel mortgage of that date, upon all the goods, wares, merchandise, accounts, notes and other effects belonging to the store of Patterson, conditioned for the payment of said two notes for \$3,000 each. Patterson retained possession of the stock of goods and the notes and accounts, and continued to sell the goods and collect the notes and accounts just as if no mortgage had been made. As he made sales of goods, he replenished his stock with other goods. In short, he continued his business precisely as he had done before the mortgage was executed. No record was made of the mortgage until November 12, 1873. On December 4, 1873, Patterson was adjudged a bankrupt.

After the execution of the mortgage, and before its record, Patterson contracted debts to the amount of \$11,171. These debts were for goods to replenish his stock. After all this Johnson, the payee of the notes made by Patterson, also went into bankruptcy. The assignee of Patterson sold the goods and other property covered by the mortgage, and the money is now in the registry of the court. The contest in this case is between the assignee of Johnson, who claims that this fund should be first applied to the payment of the notes for \$3,000 each held by him; and the assignee of Patterson, who claims that the mortgage was ineffectual and that the proceeds of the mortgaged property should be distributed among all the creditors of Patterson *pro rata*.

§ 1782. *Chattel mortgage with possession and power of sale retained by the mortgagor.*

To one unacquainted with the statute law of this state, this case would present no difficulty whatever. The general rule is, that a chattel mortgage, with possession left in the mortgagor, and power of sale, is fraudulent and void. *In re Kahley*, 2 Biss., 383; *Harvey v. Crane*, 2 id., 496; *Hawkins v. First Nat. Bank of Hastings*, 1 Dill., 462; *In re Manly*, 2 Bond, 261. The code of

Georgia, however, has this provision: "Sec. 1954. A mortgage in this state . . . may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches upon the purchases made to supply their place." In the case of *Goodrich v. Williams*, 50 Ga., 425, the supreme court of this state construed this statute, and declared that "a mortgage upon a stock of goods then on hand, and upon the additional purchases as they should be made, is a good lien under our laws to the amount of the goods on hand at the time, and is good upon future purchases to that extent, even if those purchases be unpaid for, except as against any legal liens or title that may be against the goods in the hands of a third person." Therefore, if the mortgage had been recorded according to law, we should, under this provision, be constrained to hold it good, notwithstanding the mortgagor was allowed the power of sale.

§ 1783. *In Georgia a mortgage is valid against all persons except purchasers before the mortgage is recorded.*

But the mortgage was not recorded according to law. Section 1955 of the code of Georgia declares that a mortgage must be "recorded within three months from its date." This mortgage was not recorded till seven months and a half after its date, and in the mean time Patterson contracted the debts which are now represented by his assignee, who claims that, as to these debts, the mortgage is void. But the assignee of Johnson claims that under section 1953 of the code of Georgia "mortgages not recorded within the time required remain valid as to the mortgagor," and are only "postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage;" and as the general creditors of Patterson have no lien and are not purchasers, the mortgage is good as against them. Such seems to be the law of this state. It is so positively enacted and has been so construed by the supreme court of the state as to give it this effect. In *Hardway v. Semmes*, 24 Ga., 305, it was held that "if a mortgagee does not record his mortgage in three months he risks having it postponed to after-made mortgages, and to judgments obtained before he foreclosed it, but that is all he risks." The same doctrine, substantially, has been held elsewhere. In *Cragin v. Carmichael*, 2 Dill., 519, it was held that, under the laws of Iowa, the assignee in bankruptcy, in assailing a mortgage which was recorded at the time of the commencement of proceedings in bankruptcy, must show something more than that debts were created without notice of it before it was recorded. It seems to me that there can be no doubt that, under the law of this state, this mortgage, although unrecorded, was valid as against all persons except those who had obtained liens upon or become purchasers of the mortgaged property prior to the actual record of the mortgage. There are no such persons. All the creditors represented by Johnson's assignee are general creditors without lien.

If the mortgage is valid under the state law, it is valid to the same extent under the bankrupt act. *In re Griffiths*, 1 Low., 431; *Potter v. Coggeshall*, 4 N. B. R., 73; *In re Dow*, 6 id., 10; *In re Wynn*, 4 id., 23. Section 14 of the bankrupt act (R. S., sec. 5052) declares that "no mortgage of any vessel or of any other goods or chattels made as a security for any debt in good faith and for a present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state, shall be invalidated or affected by any assignment in bankruptcy." This section has uniformly been con-

strued not to affect any mortgage good under the laws of the state where executed.

"This provision cannot enlarge the rights or title of the assignee or make a mortgage invalid against him which but for the provision would have been valid. It appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages would be affected by the assignment, and not with any view of construing the laws regarding record; and so if the mortgage be one that requires no record, or if it be executed in a state having no record, or if record is not required between the parties, the provision will not defeat it." *In re Griffiths*, 1 Low., *supra*.

In my judgment, therefore, as the mortgage in question in this case is good by the law of Georgia as against the mortgagor and against all others who had not acquired liens or become purchasers before the actual record, in spite of the fact that the mortgage was not recorded and that the mortgagor remained in possession with power of sale, I must hold it to be good as against the assignee of the mortgagor and the general creditors whom he represents. Decree of district court reversed.

§ 1784. Subsequent purchasers and creditors.—The New York statute declares the mortgage, unless filed, to be void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith. The creditors spoken of are those having judgments and executions. Subsequent purchasers or mortgagees in good faith are those who pay or advance their money upon the security of the property, without knowledge of the previous incumbrance. *In re Collins*, 12 Blatch., 548, 551.

§ 1785. A mortgage recorded before the passage of an act relating to the recording of such an instrument, and recorded in accordance with such act, is notice under the statute. *Fowler v. Merrill*, 11 How., 875 (§§ 1877-80).

§ 1786. Property in two states.—Where personal property conveyed in a mortgage is partly in one state and partly in another, and the mortgage has been duly recorded in only one of the states, its validity in that state for the property therein is not affected by its invalidity in the other state. *In re Soldiers' Business Messenger & Dispatch Co.*, 3 Ben., 204, 205.

§ 1787. Residence of mortgagor.—In New York a chattel mortgage must be filed in the county in which the mortgagor resides at the time of its execution, in order to be valid against the mortgagor's creditors or his assignee in insolvency. A filing in any other county is ineffectual. *Platt v. Stewart*, 18 Blatch., 481, 498.

§ 1788. A recital of the place of residence of the mortgagor in the deed is not sufficient; and although such a recital might estop the mortgagor to deny that he resided in the place so recited, it does not estop his other creditors to show that the recital is erroneous. *Ibid*.

§ 1789. In all cases where a chattel mortgage is given by more than one, and the mortgagors reside in the state, but in different townships or cities, the mortgage must be filed in each and every of the townships or cities in which any of the mortgagors reside; and a filing in one only of such townships or cities, or in any number less than all, is not in compliance with the statute, and is of no validity or effect whatever. *Kane v. Rice*,* 10 N. B. R., 469, 474.

3. What Instruments within the Recording Acts.

§ 1790. A bill of sale intended for security operates as a pledge and not a mortgage, and neither requires nor admits of registration. *Ex parte Fitz*, 2 Low., 519.

§ 1791. A mere agreement about personal property, if not a mortgage, need not be recorded. *Almy v. Wilbur*,* 2 Woodb. & M., 371.

§ 1792. An instrument evidencing a conditional sale need not be recorded as a chattel mortgage in order to be valid against creditors or subsequent purchasers. *Rogers Locomotive Works v. Lewis*, 4 Dill., 158.

§ 1793. Realty and personalty.—Under a statute which provides for the recording of mortgages of personal property in the same office in which conveyances of real property are recorded, and simply requires the recording officer to record such mortgages in a book kept for the purpose, a mortgage of both realty and personalty may be recorded in a book of

records kept for recording mortgages of real estate, if it be shown to be the usage of the office to record such mortgages in the book containing mortgages of real estate. *Anthony v. Butler*, 18 Pet., 423 (§§ 1689-96).

4. Refiling.

§ 1794. In New York a chattel mortgage (not renewed and refiled within one year in accordance with the statute) is void as against creditors, and as against the assignee in bankruptcy representing them. *In re Leland*, 10 Blatch., 503.

§ 1795. Under the laws of Michigan requiring the refile of a mortgage at the end of a year, the mortgagee by taking possession of the mortgaged property before the expiration of that time is excused from the obligation of refile. *Wood v. Weimar*, 14 Otto, 786 (§§ 1710-1716).

§ 1796. Canal boats.—Under the statute of New York of April 28, 1864, in regard to mortgages of canal boats and the like, a mortgage of a canal boat need not be refile after the refile within thirty days before the expiration of the year from the original filing. No subsequent refile after the first is necessary to keep the mortgage a continuing security. *Canal Boat Independence*, * 9 Ben., 395.

5. Law of the Place of Contract.

§ 1797. Removal to another state.—Where a mortgage is duly recorded according to the laws of the state where the mortgagor resides, and where the property is at the time, the subsequent removal of the mortgagor, with the property, to another state does not affect the validity of the mortgage as against subsequent purchasers and incumbrancers in the latter state. *Bank of United States v. Lee*, 18 Pet., 107.

§ 1798. It is not required that a trust deed of property, recorded in Virginia, should be recorded in the District of Columbia upon its removal thither. *Bank of United States v. Lee*, 5 Cr. C. C., 319, 326.

§ 1799. A deed of trust of personal property made in Kansas must be governed by the laws of Kansas in force when the deed was executed. *Samuels v. Holliday, McCahon*, 214, 217.

§ 1800. If a mortgage be made in New York, where the parties reside, of property situate in Illinois, and the property be attached in the latter state before the mortgage is there recorded, or the property delivered in accordance with the laws of that state, the validity of it is determined by the laws of that state, and not by the laws of New York. *Green v. Van Buskirk*, 7 Wall., 139.

§ 1801. The fiction of law, that the domicile of the owner draws to it the personal estate which he owns, wherever it may happen to be located, is by no means of universal application, and yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined. *Ibid.*

6. Actual Notice.

§ 1802. Actual notice may be proved by facts and circumstances. A purchaser of property at a sale upon execution against the mortgagor was properly charged with notice of a mortgage upon it, upon proof that the existence of the mortgage was known and talked of in the neighborhood, and publicly proclaimed at the sale. *Merrill v. Dawson*, * Hemp., 563.

§ 1803. Bona fide purchaser.—One can be protected as a *bona fide* purchaser only to the extent of his payments made before he received such notice as should have prevented him from making further payments. The purchase money must be actually paid by the purchaser and not merely secured to be paid, before any notice is received, to entitle him to the position of a *bona fide* purchaser, for otherwise he would not be hurt by the prior mortgage. *Ibid.*

§ 1804. In Indiana, an unrecorded mortgage of chattels is absolutely void except as between parties, and it is void even as against a purchaser having notice of it. *Moore v. Young*, 4 Biss., 128, 135.

§ 1805. In Iowa, an unrecorded mortgage of chattels is valid against creditors attaching the mortgaged property, with notice of the mortgage. *Cragin v. Carmichael*, * 11 N. B. R., 511.

V. FRAUDULENT MORTGAGES.

1. Fraud Arising from the Mortgagor's Continued Possession Without Record.

[See FRAUD.]

§ 1806. Contract for possession.—Where a mortgage or a lien is created on chattels by contract, it is competent for the parties to agree that the possession and use thereof shall be retained by the mortgagor until the breach of the condition. *Mitchell v. Winslow*, 2 Story, 630, 645.

§ 1807. The mortgagor's possession is only *prima facie* evidence of fraud. If, however, the intent in not changing possession was bad, fraud is inferred from such intent. If the mortgagor's possession be provided for by contract of the parties, and it be consistent with their rights, and be open and honest, no inference of fraud is to be drawn therefrom. *Almy v. Wilbur*,* 2 Woodb. & M., 371.

§ 1808. The necessity of recording mortgages arises from the statutes alone; no doubt exists, however, that they are good and valid without record as against all who have notice thereof. *Ibid.*

§ 1809. Possession consistent with the deed.—Mortgages of personal property are perfectly good and supportable between the parties and against creditors where there is no fraudulent intent, and the possession remains in the owner or mortgagor of the property, and is consistent with the deed and the arrangements made between the parties. *Fletcher v. Morey*, 2 Story, 555, 569.

§ 1810. Possession of the mortgaged property, whether before or after forfeiture, is not fraudulent, nor does it need to be explained to be consistent with honesty, provided such possession is provided for by the deed or is consistent with it. *Merrill v. Dawson*,* Hemp., 563.

§ 1811. When delivery is impossible.—Sales of chattels which are so situated that there can be no delivery at the time are within the exceptions to the general rule requiring delivery, and the sale is perfect if the vendee take possession within a reasonable time. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 449.

§ 1812. In Illinois, the owner of personal property cannot sell it absolutely or conditionally, and still continue in possession of it. In order to preserve a mortgage or lien upon the property, the instrument must be recorded; otherwise, so far as third persons are concerned, it has no validity. Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. Nor is the transaction changed by the agreement assuming the form of a lease. *Hervey v. Rhode Island Locomotive Works*, 3 Otto, 664, 672.

2. *Frauds under Statute and at Common Law.*

§ 1813. More than sufficient property.—The fact that a mortgage conveys more property than is sufficient to secure the debt provided for does not make it fraudulent. *Downs v. KISSAM*, 10 How., 102.

§ 1814. Mortgagor's declarations against title.—A mortgagee's title cannot be defeated by the subsequent declarations of the mortgagor impeaching it as void against his creditors. *Merrill v. Dawson*,* Hemp., 563.

§ 1815. Fraudulent intent.—A provision of statute that fraudulent intent shall be deemed a question of fact precludes the application of the rule of constructive fraud to a mortgage or other instrument; but this provision is held to apply only to cases of actual and intended fraud, and not to written instruments which the law adjudges to be fraudulent on their face and consequently void. *Robinson v. Elliott*, 22 Wall., 513.

§ 1816. Void in part.—The mortgage of a stock of mouldings, and all the renewals thereof, and also other property, may be valid as to such other property though void as to the stock of mouldings and lumber. *In re Perrin*,* 7 N. B. R., 283. Where a mortgage covers certain other property to be used by the mortgagor as his own and for his own benefit, it is a fraud upon his other creditors and invalidates the whole instrument. *In re Burrows*,* 7 Biss., 526.

§ 1817. A mortgage may be valid as to a part of the property described in it, and voidable as to a part. *Barron v. Morris*,* 14 N. B. R., 371.

§ 1818. A mortgage covering a stock of goods and fixtures, although void as to the stock of goods by reason of the mortgagor's right to continue in possession and sell them, is held binding upon the fixtures, as to which the power of sale did not apply. *In re Kahley*, 2 Biss., 383, 386.

3. *Fraudulent Preferences under Bankrupt and Insolvent Laws.*

[See DEBTOR AND CREDITOR, subtitle BANKRUPTCY.]

§ 1819. Not in usual course of business.—Objection under a bankrupt law that a chattel mortgage is not in the usual and ordinary course of business, and is, therefore, *prima facie* fraudulent, is not applicable to a mortgage upon a stock of goods made to secure an honest debt, wholly or partly incurred at the time. *Moore v. Young*, 4 Biss., 123.

§ 1820. A sale of a stock of goods by an insolvent debtor to a creditor who holds a mortgage upon the property, though it be invalid under the bankrupt law, does not avoid the creditor's rights under his mortgage. *In re Kahley*, 2 Biss., 383, 386.

§ 1821. Mortgage to correct error in prior mortgage.—A mortgage made in good faith for the purpose of correcting an error in a prior mortgage of the same property, and to secure the same debt, does not contravene the bankrupt act, though the latter mortgage be made and recorded within two months of the mortgagor's bankruptcy, but more than four months after the execution of the first mortgage. The mortgagee's security in such case dates from the execution of the original mortgage. *Player v. Lippincott*, 4 Dill., 124.

4. *Fraud Arising from the Mortgagor's Possession after Default.*

§ 1822. In Illinois, a chattel mortgage is fraudulent and void as against creditors, if the mortgagor retains possession and the mortgagee delays in taking possession after condition broken. *In re Forbes*, 5 Biss., 510, 512.

§ 1823. The mortgagee cannot, by taking possession of the property after an unreasonable delay on his part which has invalidated the mortgage, acquire any rights thereunder; and a bill given to him by his mortgagor under such circumstances is a preference. *Ibid.*

§ 1824. In Montana, the mortgagee of personal property must take possession after default, or must endeavor so to do with all due promptitude and diligence. If he fails to do so, he will lose his lien as against a purchaser in good faith from the mortgagor in possession. *Travis v. McCormick*,* 1 Mont. T'y, 148; S. C., id., 347.

§ 1825. The unexplained failure of the mortgagee to take possession of the property, or to foreclose his mortgage within two months after maturity of the debt, is laches amounting to fraud. *Ibid.*

§ 1826. The question of diligence in such a case is a mixed question of law and fact. *Ibid.*

§ 1827. In Colorado, the circumstance that the mortgagee allows the property covered by the mortgage to remain in the possession of the bankrupts, after the condition of the mortgage was broken, in no way affects the validity of that instrument as between the parties. Although void as against the creditors of the bankrupts and purchasers from them, it is still a lien on the property in favor of the mortgagees so long as the property remains in the possession of the bankrupts. *Halleck v. Tritch*,* 17 N. B. R., 293, 298.

VI. MORTGAGES OF MERCHANDISE WITH POWER OF SALE IN THE MORTGAGOR.

SUMMARY — *Mortgage in Oregon with power of sale in mortgagor, void*, § 1828.

§ 1828. Under a statute of the state of Oregon making all conveyances of goods and chattels in trust for the person making the same void as against his existing or subsequent creditors, it is held that a mortgage of a stock of goods, accompanied by an oral agreement or understanding between the parties that the property should remain in the possession of the mortgagor, and be disposed of by him in the course of his business, and the proceeds applied to his own use, is, in effect, an assignment of such property in trust for the person making it, and is void as against both existing and subsequent creditors of the mortgagor. *Catlin v. Currier*, §§ 1829-30.

[NOTES.—See §§ 1831-1846.]

CATLIN v. CURRIER.

(Circuit Court for Oregon: 1 Sawyer, 7-14. 1870.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The material question in this case is involved in the first conclusion of law stated in the findings of the court. Is the writing executed by Daly to the defendant, purporting to mortgage to the latter certain goods, when taken in connection with the contemporaneous oral agreement and understanding of the parties, a simple mortgage or a conveyance or transfer of the property in question, in trust, for the use and benefit of Daly, and therefore void as against creditors? This question does not arise under any provision of the bankrupt act. While there is some reason for supposing that

Daly was insolvent when he executed the so-called mortgage to the defendant, yet there is nothing in the case to show that he owed any other debts than the one due the defendant. Under these circumstances, even if Daly was insolvent, it could not be said that the writing was either executed or received, with an intention to give or receive a preference, or to hinder or delay existing creditors, or to evade or defeat any provisions of the bankrupt act.

§ 1829. *A mortgage of a stock of goods, with verbal authority to the mortgagor to sell them, is fraudulent and void as to creditors.*

The question therefore turns upon the statute of the state and the general principles of law applicable to such a transaction. By the former it is declared that a mortgage of personal property unaccompanied by immediate possession creates a disputable presumption of fraud as against the creditors of the mortgagor, unless the same is duly filed or recorded as provided by law (Or. Code, 339); and also that all conveyances and transfers of goods and chattels, in trust for the person making the same, shall be void as against the creditors, existing or subsequent, of such person. Or. Code, 655. A chattel mortgage is a pledge of personal property as a security for the performance of some act—such as the payment of an existing debt. The law allows the property pledged to remain in the possession of the mortgagor if the mortgage is put on record as notice to the world. But if the mortgage be also coupled with a condition or agreement that the mortgagor may treat the goods as if he were the owner of them—may sell them at his option and receive the proceeds to his own use—such condition or agreement avoids the mortgage. The two cannot stand together. Such use of the mortgaged property by the mortgagor is utterly inconsistent with the idea of giving a pledge or security to the mortgagee. In legal effect it is a sham, a nullity—a mere shadow of a mortgage, only calculated to ward off other creditors—a conveyance in trust for the benefit of the person making it, and therefore void as against creditors.

In this case it is shown by the finding of the court (and the testimony of the defendant was clear and unequivocal upon that point) that by the understanding between the defendant and Daly, the latter was to continue, not only in the possession of the goods, but to sell and dispose of them in the course of his business, at his option, and take the proceeds to his own use; and so he did with the knowledge and consent of the defendant until the defendant took possession near the close of the year 1868. As against the other creditors of the bankrupt, the defendant cannot claim anything in this property by such a transaction. *In re Manly*, 2 L. T., 89, decided by Mr. Justice Leavitt of the southern district of Ohio, is a case on all-fours with the one under consideration, and there the mortgage was held void as to creditors. The case of *Godchaux v. Mulford*, 26 Cal., 316, cited by counsel for defendant, is not in point. In that case it was held that in all mortgages of goods and chattels, whether accompanied by possession or not, there is a trust created in favor of the mortgagor, as to the surplus, if any, and that the statute of frauds which declares all transfers of goods made in trust for the party making the same, to be void as to creditors, does not apply to such a trust. That the trust as to the surplus is not the object of the transfer, but a mere incident, and does not bring the transaction within the purview of the statute. But, in the case at bar, the trust created was something more than a mere legal implication that the surplus, if any, after paying the debt of the defendant, should be held by him for the benefit of Daly. As has been shown, it was an express agreement that, notwithstanding the mortgage to the defendant, Daly might proceed to dispose

of the goods as his own, and receive the proceeds to his own use. This was an express trust in favor of Daly, as to all the mortgaged goods, which rendered the mortgage itself totally inoperative so long as the goods were allowed to remain in Daly's possession. As the mortgage became forfeited within a month from its execution, for the want of payment of the first instalment of interest on the debt, it was in the power of the defendant to have terminated this trust at any time thereafter by taking the goods into his own possession. But he saw proper to leave them with Daly, with the power to use and dispose of them as his own, and now the law and good morals agree that the defendant should not be preferred to other creditors who, it may be, trusted Daly upon the faith of this unqualified possession and apparent absolute ownership.

But it is said by the counsel for defendant that the question of "fraudulent intent," under the statute, is a question of fact (Or. Code, 657), and that, as the court has found as a matter of fact that the defendant acted in the premises without any intent to defraud any one, the only conclusion of law proper to be drawn from the facts is in favor of the validity of the mortgage. This argument, it seems to me, is based upon two erroneous assumptions. *First*, that the fraudulent intent of which the statute speaks as sufficient to avoid a mortgage is, in any case, the intent of the *mortgagee*; and, *second*, that the question of "fraudulent intent" is involved in this case at all. The "fraudulent intent" which, by section 52 of the chapter on conveyances (Or. Code, 657), is made a question of fact in all cases arising under titles II, III and IV of that chapter, is the intent of the grantor or vendor, and not that of the grantee or vendee. It is not found, in this case, whether Daly, the alleged mortgagor, acted in good faith or not. It is possible that he acted in bad faith, notwithstanding the defendant acted in good faith. But the fact is not material. Nor does section 52 of the chapter on conveyances include the provision of the statute (Or. Code, 339) which furnishes the special rule as to when a sale or assignment or mortgage of personal property is to be deemed fraudulent and void as to creditors, because not accompanied by an immediate delivery, and a continued change of possession.

As to the second error of the argument under consideration, it is sufficient to say that such a mortgage or conveyance as this — a conveyance in trust for the party making it — is declared void as to creditors, as a matter of public policy, without reference to the intent of the parties thereto. The law assumes absolutely, and beyond doubt correctly, that in no circumstances can such a transaction be upheld in justice to creditors. That is this case, and whatever may have been the intention of the parties, the law for the protection of the general creditors of the debtor declares the so-called mortgage void, because made in trust for Daly.

§ 1830. *Decree of foreclosure, before sale, does not affect rights of third persons in the goods.*

As to the second conclusion of law, the matter seems too plain for argument. The decree foreclosing the mortgage, at most, only extinguished the right of redemption as between Daly and the defendant. There was no seizure or sale of the goods under the decree, and beyond extinguishing the right of redemption, as stated, it had no effect upon the property in the goods, even between the mortgagor and mortgagee. But, more than that, the plaintiff was not a party to this decree, and the writing upon which it is based, however valid between the parties to it, is void as to the general creditors whom he represents. There must be a judgment for the plaintiff for the value of the goods.

§ 1831. Mortgage void where mortgagor retains power of sale.—Where one mortgages a stock of goods and continues in possession carrying on his business in the ordinary course, manufacturing the goods mortgaged, and selling the same as before, the mortgage is fraudulent and void as to creditors. *City National Bank v. Goodrich*, * 3 Colo. T'y, 139.

§ 1832. A mortgage of a stock of goods and additions thereto, which declares that the end and purpose of the mortgage is, that it shall attach to all new goods added to the stock, and be released from such as may be sold in the due course of business, so that the mortgage may be a continuing one, is fraudulent and void. *In re Bloom*, * 17 N. B. R., 425.

§ 1833. A mortgage of a stock of goods with all additions thereto, to secure a present debt payable upon demand, delivery of possession not accompanying nor following the deed, is fraudulent and void as to creditors, though it be duly recorded. *Noyes v. Brent*, 5 Cr. C. C., 656.

§ 1834. Where a retail dealer in books and stationery gave a mortgage of his entire stock in trade, and was permitted to hold possession and carry on business as before, the transaction is void in law as against his assignee in bankruptcy, though there was no express provision in the mortgage that the mortgagor should remain in possession and dispose of the property. *In re Manly*, 2 Bond, 261, 265.

§ 1835. In Indiana, a mortgage upon a stock of merchandise, which contains a stipulation that the mortgagor may sell and dispose of the property, but contains no covenant that the mortgagor shall apply the proceeds of sales of the mortgaged stock to the payment of the mortgage debt, or the debt of any other creditor, is void upon its face as against other creditors of the mortgagor. *In re Burrows*, * 7 Biss., 526.

§ 1836. Under the statute of frauds of Indiana, a mortgage of a stock of goods, which permits the mortgagor to remain in possession and dispose of the goods in the usual course of trade, is fraudulent at law and void. *Robinson v. Elliott*, 23 Wall., 518.

§ 1837. Under the laws of New York, a chattel mortgage is void when there is a contemporaneous agreement that the mortgagor shall retain possession and make sales from time to time and receive the proceeds for his own use. *In re Cantrell*, 6 Ben., 482.

§ 1838. In Kansas.—A mortgage of a stock of goods executed, but not recorded, is void, if the mortgagor remains in possession and continues to sell the goods with the assent of the mortgagee. *Bank of Leavenworth v. Hunt*, 11 Wall., 391.

§ 1839. In Wisconsin, although a mortgage of a retail stock of goods, which the mortgagor is allowed to sell from day to day, is void as to creditors, the creditors cannot question the validity of the mortgage, unless there is a deficiency of assets, so that they are prejudiced by the mortgagee's claim. *Bowen v. Clark*, 1 Biss., 128, 130.

§ 1840. In Wisconsin, a mortgage on a stock of goods bought and kept for sale, which the mortgagor habitually sold from time to time, is void as to the whole stock. *In re Kahley*, 2 Biss., 387.

§ 1841. Proof of the fact that the mortgagor is authorized to sell is made by producing the mortgage, if the authority to sell be inserted in that; but, if it is not, it may be proved by evidence *aliunde*. *Ibid*.

§ 1842. A mortgage on a stock of goods and fixtures may be valid as to the fixtures, though invalid as to the goods. *Ibid*.

§ 1843. Mortgage with power of sale in mortgagor not void.—A provision in a mortgage duly recorded, that the mortgagor may remain in possession, with power to use and dispose of the property, is not against the policy of the law, and does not make it fraudulent as to other creditors. *Mitchell v. Winslow*, 2 Story, 630, 647.

§ 1844. A mortgage of chattels, which permits the mortgagor to retain possession and deal with the property as owner, is not void upon its face. The question of fraud under such a mortgage is one of fact to be determined by the jury. *Brett v. Carter*, 2 Low., 458.

§ 1845. A clause in a chattel mortgage which constituted the mortgagor the agent of the mortgagee to dispose of the mortgaged goods and account for their proceeds, with no right or power to sell for his own use, does not render the mortgage fraudulent on its face. *Hawkins v. Hastings Bank*, 1 Dill., 453, 463; S. C., 2 N. B. R., 337.

§ 1846. A chattel mortgage is not invalidated by the mere fact that the mortgagee permits the mortgagor to sell and dispose of the mortgaged chattels as his own, this being a matter affecting the mortgagee only, who is not bound to apply the proceeds of the incumbered property to the secured debt. *Barron v. Morris*, * 14 N. B. R., 371.

VII. RIGHTS AS BETWEEN THE PARTIES.

§ 1847. Mortgagor considered the owner.—Until actual foreclosure or sale, the mortgagor is in equity considered as the owner of the property; and in case the property consist of corporate stock, the mortgagor has the right to vote upon it, and may compel the mort-

gagee, in case the stock has been transferred to his name, to give him power of attorney to vote upon the stock. *Vowell v. Thompson*,* 3 Cr. C. C., 430.

§ 1848. The possession of the mortgagor is not adverse, but under the mortgagee, and the former cannot remove or conceal the property and plead conversion and adverse possession against the latter. *Union Bank of Louisiana v. Stafford*,* 12 How., 327. Affirmed in *New Orleans Canal & Banking Co. v. Stafford*,* 12 How., 343.

§ 1849. Mortgaged property is subject to forfeiture under the revenue laws of the United States; but a *bona fide* mortgagee of distilled spirits will be protected in his mortgage, although the legal title of the spirits mortgaged remains in the distiller. *United States v. 373 Pipes of Spirits*, 5 Saw., 421, 425.

§ 1850. If the mortgagor confuses the mortgaged goods with his own, without the consent of the mortgagee, the latter may take all the goods. He is not compelled to suffer from the mortgagor's wrongful act. *Merchants' National Bank of St. Paul v. McLaughlin*, 1 McC., 258 (§§ 1702-1705).

§ 1851. The assignment of a note secured by a mortgage is in equity an assignment of the mortgage. *Ellett v. Butt*, 1 Woods, 214 (§§ 1736-38).

§ 1852. Principal debtor entitled to surety's mortgage.—If a mortgage is given by a principal debtor to secure his indorsee or other surety, and both become insolvent, the holders of the notes or other debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically. *Ex parte Morris*, 2 Low., 424, 425.

§ 1853. Mortgaged goods attached.—In Michigan mortgaged goods in the possession of the mortgagor may be attached or levied upon; but the officer must surrender them to the mortgagee on demand, after his inventory and appraisal have been completed, unless the creditor disputes the validity of the mortgage. Replevin may be maintained by the mortgagee against the officer if he refuses to deliver the property to him upon demand. *Wood v. Weimar*, 14 Otto, 786 (§§ 1710-16).

§ 1854. Where, after replevin by the mortgagee, payments are made on the mortgage debt, he cannot enforce his lien beyond the amount due when judgment was rendered. *Ibid*.

§ 1855. The statute of limitations, pleaded in favor of possession by a mortgagor, does not run till demand made upon him and refusal to return the property. *Almy v. Wilbur*,* 2 Woodb. & M., 371.

§ 1856. Mortgagee in possession accountable for use.—A mortgagee of slaves in possession of them is bound to use reasonable diligence in keeping them engaged in useful employments, so as to obtain a reasonable compensation for their labor. It is not a sufficient excuse for him to say that he managed them as they had been managed by the owner. *Bennett v. Butterworth*, 12 How., 367.

§ 1857. Mortgagee's rights after forfeiture.—The title of a mortgagee of a chattel is absolute after condition broken. If he takes possession and does not sell, the debt is satisfied to the value of the chattel when so seized. *In re Haake*, 2 Saw., 239.

§ 1858. If the property be of a perishable nature, like a ship, the mortgagee has no right to retain it for an indefinite period after condition broken, and, when the property has diminished in value by use or age, sell it, and demand of the mortgagor payment of the deficiency. *Ibid*.

§ 1859. The mortgagee has an absolute right of possession of the mortgaged property upon the mortgagor's default. *Merchants' Nat. Bank of St. Paul v. McLaughlin*, 1 McC., 258 (§§ 1702-1705).

§ 1860. A mortgage being void as to creditors because it was not filed in the county of the mortgagor's residence as required by statute, no title to the property passes to the mortgagee by reason or failure of the mortgagor to comply with the terms of the mortgage, so as to cut off any right creditors might otherwise have to contest the mortgage. *Platt v. Stewart*, 13 Blatch., 481, 498.

VIII. MORTGAGES OF SHIPS.

[See MARITIME LAW.]

§ 1861. At common law a bill of sale of a ship by way of mortgage is good as against creditors, although it be made while the vessel is lying in port, and possession be not taken by the purchaser, if, by the terms of the agreement of the parties, the mortgagor is to have the conduct and management of the voyage on which the ship is then destined. *D'Wolf v. Harris*, 4 Mason, 515.

§ 1862. The statute of the United States relating to the recording of mortgages of vessels excludes all state legislation upon the subject. Such a mortgage should be recorded in the office of the collector of the port which is the home port of the vessel, and not the

FORECLOSURE IN EQUITY AND SALES UNDER POWERS. §§ 1863-1876.

port of last registry or enrollment, when not such home port. *White's Bank v. Smith*, 7 Wall., 646.

§ 1863. **Purchaser without notice.**—If the owner of a vessel, after having given a bill of sale in the nature of a mortgage, be allowed to remain in possession and act as absolute owner without any change of her register, and he afterwards sells or mortgages the vessel to one who has no notice of the mortgage, the lien of the latter will be preferred to the mortgage. *The Romp, Olc.*, 196; *Sloop Mary*, 1 Paine, 671.

§ 1864. A bill of sale of a vessel, absolute on its face, may be shown by parol evidence to be only a mortgage. *Morgan v. Shinn*, 15 Wall., 103.

§ 1865. **Liens for supplies furnished to vessels at their home port** may, by statute, be given priority to mortgage liens. *The Illinois*, 2 Flip., 888, 417.

§ 1866. A lien for supplies or repairs upon a vessel, while in the hands of the mortgagor, may be enforced after the mortgagee has taken possession under a proceeding *in rem*. *The Granite State*, 1 Spr., 277, 278.

§ 1867. A mortgage of a vessel, duly recorded, has precedence of a lien founded upon a statute not strictly of a maritime character. *Pratt v. Reed*, 19 How., 359.

§ 1868. **Mortgagee's liability for supplies.**—A mortgagee of a vessel not in possession is not liable to contribute for supplies or repairs. He does not appoint the master or the ship's agents, and he is not bound by their acts, nor does it make any difference though the vessel be registered in his name. *Morgan v. Shinn*, 15 Wall., 103, 110.

§ 1869. **Not a bottomry bond.**—A mortgage on a vessel for money lent, which stipulates that the lender does not take upon himself the marine risks usual in cases of bottomry and hypothecation, is not a bottomry bond, and the admiralty has no jurisdiction to enforce it. *Brig Atlantic*, Newb., 514, 515.

§ 1870. **Remedy in admiralty.**—Although a mortgagee of a ship cannot maintain an action in admiralty to enforce it, yet the court, by the force of its jurisdiction over a maritime lien upon the same property, may convert this into money and may satisfy the mortgage out of the proceeds of the ship in court. *The Ship Panama, Olc.*, 843, 855; *Leland v. Ship Medora*, 2 Woodb. & M., 92.

§ 1871. If a mortgaged vessel be sold under proceedings in admiralty and the proceeds be brought into court, a mortgagee may apply by petition for the payment of his claim out of the proceeds. *Schuchardt v. Babbidge*, 19 How., 239.

IX. PAYMENT AND DISCHARGE.

§ 1872. A chattel mortgage which has been superseded by an agreement with a surety and assigned to the surety is of no validity in his hands unless it be as an indemnity against his principal, and does not exonerate him from liability on the agreement. *Harper v. Neff*,* 6 McL., 390.

§ 1873. Where a mortgagee has taken notes for interest due on the mortgage, and these are secured by a mortgage of other property, the interest will be considered as paid as against attaching creditors of the mortgagor. *Wood v. Weimar*, 14 Otto, 788 (§§ 1710-16).

§ 1874. Under the law of Louisiana a foreclosure sale of the property under execution, on a credit, neither satisfies the judgment nor novates the debt. *Union Bank of Louisiana v. Stafford*,* 12 How., 327; affirmed in *New Orleans Canal & Banking Co. v. Stafford*,* 12 How., 343.

§ 1875. **Mortgage enforced though debt barred.**—Though a debt secured by mortgage be barred by limitation, a suit as to the property is not so barred. The debt is protected by the mortgaged property and is not barred until suit for the same is also barred. *Almy v. Wilbur*,* 2 Woodb. & M., 371.

X. FORECLOSURE IN EQUITY AND SALES UNDER POWERS.

SUMMARY — *Measure of damages against mortgagor for refusal to surrender property*, § 1876.

§ 1876. The measure of damages for the refusal of the mortgagor to surrender the property upon a decree to that effect, in a suit in equity to foreclose a mortgage, is the value of the property at the time of the failure to obey the decree. *Fowler v. Merrill*, §§ 1877-1880.

[NOTES.—See §§ 1881-1884.]

FOWLER v. MERRILL.

(11 Howard, 375-397. 1850.)

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.—This was an appeal from a decree of the circuit court of the United States for the district of Arkansas. The decree was in favor of Merrill, on a bill in chancery to foreclose a mortgage of certain negroes, described therein, and executed to him November 25, 1837, to secure him for indorsing two notes made in April and June, 1837, the first payable in one year and the other in two years, for \$12,578.42 in the aggregate. These notes run to F. L. Dawson or order, and were by him indorsed to the plaintiff, Merrill, and by him to the Planters' Bank for Dawson, who obtained the money thereon for himself. This mortgage was recorded December 29, 1837. The notes not being taken up by Dawson, Merrill was compelled to pay their amount and interest on the 4th of March, 1842. The bill then proceeded to aver that the defendants below, viz., James L. Dawson, James Smith, William Dawson, and others, had since got possession of these negroes, some of one portion of them and some of another. And that, although they were bought with full notice of Merrill's prior rights to them under the above mortgage, yet the respondents all refuse to deliver them to him, or pay their value and hire towards the discharge of the mortgage. Whereupon he prayed that each of them be required to deliver up the negroes in his possession, and account for their hire, or to pay their value. The court below decided that \$18,934 be paid to Merrill by the respondents, excepting Mrs. Bayler, and on failure to do it, that the redemption of them be barred, and other proceedings had, so as eventually to restore the slaves or their value to the mortgagee. Several objections to this decree and other rulings below were made, which will be considered in the order in which they were presented.

§ 1877. *The judge of a probate court in Mississippi is a judge of a county court in the sense of the act of congress. 1 Stats. at Large, 88.*

Some of the depositions which were offered to prove important facts had been taken before "a judge of the probate court" in Mississippi, when the act of congress allows it in such cases before "a judge of a county court." 1 Stats. at Large, 88, 89.

But we think, for such a purpose, a judge of probate is usually very competent, and is a county judge within the description of the law. In Mississippi, where these depositions were taken, a probate court is organized for each county, and is a court of record, having a seal. Hutch. Dig., 719, 721. Under these circumstances, were the competency of a probate judge more doubtful, the objection is waived by the depositions having been taken over again in substance before the mayor of Natchez. The other objections to the depositions are in part overruled by the cases of *Bell v. Morrison*, 1 Pet., 356, and *Patapsco Ins. Co. v. Southgate*, 5 Pet., 617. On the rest of them not so settled, we are satisfied with the views expressed below, without going into further details.

The next exception for our consideration is, that the time of the execution of the mortgage is not shown, and hence that it may have been after the rights of the respondents commenced. But it must be presumed to have been executed at its date till the contrary is shown; and its date was long before. Besides this, it was acknowledged probably the same day, being certified as done the 24th of November, 1837. And though this was done out of the state, yet if

not good for some purposes, it tends to establish the true time of executing the mortgage. It must also have been executed before recorded, and that was December 29th of the same year, and long before the sale in October, 1841, under which the respondents claim. The objection that the handwriting of the record is Dawson's does not impair this fact, or the legality of the record as a record, it having doubtless been allowed by the register, and being in the appropriate place in the book of records.

It is next insisted that, as the negroes were left in the possession of Dawson after the mortgage, and were seized and sold to the respondents in October, 1841, to pay a debt due from Dawson to the Commercial Bank of Vicksburg, and as the respondents were innocent purchasers, and without notice of the mortgage, the latter was consequently void. This is the substance of several of the answers. Now, whether a sale or mortgage, without changing the possession of the property, is in most cases only *prima facie* evidence of fraud, or is *per se* fraud, whether in England or in some of the states, or in Arkansas, where this mortgage and the sale took place, may not be fully settled in some of them, though it is clear enough in others. See cases cited in 2 Kent's Com., 406-412. So, whether a sound distinction may not exist at times between a mortgage and a sale, need not be examined, though it is more customary in all mortgages for the mortgagor honestly to retain the possession than to pass it to the mortgagee. *United States v. Hooe*, 3 Cranch, 88; *Haven v. Low*, 2 N. H., 15. See 1 Smith's Lead. Cas., 48, note; *Brooks v. Marbury*, 11 Wheat., 82, 83; *Bank of Georgia v. Higginbottom*, 9 Pet., 60; *Hankins v. Ingolls*, 4 Blackf., 35. And in conditional sales, especially on a condition precedent *bona fide*, the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled. See in 9 Johns., 337, 340; 2 Wend., 599. See most of the cases collected in 2 Kent's Com., 406.

§ 1878. *If a mortgage has been recorded before the law passed which required such papers to be recorded, it is sufficient.*

But it is unnecessary to decide any of these points here, as, in order to prevent any injury or fraud by the possession not being changed, a record of the mortgage is in most of the states required, and was made here within four or five weeks of the date of the mortgage, whereas the seizure and sale of the negroes to the respondents did not take place till nearly four years after. Yet it is urged in answer to this, that the statute of Arkansas, making a mortgage, acknowledged and recorded, good, without any change of possession of the articles, did not take effect till March 11, 1839, over a year after this record. Such a registry, however, still tended to give publicity and notice of the mortgage, and to prevent as well as repel fraud, and it would, under the statute of frauds in Arkansas, make the sale valid, if *bona fide* and for good consideration, unless against subsequent purchasers without notice. R. S., ch. 65, sec. 7, p. 415. There is no sufficient proof here of actual fraud, or *mala fides*, or want of a full and valuable consideration. And hence the objection is reduced to the mere question of the want of notice in the respondents. In relation to that fact, beside what has already been stated, evidence was offered to show that the existence of the mortgage was known and talked of in the neighborhood and proclaimed publicly at the sale. Indeed, some of the evidence goes so far as to state that, after the notice of the mortgage at the sale, the sheriff proceeded to sell only the equity of redemption, or to sell the negroes subject to any incumbrances. His own deed says expressly, "hereby conveying all the right, title, estate, interest, claim and demand of the said James L. Dawson, of,

in and to the same, not making myself hereby responsible for the title of said slaves, but only conveying, as such sheriff, the title of said James L. Dawson, in and to the same."

The proof likewise brings this actual notice home to each of the respondents before the purchase, independent of the public record of the mortgage and the public declaration forbidding the sale at the time on the ground that the mortgage existed and was in full force. According to some cases this conduct of theirs under such circumstances would seem more fraudulent than any by Merrill. *Le Neve v. Le Neve*, 3 Atk., 646; 1 Story, Eq., 395; 8 Wheat., 449. Beside this, the answer should have averred the want of notice, not only before the sale but before the payment of the purchase money. Till the actual payment the buyer is not injured, and it is voluntary to go on or not when informed that the title is in another. *Wormley v. Wormley*, 8 Wheat., 449; *Hardingham v. Nicholls*, 3 Atk., 304; *Jewett v. Palmer*, 7 Johns. Ch., 68. See *Le Neve v. Le Neve*, 3 Atk., 651.

There is another view of this transaction, which, if necessary to revert to, would probably sustain this present mortgage. The Arkansas law to make a mortgage valid if recorded, passed February 20, 1838. R. S., p. 580. This mortgage was on record then and since, and had been from December, 1837, thus covering both the time when the law took effect and when the respondents purchased. It was also acknowledged then, and though not before a magistrate in Arkansas, yet before one in Mississippi; and in most states the acknowledgment may be before a magistrate out of the state as well as in, if he is authorized to take acknowledgments of such instruments. Nothing appears in the record here against his power to do this. Some complaint is next made of the delay by Merrill to enforce his mortgage against Dawson. But it will be seen on examining the evidence that he was not compelled to pay Dawson's notes to the bank till March 4, 1842, and that these negroes were sold to the respondents and removed some months before, viz., October 11, 1841, so that no delay whatever occurred on his part to mislead the respondents.

§ 1879. *A mortgage of slaves covers the children of the slaves born while the mortgage is in force.*

It was next objected that two or three children, born since the mortgage, should not be accounted for, and one woman, who is supposed to have died after the sale and before this bill in chancery. But it seems to accord with principle that the increase or offspring should belong to the owner of the mother (2 Bl. Com., 404; *Backhouse v. Jett*, 1 Marsh., 511); and the evidence is so uncertain whether the death of Eliza occurred after this bill or before that the doubt must operate against the respondents, whose duty it was to prove satisfactorily that it happened before, in order to be exonerated. It is argued further against the decree that the respondents were made to account below for a boy, not proved clearly to have been born of one of the mortgaged women. But there seem circumstances in the case from which it might be inferred that he was so born. He was brought up among them, he was under the care chiefly of one, and no other person is shown to have been his parent. We do not see enough, therefore, to justify us in differing from the judge below on this point. The rules adopted in the circuit court for fixing the value to be paid for the negroes are also objected to, but seem to us proper. 1 Marsh., 500.

§ 1880. *The rule of damages when mortgaged property is not given up.*

The mortgaged property is given up or taken possession of by the mortgagee

usually at the time of the decree; and if not surrendered then, its value at that time, instead of the specific property mortgaged, must be and was regarded as the rule of damages. The injury is in not giving it up when called for then, or in not then paying the mortgage, and not in receiving it some years before, and not paying its value at that time. This is not trover or trespass for the taking of it originally, but a bill in chancery to foreclose the redemption of it by a decree, and hence its value at the time of the decree is the test of what the mortgagee loses, if the property is not then surrendered.

There is another exception to the estimate made of the value of the hire of the slaves. Their hire or use was charged only from the institution of this bill in chancery. This surely does not go back too far. 1 Marsh., 515. And some analogies would carry it back further, and in a case like this charge it from the period of their going into the possession of the respondents. But they object to the hire allowed, because it is said that clothing, medicine, etc., during this time should have been deducted. 1 Dana, 286; 3 J. J. Marsh., 109. We entertain no doubt, however, that in fact the hire here was estimated as the net rather than gross hire, and all proper deduction made. It is only \$100 in one case, and \$70 in others, which manifestly might not equal their gross earnings, while nothing is charged for the children. Testimony, too, was put in as to the proper amount for hire, and the judge as well as witnesses belonging to the country, and being acquainted with its usages, doubtless made all suitable deductions. There is no evidence whatever to the contrary. And on the whole case, we think the judgment below should be affirmed.

§ 1881. **Sale under power, when judicial proceedings required.**—To render a sale under a deed of trust valid, it must be conducted in accordance with the law of the state where the property is situated. If, by the laws of that state, all foreclosures are required to be by proceedings in court, a sale under the power without judicial proceedings is void, and the purchaser is accountable for the property delivered to him under such sale or for its value; and the trustee is also liable. *Samuel v. Holladay*,* 1 Woolw., 400.

§ 1882. **Under the statute of Kansas of 1859, requiring the foreclosure of all mortgages to be by proceedings in court, a sale by a trustee under a power in a deed of trust of personal property was without authority and void.** *Samuels v. Holliday, McCahon*, 214, 217.

§ 1883. **Rights of third persons before sale.**—A decree foreclosing a chattel mortgage, so long as the property has not been seized or sold under it, does not affect the rights of third persons in the goods. *Catlin v. Currier*, 1 Saw., 7 (§§ 1829-30).

§ 1884. **Where there are two funds to which a prior lien holder can resort, while a subsequent mortgagee has only one of these, the former must first enforce his lien on the fund to which the latter has no recourse.** *Merchants' National Bank of St. Paul v. McLaughlin*, 1 McC., 258 (§§ 1702-1705).

See the cross-references at the beginning of the subject.

CONVICTS.

See **CRIMES.**

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CORONERS.

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 presumed from beneficial nature of conveyance. Conv., §§ 49, 68, 69.
 if a consideration is to be paid, acceptance is to be shown. Conv., § 70.

f. *Surrender and cancellation.*

taking back deed in escrow by grantor, ineffectual. Conv., § 49.
 does not revest title. Conv., §§ 75-79.

4. ACKNOWLEDGMENT. See *Mortgages*, 1.

a. *In general.*

involuntary or under duress, is void. Conv., §§ 81, 82.
 defective, may be subsequently remedied by the legislature. Conv., § 87.
 necessity and validity of, in various states. Conv., §§ 88-123.
 and deed, may be construed together. Conv., § 126.
 seal of court on, valid, though impressed on paper. Conv., §§ 127, 128.
 certified copy should show that seal of notary was such. Conv., § 129.
 act providing that acknowledgments before clerks in other states should be valid,
 is prospective only. Conv., § 137.
 certificate of, not conclusive. Conv., § 138.
 statutes as to execution in other states do not apply to deeds under decrees. Conv.,
 § 139.

CONVEYANCES, ACKNOWLEDGMENT — continued.

- b. *Necessity of.*
whether affects validity, or only constructive notice. Conv., §§ 84, 85.
does not affect validity in Indiana. Conv., § 94.
how, in Minnesota. Conv., § 104.
deeds of married women. Conv., §§ 88-123.
- c. *Substantial compliance with statute enough.*
form not essential. Conv., § 124.
substantial requirements must be complied with. Conv., § 125.
deed may be resorted to to show substantial compliance. Conv., § 126.
- d. *Acknowledging officers.*
by notary public interested as a beneficiary of the trust, is valid. Conv., §§ 80, 82.
need not contain statement of official character of. Conv., § 130.
official character supplied by parol. Conv., § 131.
authority of must be shown, when. Conv., §§ 132, 133.
certificate is *prima facie* evidence of official character of. Conv., § 134.
an alderman is a magistrate, in Maine. Conv., § 135.
justice of the peace cannot act without his state. Conv., § 136.
- e. *Amendment of.*
possible before recording but not afterwards. Conv., § 86.
- f. *By married women.*
statute must be strictly pursued; separate examination necessary. Conv., §§ 140-143.
must appear that she understood her act; may be examined through interpreter.
Conv., §§ 140, 144.
presumption that she is of age; reacknowledgment after husband's death. Conv.,
§§ 145-147.

5. REGISTRATION AND NOTICE. See *Mortgages*, 10, 11.

- a. *In general.* See names of the several states.
"purchaser," in record acts, means purchaser of legal title. Conv., § 152.
registry of copy of deed has no effect. Conv., § 156.
what is a sufficient recording in a book. Conv., § 157.
when county divided, deed of land in new county, made before division, must be
there recorded. Conv., § 160.
filing for record held not registry, in Arkansas. Conv., § 163.
otherwise in Illinois; failure of officer does not affect grantees. Conv., §§ 169-
171.
purchasers at judicial sales protected. Conv., § 172.
but not purchasers of the "right, title and interest" of the grantor. Conv.,
§ 176.
judgment creditors are "purchasers" in Minnesota. Conv., § 180.
- b. *Necessity of registration.*
unnecessary to validity of deed at common law. Conv., §§ 148, 149, 150.
- c. *What instruments may be recorded.*
record of deed not acknowledged is ineffectual. Conv., § 151.
record of paper not required to be recorded is void. Conv., §§ 153, 154.
- d. *Effect of recording.*
gives priority of title, when. Conv., § 155.
does not relate back to record of prior contract to convey. Conv., § 158.
record of deed in one state of land in another, invalid. Conv., § 153.
- e. *Notice by record.*
recital in deed not a part of the chain of title is ineffectual. Conv., § 165.
effect of misdescription in deed operating as notice. Conv., § 322.
- f. *Actual notice.*
of prior unrecorded deed, binds purchaser. Conv., § 161.
so to attaching creditor; implied notice enough. Conv., §§ 162-164.
reading recital in deed not operating as constructive notice. is. Conv., § 166.
open and visible possession under unrecorded deed good. Conv., §§ 167, 180.

6. VALIDITY AND OPERATION.

- a. *In general.*
deed made as a compromise and to quiet title, not set aside, when. Conv., §§ 192,
193.
effect of a failure of consideration. Conv., § 204.
effect of deed by tenant in common, of particular part of the land. Conv., § 207.
deed made to confer federal jurisdiction, void for that purpose, but passes title.
Conv., § 231.
deed invalid as a conveyance may be good as a contract. Conv., § 234.
void grants may be made valid by statute. Conv., §§ 241-244.
statement in deed as to annuity, operates how. Conv., § 255.
- b. *Time of taking effect.*
deed made before issuance of patent takes effect from such issuance. Conv., § 233.

CONVEYANCES, VALIDITY AND OPERATION — continued.

c. *Capacity of parties.*

deed of infant is voidable only. Conv., § 205.

how ratified. Conv., § 206.

weakness of mind, from age, sickness, etc., will avoid deed. Conv., § 209.

one in possession claiming title cannot take tax deed. Conv., § 230.

effect of deed to alien. Conv., §§ 236, 237.

corporation presumed capable to take. Conv., §§ 238, 239.

may take in other states by comity. Conv., § 239.

question of capacity concerns only the state. Conv., § 240.

d. *Fraud and inadequate consideration.*

not a fraud, *per se*, to recite a nominal, and not the real, consideration. Conv., § 197.

a voluntary deed passes the title, except as to creditors. Conv., § 213.

so of fraudulent deed; it is good if there were no debts. Conv., § 245.

case of fraud by trustee, in a release. Conv., § 246.

made *bona fide*, are valid though grantor soon becomes bankrupt. Conv., §§ 1780, 1781.

e. *Grantor not in possession.*

deed of one disseized is void. Conv., §§ 215-226.

but his release to the disseizor is good. Conv., § 227.

deed before grantor has obtained title by pre-emption, void. Conv., § 229.

f. *Alterations.*

presumed to have been made before execution; avoids deed. Conv., §§ 210-212.

erasure not shown to have been made before execution, avoids deed. Conv., § 214.

g. *Duress and undue influence.*

avoid deed. Conv., § 203.

h. *Constitutional law.*

prior void grants may be made valid by law. Conv., §§ 241-244.

7. CONSTRUCTION.

a. *In general.*

of deed to secure support of grantor. Conv., § 235.

taken most strongly against grantor. Conv., § 247.

but the intention of the parties controls. Conv., § 248.

uncertain matter construed by certain. Conv., § 249.

by punctuation. Conv., § 250.

by conduct of parties. Conv., § 251.

federal courts not bound by interpretation of state courts. Conv., § 252.

recitals in deeds are evidence by way of estoppel. Conv., §§ 253, 254.

sheriff's deeds unconstrued like other deeds. Conv., § 290.

b. *What estate passes.*

in general; it is the office of the *habendum* to define the estate. Conv., § 256.

whole conveyance looked at. Conv., § 257.

any form of deed sufficient, if intent to pass estate manifest. Conv., §§ 260, 266, 270.

of wild lands, passes constructive seizin. Conv., § 262.

deed of trustee passes full title; absolutely if bargainee have no notice. Conv., § 275.

the rules as to legal and equitable estates are the same. Conv., § 276.

deed to one as "trustee" passes full title. Conv., § 343.

instances; reconveyance by grantee having no power to convey. Conv., § 258.

by bargain and sale; operates as an affirmation of the estate described. Conv., § 264.

does not bind after-acquired estate. Conv., § 267.

by release; what is a sufficient interest in grantee to support a, to him. Conv., §§ 258, 259.

operated independent of the statute of uses. Conv., § 271.

recital of lease operates by estoppel. Conv., § 272.

grantee in, may be a *bona fide* purchaser. Conv., § 273.

by quitclaim; passes only interest of grantor; he may afterwards acquire valid title. Conv., § 263.

grantee takes land subject to all equities. Conv., § 265.

nor is he a *bona fide* purchaser. Conv., § 266.

does not include land previously conveyed by grantor, by unrecorded deed. Conv., § 270.

appurtenances; land cannot be to land, nor easement to easement. Conv., §§ 294, 336.

to house or store, what. Conv., § 337.

easements; cannot be appurtenant to each other. Conv., § 294.

c. *What land passes; description and boundaries.*

in general; may pass without specific description; as "banks," etc. Conv., § 312.

grant of island, by name, passes the whole. Conv., § 313.

"more or less," intended to cover a reasonable exception or deficit. Conv., § 315.

CONVEYANCES, CONSTRUCTION, *What land passes; description and boundaries*—continued.

- in general*; omission of one course immaterial, when. Conv., § 816.
- repugnant call may be rejected. Conv., § 818.
- latent ambiguity not fatal, if the intention can be found. Conv., § 819.
- misdescription, not fatal, when. Conv., § 820.
- incurable uncertainty avoids deed. Conv., §§ 823, 824.
- boundaries on waters*; though shifting, they control like other monuments. Conv., §§ 294, 295, 296.
- deed of land on stream takes to center. Conv., § 800.
- bed of stream may be conveyed separately. Conv., § 801.
- distances on large river go by meander line, and not in a straight line. Conv., § 803.
- extrinsic evidence to aid description. Conv., § 825.
- boundaries shown by reputation. Conv., § 826.
- but it must be general and traditionary. Conv., §§ 827, 828.
- description may be by reference to another instrument. Conv., § 829.
- intention of parties controls. Conv., § 831.
- clause creating lien controls as to amount of interest conveyed. Conv., § 552.
- courses, etc.*, yield to monuments; otherwise, if the monuments are inconsistent with the sense of the instrument. Conv., §§ 287, 290, 291.
- generally monuments control both courses and distances. Conv., §§ 295, 296, 297, 311, 317.
- if there are no monuments, courses, etc., control. Conv., § 298.
- construction by parties*; long possession on each side of fence, conclusive as to boundary, when. Conv., § 807.
- by reference to plat*; to recorded plat, original, unrecorded plat cannot control. Conv., §§ 288, 292, 293.
- is conclusive at law, though plat not legally recorded. Conv., §§ 299, 293.
- accretions to lot after plat made, go with the lots. Conv., §§ 292-294, 302.
- plan referred to in deed considered as part of. Conv., § 304.
- call for plat to show boundary, other evidence admissible. Conv., §§ 305, 306.
- plat may be defective, and not entitled to record. Conv., § 330.
- designation of quantity*; will not control courses, but is considered, when they are doubtful. Conv., §§ 309, 311.
- rejected in favor of specific metes and bounds. Conv., §§ 310, 314.
- exceptions*; may be by reference to a former deed. Conv., §§ 332, 335.
- an exception from the granting clause is not granted. Conv., § 333.
- of "squares, conveyed solid," etc., good. Conv., § 334.

d. *Conditions.*

- for reverter if grantee sell liquors on the premises, good. Conv., §§ 338, 341-346.
- are conditions subsequent; commencing action is in lieu of entry and demand. Conv., §§ 339, 342.
- after breach, grantee cannot defend on the ground that his grantor had no title. Conv., § 346.
- precedent and subsequent defined. Conv., § 347.
- recital of purpose of conveyance held not a condition. Conv., § 348.
- deed on condition of permanently locating an institute complied with by resolution locating the building on the land. Conv., § 349.
- trust deed for creditors, to vest on their assent, held on condition subsequent. Conv., § 425.
- mortgage held to be on a conditional limitation. Conv., §§ 669-671.
- impossible conditions are inoperative. Conv., § 919.

e. *Covenants.*

- in general*; making covenants "as trustee" binds him personally. Conv., § 353.
- contract to convey by general warranty satisfied by deed not having the five covenants. Conv., § 354.
- of ownership, inures by way of estoppel. Conv., § 355.
- against the acts of several grantors, includes several incumbrances. Conv., § 356.
- on joint covenant, heir of one covenantor liable in specific performance. Conv., § 357.
- scroll for seal will not support covenant, but only *assumpsit*, in New York. Conv., § 363.
- exception of United States in covenant, covenantor not estopped to claim under subsequent patentee. Conv., § 365.
- possession or right of possession in grantor sufficient to carry covenants to assignee. Conv., § 367.
- on general covenant to convey, when covenantor in default. Conv., § 370.
- discharge in bankruptcy does not affect. Conv., §§ 662, 676-679.
- of warranty*; not necessary that the word "warrant" be used. Conv., § 350.
- to warrant and defend lands; effect of. Conv., § 352.
- carries after-acquired title. Conv., § 675.
- in Mississippi the words "grant, bargain and sell" amount to. Conv., § 676.
- when negotiable note assigned by deed the assignor is liable simply on the covenants. Conv., § 1179.

CONVEYANCES, CONSTRUCTION, *Covenants* — continued.

of *seizin*; not necessary to satisfy agreement to make a "general warranty deed."

Conv., § 351.

it is a breach that grantee cannot get possession of adverse possessor. Conv., § 353.

applies to present *seizin* and title. Conv., § 359.

eviction unnecessary to support action for breach. Conv., § 360.

what looked into in action for breach. Conv., §§ 360, 361.

against incumbrances; not prospective. Conv., § 368.

for *non-claim*; of any person under the grantor, not an estoppel on him. Conv., § 369.

for *quiet enjoyment*; to "give peaceable possession," not a covenant for. Conv., § 364.

implied; form of action on, same as if express. Conv., § 372.

none, from words "bargain, sell and convey," or applying to expectant interest. Conv., § 371.

running with the land; may be divided into as many parts as the land itself. Conv., § 366.

8. PROOF OF DEEDS. See *Evidence*.

probate by witness is entitled to more weight than proof of deceased witness' handwriting. Conv., § 376.

witness may be compelled to attend to prove deed. Conv., § 377.

CORPORATIONS. See *National Banks*; *Railroad Companies*; *Railroad Mortgages*.

1. POWERS OF.

to make deed, presumed from corporate seal. Conv., § 4.

deed to, not having power to take, conveys nothing. Conv., § 17.

presumed capable to take land; powers by county; whether individual can urge want of power. Conv., §§ 233-40, 344, 345.

directors may meet at other than usual offices. Conv., § 642.

may buy at sale under trust deed though the trustee be its actuary. Conv., § 1191.

by estoppel. Conv., § 1216.

estopped to plead that a mortgage is void, when sanctioned by a stock vote. Conv., § 1445.

2. CONVEYANCES BY.

must have corporate seal; under seal of president, is *his* deed. Conv., §§ 5, 418.

how signed. Conv., § 11.

may mortgage, having the power to acquire, hold and convey. Conv., §§ 409, 410, 417.

mortgage to secure president's bond for money used for corporate purposes, the debt is that of the company. Conv., §§ 405, 411.

3. RELATION OF STOCKHOLDERS TO CORPORATION.

stockholders need not be made parties; certificates to, or bearer, in lieu of stock, not negotiable. Conv., §§ 1353, 1354.

when directors refuse to defend foreclosure, stockholder may do so. Conv., § 1460.

cannot maintain suit for proceeds of void sale of corporate property, as it belongs to the corporation. Conv., § 1486.

4. RELATION OF OFFICERS AND STOCKHOLDERS.

directors are trustees of stockholders. Conv., § 646.

director obtaining mortgage to himself for a corporate credit is a trustee. Conv., § 1215.

5. RELATION OF OFFICERS AND CREDITORS.

former are trustees of latter. Conv., § 646.

directors not allowed to prefer themselves to other creditors. Conv., § 1240.

6. RELATION OF CREDITORS AND CORPORATION.

property liable for debts; fund from sale of stock is a trust fund to pay debts. Conv., §§ 1348, 1349.

after discharge of mortgage the mortgaged property is liable for debts. Conv., § 1351.

service on proper officer good, though he withholds it from the company. Conv., § 1502.

a chattel mortgage *ultra vires* is a fraud, and may be set aside. Conv., § 1700.

7. TRANSFER OF STOCK.

is an executed contract of sale, when. Conv., § 1124.

8. PREFERRED STOCK.

is a lien, affecting subsequent mortgagee having notice. Conv., §§ 1355, 1564.

may be a lien by agreement. Conv., § 1563.

9. SUCCESSION OF CORPORATIONS.

a new corporation formed by purchasers in foreclosure of mortgage against old, not liable for debts of latter. Conv., §§ 1629, 1631.

COSTS.

denied in equity to one making an inequitable defense. Conv., § 549.

COUPONS. See *Railroad Mortgages*, 6.

are distinct contracts, bearing interest after due. Conv., § 800.

COVENANTS. See *Conveyances*, 7, c.

CREDITORS' SUITS.

one or more of a class may sue for all. Conv., § 1300.

decree in, not conclusive of a debt. Conv., § 1301.

against corporation, stockholders need not be made parties, when. Conv., § 1353.

CROPS.

subject to mortgage, before seed sown. Conv., § 481.

D.

DEBENTURES. See *Railroad Mortgages*, 12.

DECREE. See *Chattel Mortgages*, 10; *Mortgages*, 29; *Railroad Mortgages*, 10.
how far may be amended at subsequent term. Conv., §§ 1492, 1612, 1613.
final, see *Appeals and Writs of Error*.

DEDICATION.

in Illinois, a plat not legally executed operates as, of an easement to the public. Conv., § 808.

DEEDS. See *Conveyances*.

DEFICIENCY.

judgment for, see *Mortgages*, 31.

DEFINITIONS.

"purchaser," in registry acts, means of legal title. Conv., § 152.

"more or less" in deed. Conv., § 815.

"creditor" in Iowa statute as to conditional sales. Conv., § 1552.

"servant or employee" excludes railroad secretary. Conv., §§ 1573, 1577.

DELIVERY. See *Conveyances*, 3.

DEMAND.

bringing of suit, a sufficient. Conv., § 993.

DEMURRER.

reasonable presumptions are admitted by. Conv., § 956.

DEPOSITIONS.

probate judges may take, in Mississippi, as "judges of county courts." Conv., § 1877.

DISCHARGE. See *Chattel Mortgages*, 9; *Mortgages*, 18.

DISCOVERY.

bill of, on ground of lost deed, should have affidavit of loss. Conv., § 378.
but answering over waives defect. *Id.*

DISTRICT OF COLUMBIA.

decree *in personam* may be rendered against mortgagor in. Conv., § 1099.

DOWER.

inchoate, how conveyed. Conv., §§ 278-281, 283-286.

mortgage for purchase money binds, though not signed by wife. Conv., § 593.

attaches to estate mortgaged, and subsequent improvements. Conv., § 594.

DURESS.

not set up against innocent holder of mortgage. Conv., §§ 781, 783.

avoids deeds. Conv., § 208.

E.

EARNINGS.

of railroad, how found. Conv., § 1269.

EASEMENTS. See *Conveyances*, 7, b.

EJECTMENT.

grantee of trustee in trust deed may recover in. Conv., § 1152.

ELECTION.

a choice of securities is final, by a creditor. Conv., § 1280.

as to option clauses in mortgages, see *Mortgages*, 7; *Railroad Mortgages*, 9, 10.

EQUITABLE MORTGAGES. See *Mortgages*, 4.

EQUITY PRACTICE.

not governed by state laws, or derived therefrom. Conv., § 454.
 no evidence outside of the record received on appeal, except in admiralty and prize causes. Conv., § 510.
 if exceptions not taken before master, it is a waiver. Conv., § 852.
 general assignment of errors in master's report not sufficient. Conv., § 862.
 effect of waiving answer under oath. Conv., § 957.
 defendant must seek affirmative relief by cross-bill, not by answer. Conv., § 1026.
 relief must be consistent with the allegations of the bill. Conv., § 1169.
 interlocutory orders are subject to modification. Conv., § 1268.
 objection to master's report is incorrect when objector did not render the master proper assistance. Conv., § 1278.
 a bill to ascertain the true construction of a decree is supplemental. Conv., § 1816.
 opposition to claim of one creditor inures to the benefit of all. Conv., § 1841.
 waiver of objections to claim has no effect except as to those waiving. Conv., § 1842.
 a cross-bill filed without leave not considered by the court. Conv., § 1461.

ESCROW. See *Conveyances*, 8.

ESTATES FOR LIFE.

powers of tenant to bind reversioners by arrangement of insurance on the property. Conv., §§ 572-575.

ESTOPPEL.

a county having contracted to convey lands, claiming title, estopped to claim that the land was taxable. Conv., § 44.
 of grantor, to deny consideration. Conv., § 194.
 but the real consideration may always be shown. Conv., §§ 200-203.
 deed not purporting to convey estate does not operate as. Conv., § 282.
 by recitals in deeds. Conv., §§ 253, 254.
 none of married woman by conveying her property. Conv., § 387.
 by A. to claim land mortgaged by B. upon A.'s representations of B.'s title. Conv., § 391.
 of mortgagor to deny seizin. Conv., §§ 660, 673-675.
 personal liability not necessary to. Conv., § 679.
 of owner, by representing that mortgagor owns the land. Conv., § 686.
 of corporation, to claim mortgage void, after stock vote in favor of it. Conv., § 1216.
 see *Corporations*.

EVIDENCE.

from recitals in deeds. Conv., §§ 253, 254.
 objection to admission of, on one ground, other objections waived. Conv., § 1714.

1. DOCUMENTARY.

copy of recorded deed admissible without original. Conv., § 373.
 deed need not be proved by subscribing witness. Conv., § 374.
 act as to ancient deeds held not retrospective. Conv., § 375.
 weight of evidence by probate by subscribing witness. Conv., § 376.
 parol evidence of contents of lost deed must be clear. Conv., § 379.

2. PAROL.

admissible to show that consideration of mortgage inured to mortgagor, and not obligor whose bond is secured. Conv., § 412.
 absolute deed may be shown to be a mortgage, see *Mortgages*, 6.

3. ADMISSIONS.

of mortgagor and mortgagee, as to their interest. Conv., §§ 818, 820.
 put in by opposite party, may be used by either side. Conv., § 50.

EXCEPTIONS. See *Conveyances*, 7, c; *Equity*.

EXECUTIONS.

equity of redemption of leasehold cannot be sold under, in Maryland. Conv., § 682.
 in lands, subject to. Conv., § 964.
 not subject, issued on mortgage debt, at common law. Conv., § 965.

F.**FEOFFMENT.**

deed construed to operate as a. Conv., §§ 260, 261.

FILING. See *Chattel Mortgages*, 4.

FIXTURES. See *Mortgages*, 9.

rolling stock, see *Railroad Mortgages*, 5.
 mortgage of, valid against mortgagor's assignee, when. Conv., § 1764.
 mortgage of goods and, void as to goods may be valid as to fixtures. Conv., § 1818.

FORECLOSURE. See *Chattel Mortgages*, 10; *Mortgages*, 21-26; *Railroad Mortgages*, 10.

FORGERY.

of mortgage, avoids it as to innocent holder. Conv., §§ 403, 407, 408.

FRAUD. See *Chattel Mortgages*, 5; *Conveyances*, 6, d.

intent to defraud must be carried out, in order to avoid a conveyance, when. Conv., §§ 635, 647.

defense of collusive agreement to foreclose held not sustained. Conv., §§ 1462, 1472.
in foreclosure sales, see *Railroad Mortgages*, 15.

G.

GEORGIA.

a mortgage creates only a lien in. Conv., § 395.

construction of statute defining territory. Conv., § 993.

chattel mortgage of future property valid in. when. Conv., §§ 1772, 1782, 1783.

GROWING TIMBER.

passes by mortgage; rights of mortgagee against purchaser of. Conv., §§ 426, 427-429.

H.

HOMESTEAD.

effect of declaration of, on rights of junior mortgages. Conv., § 706.

not sold at forced sale in Texas. Conv., § 708.

when judgment lien superior to mortgage. Conv., § 715.

HUSBAND AND WIFE. See *Married Women*.

post-nuptial contract on sufficient consideration, partly executed, good in equity.

Conv., § 589.

deeds by, see *Conveyances*, 1, h.

I.

ILLINOIS.

necessity and validity of acknowledgments of deeds in. Conv., §§ 88-93.

filing deed for record is a registry. Conv., §§ 169-171.

statute as to redemption does not prevent allowing of commissions on, in federal court.
Conv., § 805.

strict foreclosure not allowed in. Conv., § 1030.

sales on foreclosure made in inverse order of alienation by mortgagor. Conv., § 1070.

redemption from such sales. Conv., § 1072.

rolling stock subject to execution in. Conv., §§ 1325, 1326.

powers of judges in vacation. Conv., §§ 1382-1384.

redemption statute does not apply to railroad mortgages. Conv., §§ 1390-1392.

nor does the chattel mortgage law apply. Conv., § 1393.

unrecorded conditional sale is valid in. Conv., § 1550.

seller remaining in possession, effect of. Conv., § 1812.

chattel mortgagor remaining in possession after default is fraudulent. Conv., § 1822.

INDIANA.

acknowledgment not necessary to validity of deed in. Conv., § 94.

deed not acknowledged, good between the parties. Conv., § 174.

mortgagor entitled to possession in. Conv., §§ 658, 667, 668.

foreclosure by *scire facias* in. Conv., § 973.

judgment for deficiency in, on foreclosure. Conv., § 1103.

chattel mortgage not recorded is not good even as to mortgagor's assignee. Conv., §§ 1765, 1805.

of goods, with power of sale in mortgagor, is void. Conv., §§ 1835, 1836.

INFANTS.

deeds of, see *Conveyances*, 6, c.

INJUNCTIONS.

temporary, sometimes granted though answer denies mistake or fraud. Conv., § 1130.

a trust fund, proceeds of sale, not enjoined to answer damages unless debtor insolvent.

Conv., § 1164.

lie to prevent irreparable wrong. Conv., § 1210.

INSURANCE. See *Mortgages*, 8.

mortgagee insuring premises is entitled to insurance money, as against mortgagor.

Conv., §§ 508, 516.

powers of life tenant to bind reversioners by arrangement of. Conv., §§ 572-575.

INSURANCE—continued.

powers of court of equity to apportion between life tenant and reversioners. Conv., § 575.
foreign company may take mortgage to secure loan. Conv., § 421.

INTEREST.

agreed rate runs after maturity of mortgage. Conv., §§ 850, 871-873.
at special statutory rate, ordinary legal rate due after maturity. Conv., § 879.
option to make all due on default to pay, see *Mortgages*, 7.

INTERLINEATION.

in deeds, when presumed unauthorized; when not. Conv., §§ 381, 389.

INTERPRETATION. See *Construction and Interpretation; Conveyances*, 7.**IOWA.**

unrecorded conditional sale valid in. Conv., § 1550.
chattel mortgage unrecorded, good as to attaching creditor. Conv., § 1805.

J.**JOINT TENANTS.**

deed by one passes only his interest. Conv., § 1186.

JUDGMENTS.

in state court, an estoppel to action for same cause in federal court. Conv., § 969.
proceedings in bankruptcy a bar to foreclosure in state court. Conv., § 970.
for deficiency, see *Mortgages*, 81.
lien of, attaches to interest of vendor in land contract. Conv., § 139.

JURISDICTION. See *Railroad Mortgages*, 9.

deed made to confer federal, void for that purpose. Conv., § 231.
court first obtaining, retains to the exclusion of others. Conv., §§ 969-972.
federal court cannot set aside sale in state court between same parties. Conv., § 1076.
federal court has, of suits with its receiver. Conv., § 1315.
when receiver of federal court may take property, not in custody of state court. Conv., § 1386.
of federal circuit courts. Conv., § 1442.
on removal of party brought in by publication in state court. Conv., § 1610.
by assignment; assignee of mortgage, apart from note, cannot sue in federal court. Conv., § 408.
that some parties refusing to be plaintiffs are made defendants does not affect. Conv., § 1443.
of party answering, though no replication filed. Conv., § 1611.

K.**KANSAS.**

foreclosure in. Conv., § 974.
chattel mortgage not recorded, with power of sale in mortgagor, is void. Conv., § 1833.

KENTUCKY.

necessity and validity of acknowledgment of deeds in. Conv., §§ 93-97.
recorded deed precedes prior unrecorded deed. Conv., § 175.
unless former passes only the right of the grantor. Conv., § 176.
unrecorded deed good between the parties. Conv., § 177.

L.**LACHES.** See *Mortgages*, 21, 22; *Statute of Limitations*.

setting aside sales in foreclosure under railroad mortgages. Conv., §§ 1630, 1639.

LEASE AND RELEASE. See *Conveyances*, 7.

purchaser under, may be a *bona fide* purchaser. Conv., §§ 264, 273.

LEASES.

mortgagee of term not such an assignee as to be liable on covenants of lessee. Conv., § 727.
not subject to execution in Maryland. Conv., § 682.

LIEN.

for materials, inferior to prior mortgage. Conv., § 992.
priority. Conv., § 994.
statutory, in favor of towns, etc., on railways, see *Railroad Mortgages*, 2.
may be created by statute or contract; equitable liens. Conv., §§ 1624-1626.
on vessels, see *Chattel Mortgages*, 8.

LIMITATIONS. See *Statute of Limitations*.

LIVERY OF SEIZIN.

deed construed to operate as a feoffment. Conv., §§ 260, 261.

LOUISIANA.

notarial act as to immovables void without registry. Conv., § 178.

registry of mortgages in; effect of. Conv., §§ 599-602.

sale on foreclosure in. Conv., §§ 975-979.

fraudulent purchaser of railroad treated as trustee. Conv., §§ 1648-1654.

foreclosure sale on credit does not bar debt. Conv., § 1874.

M.

MAINE.

an alderman is a magistrate in. Conv., § 135.

MARITIME LAW.

as to mortgages of ships, see *Chattel Mortgages*, 8.

MARRIED WOMEN. See *Dower; Husband and Wife*.

necessity of acknowledgment of deeds by. Conv., §§ 88-123.

separate acknowledgment of deeds by. Conv., §§ 140-147.

conveyance of interest of, or dower, see *Conveyances*, 1, h.

not estopped by deed of their property. Conv., § 387.

may execute mortgage for husband's debt. Conv., §§ 414, 416.

* otherwise in Louisiana, unless. Conv., § 415.

may convey separate estate for husband's debt. Conv., § 1188.

MARSHALING SECURITIES.

when two funds are available to one creditor, and only one to another. Conv., § 1704.

sale of one of two parcels, not both covered by same debt. Conv., § 1082.

MARYLAND.

validity of acknowledgment of deeds in. Conv., §§ 98, 99.

equity of redemption of lease not subject to execution in. Conv., § 682.

MASSACHUSETTS.

statute of limitations of, considered. Conv., § 951.

chattel mortgage not acknowledged, recorded, etc., good between the parties. Conv., § 1752.

MERGER. See *Mortgages*, 17.

MICHIGAN.

validity of acknowledgment of deeds in. Conv., §§ 100-103.

record of mortgages in. Conv., § 603.

chattel mortgagee may maintain replevin against officer levying against mortgagor. Conv., § 1710.

law as to filing chattel mortgages. Conv., § 1712.

taking possession by mortgagee makes refiling unnecessary. Conv., § 1795.

MINNESOTA.

deed not sufficiently acknowledged passes equitable rights. Conv., § 104.

judgment creditors protected as *bona fide* purchasers in. Conv., § 179.

but possession is notice to. Conv., § 180.

deed by pre-emption claimant before obtaining title, void. Conv., § 229.

married woman must acknowledge deed separate from husband. Conv., § 383.

inserting excessive claim for attorneys' fees in advertisement, not fatal. Conv., § 809.

foreclosure barred in ten years. Conv., § 934.

MISSISSIPPI.

mortgages must be recorded. Conv., § 604.

"grant, bargain and sell" amount to covenant of warranty in. Conv., § 676.

chattel mortgage of crop not raised, invalid by statute. Conv., §§ 1734, 1735, 1736-38.

judge of probate is a "judge of a county court." Conv., § 1877.

MISSOURI.

deed of married woman must be acknowledged. Conv., § 105.

law of, on judicial sales and mesne profits. Conv., § 1074.

the legislature may release railroad debts due the state, but not the liens securing them. Conv., § 1231.

MISTAKE.

surrender of memorandum of conditions, by one believing he has no right, does not destroy the right. Conv., § 500.

of mortgagor in believing his rights destroyed, prevents running of limitation against suit to redeem. Conv., § 504.

MONTANA.

chattel mortgagor remaining in possession after default is fraudulent, when. Conv., §§ 1824-28.

MORTGAGES. See *Chattel Mortgages; Conveyances; Estoppel; Reforming Instruments; Railroad Mortgages.***1. FORM AND REQUISITES, ETC.**

parol authority sufficient to authorize alteration or addition. Conv., § 885.
 but there can be none, of a blank instrument. Conv., § 886.
 a conveyance, to be void on paying a note, is a mortgage. Conv., § 1127.
 in blank, executed by married woman before filling up, void. Conv., §§ 883-888.
 distinction between, and trust deed. Conv., § 1167.
 interlineation, when presumed unauthorized; when not. Conv., §§ 881, 889.
 may be reformed by inserting name of mortgagee, when. Conv., §§ 892, 890-892.
 a mere lien as to third persons; a conveyance between the parties. Conv., §§ 893-899.
 on past consideration, valid. Conv., § 486.
 operate by estoppel on after-acquired interest. Conv., §§ 427, 438, 444.
 when other rights not prejudiced. Conv., § 444.
 trust deed may be executed as a deed. Conv., § 609.
 having but one witness, good between the parties. Conv., § 611.
 by married woman, impeached only on clear proof. Conv., § 614.
acknowledgment, see *Conveyances*, 4.
 can be no valid, until material parts of mortgage written. Conv., §§ 890, 884.
 by married woman, in Minnesota, must be apart. Conv., § 888.
 officer's certificate not conclusive. Conv., §§ 888, 615.
 notary may take, though interested as beneficiary. Conv., § 618.

2. THE PARTIES.**a. Who may give a mortgage.**

forgery of wife's name on note and mortgage for the benefit of her husband's firm, avoids both, even as to innocent holder. Conv., §§ 403, 407, 408.
 a corporation may make a mortgage, as for future advances, incidental to the power to take, hold and convey real estate. Conv., §§ 404, 409, 410, 417.
 must be under its seal. Conv., § 418.
 executed when grantor intoxicated, voidable. Conv., § 413.
 married woman may, to secure husband's debt. Conv., §§ 414, 416.
 otherwise in Louisiana, unless loan represented to be for her use. Conv., § 415.
 power to sell includes power to mortgage, when. Conv., § 419.

b. Who may take a mortgage.

aliens; foreign insurance companies, to secure loans. Conv., §§ 420, 421.
 national bank, though prohibited by national banking act. Conv., § 422.
 United States may take trust deed to secure debt. Conv., § 423.
 to two persons, makes them tenants in common. Conv., § 424.
 deed of trust for creditors to which they were to assent, held on condition subsequent. Conv., § 425.

3. WHAT MAY BE MORTGAGED.

mortgage of land covers timber growing, which may be followed into hands of purchaser from mortgagor. Conv., §§ 426, 427-429.
 pre-emption right. Conv., § 430.
 crop, before seed sown. Conv., §§ 431, 432, 435.

4. EQUITABLE MORTGAGES.

arise from agreement to purchase and mortgage land. Conv., §§ 433, 439.
 and by deposit of title deeds, accompanied with an equity. Conv., §§ 434, 440, 447.
 must be intent to give lien. Conv., § 445.
 agreement for a mortgage treated as. Conv., §§ 441, 442, 443.
 by deposit of title papers, held not to extend to subsequent advances. Conv., § 446.

5. ABSOLUTE DEED AND AGREEMENT TO RECONVEY.

at law, amount to a mortgage, though grantee may sell. Conv., §§ 448, 453, 463.
 right to redeem not lost, unless given up deliberately, for an adequate consideration. Conv., §§ 449, 455, 456.
 assignment of mortgage as security, with agreement to reassign, not a mortgage, but an assignment in trust. Conv., §§ 452, 459, 460.
 must be a defeasance to constitute a mortgage. Conv., § 460.
 defeasance must be between same parties as the conveyance. Conv., § 462.
 in doubtful cases, treated as a mortgage. Conv., § 466.
 when an absolute sale; valid, if intended as such. Conv., §§ 450, 457.
 deed to trustees, to be reconveyed if purchase money repaid, otherwise to be conveyed to creditor, held absolute after default. Conv., § 457.
 where grantee to sell at profit, pay purchase price and debt of grantor, and divide surplus, held absolute. Conv., §§ 451, 458.
 a gift cannot be. Conv., § 464.
 depends on intention of parties. Conv., § 465.

MORTGAGES — continued.

6. **PAROL EVIDENCE TO PROVE ABSOLUTE DEED A MORTGAGE.**
 - is admissible to show defeasance omitted, destroyed or dispensed with on mutual confidence. Conv., §§ 487, 478, 479, 494, 510, 517-519, 948.
 - where absolute deed intended as a mortgage, it will be so treated. Conv., § 920.
 - where loan made, bond taken, and absolute deed taken, it is a mortgage. Conv., §§ 488, 483, 493.
 - the rule as to the exclusion of parol testimony does not forbid. Conv., §§ 469, 472, 485, 491.
 - the right of redemption cannot be waived by contemporaneous oral stipulation. Conv., §§ 470, 486.
 - not subsequently released by vague release when value of property excessive. Conv., §§ 471, 487.
 - nor when the mortgagor cultivated and possessed the land. Conv., § 489.
 - borrower submitting to dictation of lender, and giving absolute deed, does not consent to release of. Conv., § 498.
 - mortgagee in possession may take release of, without undue advantage. Conv., § 501.
 - purchase of, closely scrutinized. Conv., §§ 502, 709-711.
 - for no consideration, or to correct mistake, void. Conv., § 503.
 - "once a mortgage, always a mortgage." Conv., § 532.
 - grantee has rights of owner, as to third persons. Conv., §§ 529, 530.
 - grantee must have so understood the transaction, as well as the grantor. Conv., § 527.
 - parol evidence of loose conversations at time deed made, inadmissible. Conv., § 525.
 - papers executed after the deed are construed in reference to it. Conv., § 490.
 - inadequacy of consideration an important circumstance. Conv., §§ 473, 494.
 - what evidence of value admissible. Conv., § 495.
 - what is inadequacy. Conv., § 496.
 - in doubtful case, transaction construed a mortgage. Conv., §§ 474, 497.
 - but the proof must be strict; testimony of grantor that he so understood it, not enough. Conv., §§ 475, 510-512, 524, 526, 528.
 - what facts show the transaction to be a mortgage; consideration, possession, payment of interest and admissions of grantee. Conv., §§ 477, 515.
 - fact of security important. Conv., §§ 520, 521.
 - admissible on ground of fraud. Conv., § 522.
 - purchaser from grantee with notice, is a mortgagee. Conv., § 531.
7. **THE DEBT SECURED.**
 - bond or note not necessary. Conv., §§ 533, 539.
 - mortgage not invalid simply because it purports to secure a bond having no existence. Conv., § 539.
 - may be future advances, unless prohibited by statute; if prohibited, valid as to part securing debt due. Conv., §§ 535, 545-549, 553, 562-566, 765.
 - statute of New Hampshire construed. *Id.*
 - in Connecticut, they must be specifically described. Conv., § 551.
 - mortgagee not secured for future advances, made after notice of other incumbrances without binding contract therefor. Conv., §§ 537, 553, 555.
 - such advances made after docket of judgment take precedence. Conv., § 564.
 - mortgage for definite sum may be shown to have been given for indemnity. Conv., §§ 538, 556-558, 567.
 - debt need not be truly stated. Conv., § 558.
 - is essential to create a mortgage. Conv., § 559.
 - is the one described in the mortgage. Conv., § 560.
 - joint debt of two excludes debt of partnership with a third person. Conv., § 560.
 - mortgage for bond past due is good. Conv., § 561.
 - may be to secure agreement. Conv., § 568.
 - when option to declare, whole due must be declared. Conv., §§ 640, 960.
 - provision that all due on default of any part, valid. Conv., §§ 959, 1062.
 - as to railroad mortgages, see §§ 1241, 1260, 1261.
8. **INSURANCE.**
 - obtained by mortgagee, is his as against mortgagor. Conv., § 508.
 - clause for, creates equitable lien on insurance money. Conv., §§ 569, 571, 577, 580.
 - provision that loss payable to mortgagee, operates as an assignment. Conv., §§ 569, 572-575.
 - by mortgagor, mortgagee cannot claim without agreement therefor. Conv., § 579.
 - obtained at request or expense of mortgagor, must be applied to the debt. Conv., §§ 581, 582.
 - a conveyance treated in equity as a mortgage does not avoid, under the alienation clause. Conv., § 582.
9. **FIXTURES.**
 - mortgagor may remove steam-engine not affixed, put on after mortgage. Conv., §§ 583, 584.
10. **REGISTRATION AS AFFECTING PRIORITY.** See *Conveyances*, 5.
 - mortgagee in good faith, with mortgagor in possession under recorded deed, is an innocent purchaser. Conv., §§ 585, 587.

MORTGAGES, REGISTRATION AS AFFECTING PRIORITY — continued.

- so of a trustee in a deed of trust. Conv., §§ 586, 588, 589, 591.
- otherwise if mortgage given for prior debt. Conv., §§ 590, 591.
- mortgages are valid without registry. Conv., § 595.
- so of assignments. Conv., § 596.
- recorded before filing of lien, takes priority. Conv., § 597.
- effect of statute making unrecorded mortgage fraudulent. Conv., § 598.
- in Louisiana, a decree establishing a mortgage under "burnt record act" operates as a record. Conv., §§ 599, 600.
- must be reinscribed within ten years. Conv., § 601.
- but purchasers with notice are bound. Conv., § 602.
- mortgage of realty and personalty may be recorded in real estate books only. Conv., § 1695.
- must be acknowledged and attested. Conv., §§ 611, 612.
- creditor losing priority by failure to record, has no relief in equity. Conv., § 616.
- mortgagee not bound to give personal notice of his lien. Conv., § 617.
- junior mortgage first recorded, without notice, takes priority. Conv., §§ 618, 619.
- an agreement not to record does not affect actual notice of. Conv., § 632.

11. NOTICE AS AFFECTING PRIORITY. See *Conveyances*, 5.

- recital in deed of prior mortgage is binding on grantee. Conv., §§ 620, 624, 625.
- and on his grantee. *Id.*
- registry is notice; so is actual possession. Conv., §§ 622, 627.
- actual, of prior instrument, binds purchaser. Conv., §§ 629-632.
- constructive, by possession, does not affect lands outside the possession. Conv., § 633.

12. VOID AND USURIOUS MORTGAGES.

- not usury, that interest commences before money advanced. Conv., § 540.
- usury must be alleged. *Id.* Conv., § 910.
- to secure usurious interest by way of lease, void. Conv., § 642.
- usury must be proved. Conv., §§ 653, 1446.
- relieved from, only on payment of sum actually due. Conv., § 786.
- conflict of laws as to rate of interest. Conv., §§ 654-656.
- on past consideration, valid. Conv., § 648.
- in fraud of law, binds the parties and their privies. Conv., § 651.
- executed on Sunday, without mortgagee's knowledge, dated, acknowledged and delivered the next day, valid. Conv., §§ 634, 638, 639.
- unauthorized computation in, will not avoid, even though mortgagor could not read. Conv., §§ 637, 649.
- certain representations held not fraudulent. Conv., § 674.
- made to give unlawful preference, valid, if intention not carried out. Conv., §§ 635, 647.
- fourled in part on legal and part on illegal consideration, valid *pro tanto*. Conv., §§ 636, 647.
- mortgage for \$90,000, for debt of \$4,000, fraudulent. Conv., § 650.

13. MORTGAGOR'S RIGHTS AND LIABILITIES.

- in Oregon, is entitled to possession until foreclosure and sale. Conv., § 657.
- mortgagee has no right to possession. Conv., § 657.
- in Indiana, he is entitled to rents after receiver appointed, until the court orders their application to the debt. Conv., §§ 653, 667, 668.
- is estopped to deny seizure; he can only show payment, want of consideration and fraud. Conv., §§ 660, 673-675.
- after-acquired title inures to mortgagee. Conv., § 684. See § 675.
- a provision that possession shall be surrendered on demand creates a conditional limitation; no entry or demand is necessary. Conv., §§ 659, 669-671.
- cannot acquire outstanding title to defeat mortgage; but may have amount paid refunded. Conv., § 675.
- covenant of, as to title, not destroyed by assignment in bankruptcy. Conv., §§ 662, 676-679.
- the mortgaged property is subject to levy by creditors of mortgagor. Conv., § 681.
- but he need not protect the title. Conv., § 685.
- a mortgage is a security, not an estate, as between the parties. Conv., § 698.
- courts of equity regard legal title in mortgagee. Conv., § 699.
- no forced sale of homestead in Texas by statute; nor can a mortgagee recover possession thereof by ejectment. Conv., §§ 693, 707, 708.
- conveyance of equity does not release mortgagor. Conv., §§ 716, 720.
- may assign surplus rents received by mortgagee, after payment of debt. Conv., § 859.

14. MORTGAGEE'S RIGHTS AND LIABILITIES.

- cannot take possession, in Oregon. Conv., § 397.
- at common law he takes the fee; otherwise in equity. Conv., § 665.
- has action against stranger for injury to property if mortgagor insolvent. Conv., §§ 633, 680.
- it is waste to take sand for brick-making, though this be the ordinary use of the land. Conv., § 683.
- as to estoppel of mortgagor and after-acquired title, see *supra*, 13.
- owner representing to, that mortgagor is the owner, is estopped. Conv., § 686.
- has title to wood, etc., cut from the land. Conv., § 637.

MORTGAGES, MORTGAGEE'S RIGHTS AND LIABILITIES — continued.

under statute giving possession to the mortgagor, the mortgagee in possession by agreement may hold until the mortgage is paid. Conv., §§ 688, 694-696.

such right paramount to that of purchaser at execution sale. Conv., § 696.

can convey a defeasible title only. Conv., §§ 849, 862-870.

entering after breach, cannot be dispossessed. Conv., §§ 690, 700-705.

entry on part of large tract deemed an entry on the whole. Conv., § 691.

lapse of time affords no presumption against mortgagee in possession, that the mortgage is paid. Conv., § 705.

junior mortgagee may compel resort by elder to his exclusive lien first; right not impaired by subsequent declaration of homestead on property covered by prior mortgage. Conv., §§ 692, 706.

may purchase equity of redemption, but the transaction is closely scrutinized. Conv., §§ 502, 709-711.

of term, not in possession, not such an assignee as to be liable on lessee's covenants. Conv., § 727.

fee does not vest on condition broken, in Wisconsin. Conv., § 712.

may have all sold; not compelled to apportion debt among parcels. Conv., § 925.

in possession, cannot be ousted without debt paid. Conv., § 713.

mortgage to surety inures to principal creditor. Conv., §§ 714, 968.

when judgment lien on homestead preferred to mortgage. Conv., § 715.

mortgage for improvements superior to homestead right. Conv., § 876.

second mortgagee may have first mortgage canceled when barred by statute. Conv., § 898.

15. PURCHASER'S RIGHTS AND LIABILITIES.

conveyance of equity of redemption does not release mortgagor. Conv., §§ 716, 720. stands in place of mortgagor, not allowed improvements. Conv., §§ 908, 909, 924.

a court of equity, having acquired jurisdiction, may adjudge personal liability of purchaser of the equity. Conv., §§ 717, 721.

admissions by mortgagor do not affect purchaser, made after purchase. Conv., § 818.

clause in deed, whereby the grantee assumes the mortgage, binds him. Conv., §§ 721, 722.

so though inserted by mistake, in favor of innocent holder of note. *Id.*, §§ 726, 1096.

assumpsit lies against him. Conv., §§ 719, 723, 725.

when purchase is not subject to mortgage. Conv., § 724.

16. ASSIGNMENT OF MORTGAGES.

irregular sale under decree makes purchaser an assignee. Conv., §§ 702, 743.

assignee has same rights as assignor. Conv., § 554.

follows from assignment of debt. Conv., §§ 744, 1788.

mortgagee of term not liable on lessee's covenants. Conv., § 727.

must be of legal estate in order that assignee may maintain ejectment. Conv., §§ 728, 735.

one merely giving right to foreclose is insufficient. Conv., §§ 729, 734.

the mortgagor has no remedy if the note and mortgage be separated. Conv., §§ 730, 735.

assignee of mortgage securing negotiable instrument is protected against equities; duress not available. Conv., §§ 731, 738, 741, 747.

purchaser under trust deed must account to mortgagor, when. Conv., § 1150.

the ordinary rule of assignment is otherwise; but an assignee in good faith is protected against a prior secret assignment. Conv., §§ 732, 739, 746.

mortgagor without notice of assignment may pay to mortgagee. Conv., § 740.

one of several trustees cannot assign. Conv., § 742.

assignee as collateral does not guaranty sufficiency of mortgage. Conv., § 745.

assignee of a mortgage in trust becomes a trustee. Conv., § 749.

priorities of assignees; assignee need not record his assignment to protect himself against subsequent purchasers. Conv., §§ 754, 755.

subsequent mortgagee redeeming becomes an assignee. Conv., §§ 794, 813.

from grantee in absolute deed intended as a mortgage, is a mortgage. Conv., § 952.

after entry for condition broken, conveys the fee. Conv., § 982.

17. MERGER AND SUBROGATION.

not a matter of record, but of fact; purchaser cannot rely on record. Conv., §§ 751, 752, 753, 756.

merger occurs when the purchaser of the equity becomes the holder of the debt. Conv., §§ 757, 758.

does not occur upon conveyance of equity to mortgagee; this is an extinguishment of the equity. Conv., § 759.

junior mortgagee paying prior lien is subrogated, when. Conv., §§ 760, 761.

one of several mortgagees redeeming from tax sale, inures to all; he is to be reimbursed. Conv., § 833.

18. PAYMENT AND DISCHARGE.

in the absence of application by debtor, the court makes the application. Conv., §§ 762, 766, 772.

and will apply to unsecured debt, when. Conv., § 771.

MORTGAGES, PAYMENT AND DISCHARGE—continued.

changes in the form of the debt secured, as by taking a note, not a discharge. Conv., §§ 763, 768, 774, 775.

by mortgagor charging himself with note as mortgagee's executor. Conv., § 773.

entry and possession not a discharge; deficiency recovered. Conv., §§ 764, 769, 770.

on payment, a trust results to the mortgagor. Conv., § 823.

proof of whole debt against mortgagor's estate, not a discharge. Conv., §§ 767, 778.

by substitution of one deed of trust for another. Conv., § 776.

not by a decree, when. Conv., § 777.

after payment, mortgagee entitled to possession; if mortgagee is in, he is a trustee. Conv., § 780.

effect of payment on the title. Conv., § 781.

discharge in Louisiana by petition. Conv., § 782.

no discharge where the note is outstanding. Conv., § 784.

unauthorized release of trust deed has no effect on the debt. Conv., § 785.

a fraudulent release is ineffectual. Conv., § 786.

19. REDEMPTION.

right of, is a rule of property, binding on federal courts. Conv., §§ 787, 800-804.

federal court may compel person redeeming to pay one per cent. to the clerk. Conv., §§ 788, 805, 824.

sheriff's certificate of redemption not conclusive; redemptioner may show a payment in full. Conv., §§ 789, 806.

jurisdiction of bill to redeem is in forum of mortgagee's domicile. Conv., § 831.

bill of review not entertained after redemption expired. Conv., §§ 790, 807.

how far right of, is controlled by provision against impairing contracts. Conv., § 804.

an appeal within the redemption period extends it. Conv., §§ 791, 808.

may be after release of equity of redemption, when. Conv., § 823.

of homestead by assignee, does not inure to bankrupt. Conv., §§ 792, 809-811.

junior mortgagee may redeem from first mortgage. Conv., § 830.

whole debt must be paid. Conv., § 831.

redemptioner must pay amounts paid by junior mortgagee to protect the estate. Conv., §§ 793, 812.

assignee of equity must pay all that the mortgagor was liable to pay. Conv., § 832.

by subsequent mortgagee, he becomes an assignee. Conv., §§ 794, 813.

agreement for by mortgagor and purchaser for, in fraud of third persons, void. Conv., § 1075.

parties to bill to redeem. Conv., §§ 795, 814-820.

trustees with legal estate, and not *cestuis que trust*. Conv., §§ 796, 814.

heirs of mortgagor. Conv., §§ 797, 815.

heirs of mortgagee. Conv., §§ 798, 816.

otherwise if mortgage goes to personal representative. Conv., §§ 799, 817.

and where he had not taken possession. *Id.*

offer of, must be made with a suggestion that proper time not allowed by the decree. Conv., § 825.

right of, presumed abandoned after twenty years' possession by mortgagee. Conv., § 819.

effect of admission by mortgagee that he is such. Conv., § 820.

none after statutory period expired. Conv., § 826.

avoids sale. Conv., § 827.

statute providing for, is inoperative as to existing mortgages. Conv., § 828.

by heirs, of mortgage to administrator. Conv., § 829.

lien of mortgage not tacked to prior judgment lien. Conv., § 834.

bill to redeem supported by an offer and readiness to redeem. Conv., § 835.

after decree, time for, not usually extended. Conv., § 836.

when right is cut off by foreclosure. Conv., § 1000.

by those not parties. Conv., § 999.

20. MORTGAGEE'S ACCOUNT.

must account for notes received as collateral and collected. Conv., § 892.

not an inseparable incident in a decree for redemption. Conv., § 505.

may be waived or discharged by mortgagor. *Id.*

barred by such neglect of mortgagor as would make it inequitable to enforce it. *Id.*; §§ 506, 507, 708.

right to rent barred in six years, when. Conv., § 880.

is entitled to insurance taken out by himself. Conv., § 508.

mortgagee is a trustee in equity. Conv., § 506.

he cannot set up an outstanding title. Conv., §§ 889, 852-861.

master need not inquire into consideration when treated as valid by the parties. Conv., § 863.

examinations of books of account by. Conv., § 865.

cannot open a settled account, when. Conv., § 868.

mortgagee in absolute deed must account. Conv., §§ 874, 1196.

mortgagee taking possession under a void sale must account. Conv., § 1197.

for rents actually received, only when he cannot lease, or cannot collect rent after judicial leasing. Conv., §§ 837, 851.

rents received after mortgage paid barred after six years. Conv., §§ 890, 949.

MORTGAGES, MORTGAGEE'S ACCOUNT—continued.

- for rental value*; when he has used the property in a partnership, and the business fails. Conv., §§ 838, 851.
- when he has occupied the premises. Conv., §§ 839, 852-861.
- if he has kept no proper accounts; for what he might have received by proper care. Conv., §§ 846, 862-870.
- sound discretion to be exercised. Conv., §§ 847, 870.
- for interest*; when in possession, and the rents exceed mortgage interest. Conv., §§ 840, 854.
- when he receives rents after debt paid. Conv., §§ 841, 855.
- rate of agreed on continues after maturity. Conv., §§ 850, 871-873.
- for moneys received from sale of part of land by him.* Conv., §§ 848, 867.
- allowances to him*; none for improvements if property not enhanced. Conv., §§ 842, 864.
- entitled only to principal and interest. Conv., §§ 845, 861.
- repairs. Conv., §§ 864, 875.
- insurance premiums. Conv., §§ 872, 878.
- what allowances made. Conv., § 873.
- taxes which it is his duty to pay. Conv., § 877.
- between different mortgagees*; second may claim surplus rents of first. Conv., §§ 844, 860.

21. WHEN THE RIGHT TO REDEEM IS BARRED.

- not by lapse of nineteen years eight months, when mortgagor believed that his rights were destroyed. Conv., §§ 504, 507.
- would generally be barred by twenty years' possession of mortgagee. Conv., § 703.
- twenty years' exclusive possession is a bar. Conv., §§ 831, 885-891, 894, 897, 898, 903, 953.
- a state statute providing for redemption after twenty years, followed. Conv., §§ 882, 887, 888.
- verbal acknowledgment must be clear in order to remove bar. Conv., § 883.
- by answer to bill sufficient, when. Conv., § 896.
- this period is adopted in analogy to the limitation of the right to enter on lands. Conv., §§ 884, 892, 893.
- statute does not run in favor of grantee in deed absolute on its face. Conv., § 899.
- acknowledgments by mortgagor do not affect purchasers under him. Conv., § 893.
- lapse of time of twenty years affords no presumption of payment. Conv., § 901.
- twenty years' possession under *de facto* foreclosure a bar. Conv., §§ 897-900.

22. WHEN FORECLOSURE IS BARRED.

- in fifteen years, in Connecticut. Conv., § 898.
- limitation in equity adopted in analogy to statutes of limitation in like cases. Conv., §§ 903, 918.
- state statutes enforced as rules of property in federal courts. Conv., §§ 904, 913.
- statutes of limitations affect the remedy, not the contract. Conv., §§ 903, 915.
- stale demands not enforced in equity. Conv., §§ 906, 916.
- presumption of payment from lapse of time repelled by payments, admissions, etc. Conv., §§ 907, 923, 928.
- right to plead statute a personal privilege. Conv., § 926.
- not a defense that the note is barred. Conv., § 929.
- but if not pleadable on note it is not on mortgage. Conv., § 931.
- confiscation of estate does not affect, so long as debt remains. Conv., § 935.
- agreement to extend time of payment stops the statute between the original parties only. Conv., § 961.
- by bankruptcy proceedings, and ordering sale of property. Conv., § 970.

23. REMEDIES FOR ENFORCING MORTGAGES.

- recovery on note operates to merge it, but does not affect the mortgage. Conv., §§ 936, 941-944, 963.
- suit for deficiency. Conv., §§ 936, 945.
- when mortgage provides that whole debt is due on default. Conv., §§ 939, 947.
- sale on default, when default appears only from note. Conv., § 958.
- clause that whole debt due on default is valid. Conv., § 959.
- proceedings at law and in equity at same time. Conv., §§ 962, 963.
- at common law an execution by mortgagee against equity of redemption is invalid. Conv., § 966.
- discharge of mortgagor in bankruptcy does not prevent foreclosure. Conv., § 967.
- bankruptcy proceedings not a bar, unless sale ordered. Conv., §§ 970, 971.
- court first getting jurisdiction retains it. Conv., §§ 969, 972.
- scire facias* in Illinois. Conv., § 973.
- remedies in various states. Conv., §§ 974-979.
- state court acquiring jurisdiction, federal court excluded. Conv., § 1001.
- none after payment. Conv., § 1006.

24. FORECLOSURE BY ENTRY AND POSSESSION, AND BY WRIT OF ENTRY.

- deficiency may be recovered by suit. Conv., §§ 764, 769, 770.
- cannot be after payment. Conv., § 779.

MORTGAGES, FORECLOSURE BY ENTRY AND POSSESSION, AND BY WRIT OF ENTRY — con.

entry for condition broken in presence of witnesses. Conv., § 980.

on one lot, good on all. Conv., § 981.

assignment after, assignee takes fee. Conv., § 982.

by writ of entry. Conv., § 983.

what declaration must allege. Conv., § 984.

though mortgage contains a power of sale. Conv., § 985.

effect of judgment. Conv., § 986.

25. PARTIES TO EQUITABLE FORECLOSURE SUITS.

effect of omission to make subsequent mortgagee a party. Conv., § 917.

wife not necessary party to suit involving homestead when she has executed the mortgage. Conv., §§ 948, 991, 997, 1017.

nor when the mortgage is paramount to her right. Conv., §§ 988, 991, 997, 1018.

mortgagor who has conveyed the equity not necessary party. Conv., §§ 987, 995.

attaching creditor a proper party. Conv., § 999.

creditor obtaining judgment pending suit is bound by the decree. Conv., §§ 990, 1001-3.

courts of equity are reluctant to dismiss for want of parties. Conv., § 996.

incumbrancers *pendente lite* not necessary parties. Conv., §§ 1004, 1005.

when proper or necessary. Conv., § 1019.

husband necessary in wife's foreclosure, when. Conv., § 1007.

one in possession, not a party, is not bound by decree. Conv., §§ 628, 1008, 1010.

persons holding the equity are necessary. Conv., § 1009.

beneficiaries not made parties not bound. Conv., § 1011.

trustee in trust deed necessary, as he holds the legal title. Conv., §§ 1012, 1018.

trustees and beneficiaries, when. Conv., § 1014.

persons through whom fraudulent title passed not necessary. Conv., § 1015.

executor with power to sell the land not a necessary party. Conv., § 1016.

when maker of note secured should be a party. Conv., § 1020.

decree not opened to let in new parties. Conv., § 1021.

joint tenants with mortgagor not necessary, when. Conv., § 1022.

infant heirs of mortgagor not made parties must assert their rights within one year after majority. Conv., § 1023.

how, when United States owns the equity. Conv., §§ 1024, 1029, 1030.

decree against trustee does not bar *cestuis que trust*. Conv., § 1049.

decree does not affect those not made parties. Conv., § 1151.

one joint tenant not a necessary party in foreclosure against another. Conv., § 1187.

volunteers who become interested *pendente lite*, not necessary parties. Conv., § 1209.

rule as to, stated. Conv., §§ 1444, 1567.

26. FORECLOSURE BY EQUITABLE SUIT.

lies when money due, though no time for payment is fixed. Conv., § 487.

alien may bring such a suit. Conv., § 922.

is *quasi in rem*; non-residence of mortgagor immaterial. Conv., § 938.

mortgagee's title cannot be questioned in, but only at law. Conv., §§ 1025, 1026, 1027.

may be brought after suit at law on the debt, or at the same time. See *supra*, 23.

jurisdiction of federal courts of, by assignment. Conv., § 1028.

in Louisiana. Conv., § 1031.

notes secured by the deed may be offered in evidence. Conv., § 1032.

parts of the property previously sold may be omitted. Conv., § 1033.

estoppels and admissions of mortgagor. Conv., § 1035.

of mortgage when no time of payment specified. Conv., § 1034.

subsequent mortgagee, made a party, cannot set off personal claim against plaintiff. Conv., § 1036.

when fraud not a defense. Conv., § 1038.

27. APPOINTMENT OF A RECEIVER.

made only on some strong special reason, and is discretionary. Conv., §§ 1039, 1040.

receiver under junior mortgage not disturbed by suit by prior mortgagee, when. Conv., § 1041.

none before answer or default. Conv., § 1042.

when after assignee appointed. Conv., § 1043.

to receive rents and pay interest. Conv., § 1044.

title of purchaser from receiver. Conv., § 1045.

28. STRICT FORECLOSURE.

time for redemption must be allowed in the absence of statute. Conv., §§ 1046, 1047, 1048.

cannot be allowed except under a special statute. Conv., § 1048.

extinguishes the debt. Conv., § 1052.

not allowed in Illinois. Conv., § 1050.

29. DECREE OF SALE.

one in possession, not a party, is not bound by. Conv., § 628.

against trustee, does not bar the *cestuis que trust*. Conv., § 1049.

may be made when strict foreclosure asked for. Conv., § 1051.

void if it does not sufficiently describe the land. Conv., § 1053.

MORTGAGES, DECREE OF SALE — continued.

jurisdiction presumed; decree not collaterally attacked for error. Conv., §§ 1054-1056.
 is final on the merits. Conv., § 1057.
 rendered without requisite notice by publication is erroneous only, not void. Conv., § 1058.
 recital of service on defendant stands as true, after thirty years. Conv., § 1059.
 jurisdiction presumed after lapse of considerable time. Conv., § 1060.
 accounting should precede, when. Conv., § 1061.
 is a final decree for purposes of appeal. Conv., § 1063.
 does not affect those not made parties. Conv., § 1151.
 decree of payment in coin is erroneous. Conv., § 1152.

80. FORECLOSURE SALES UNDER DECREE.

though irregular and void, passes all the rights of the mortgagee. Conv., § 702.
 statute as to sale in separate parcels is directory. Conv., § 810.
 in Illinois, are made in inverse order of mortgagor's conveyances. Conv., §§ 1065, 1070-1072.
 decisions of state court followed. Conv., §§ 1066, 1071.
 no title passes until confirmation; it then vests by relation to sale, if no equities intervene. Conv., §§ 1067, 1073, 1074.
 not set aside on agreement between mortgagor and purchaser in fraud of third persons, for redemption. Conv., §§ 1068, 1075, 1076.
 when set aside the satisfaction of the debt following the sale is vacated. Conv., §§ 1069, 1077.
 change of name of newspaper designated to publish notice of, immaterial. Conv., § 1078.
 decree may require deposit of "earnest" money. Conv., § 1079.
 mill property required to be sold as a unit. Conv., § 1080.
 mortgagee has the right to have the whole sold. Conv., § 1081.
 sale where two persons have lien on same property, and one has a lien on other land. Conv., § 1082.
 may be adjourned. Conv., § 1083.
 bid must be accepted. Conv., § 1084.
 purchaser entitled to possession as against a receiver appointed to enforce a judgment lien. Conv., § 1085.
 writ of assistance issues against parties and privies only. Conv., §§ 1086-1089.
 federal court cannot set aside sale in state court. Conv., § 1089.
 if statute runs on one note after sale it will not affect the right to proceeds. Conv., § 1090.
 inadequacy of price, unless gross, will not avoid sale. Conv., §§ 1190, 1199.

81. JUDGMENT FOR DEFICIENCY. See *supra*, 23.

mortgagor who has conveyed equity liable to. Conv., § 720.
 deficiency may be recovered and applied, after foreclosure by entry and possession. Conv., §§ 764, 769, 770.
 value of equity is to be taken at time of its extinction. Conv., § 783.
 when not made, in foreclosure. Conv., § 1037.
 a court of equity, having jurisdiction to foreclose, may retain to decree deficiency. Conv., §§ 1091, 1095-1097.
 decree may be *in personam* in the District of Columbia. Conv., §§ 1092, 1098, 1099.
 in New York, under a statute that there is no covenant implied in a mortgage, there can be none without a separate obligation. Conv., §§ 1093, 1100, 1101.
 but there may be a personal action for the debt, on competent evidence. Conv., §§ 1094, 1101.
 against grantee of mortgagor who assumes the mortgage. Conv., § 1097.
 execution may issue upon. Conv., § 1102.
 in Indiana, where there is no written agreement to pay. Conv., § 1103.
 execution of enjoined when creditor has bid in land at his own price. Conv., § 1162, 1173, 1174.

82. POWER OF SALE IN MORTGAGES AND DEEDS OF TRUST.**a. Nature and operation of such instruments.**

in California are mortgages, when. Conv., §§ 1104, 1109-1112.
 a mortgage with power of sale in third person implies a trust; no right of possession till default. Conv., §§ 1105, 1110.
 sale on default of interest. Conv., § 1175.
 so of a trust deed. Conv., §§ 1106, 1111.
 in California the title is in the trustees. Conv., §§ 1107, 1112.
 trustees have no right to possession before default. Conv., §§ 1108, 1111.
 any act under the deed is an acceptance. Conv., § 1113.
 mortgages and trust deeds have same legal effect. Conv., § 1114.
 deed with power of sale is a mortgage. Conv., §§ 1115, 1146.
 instrument given as a security, with clause for reconveyance, is a trust deed. Conv., § 1116.
 trust deed conveys title. Conv., § 1117.
 trustee may be removed. Conv., § 1118.
 trustee may exercise power to sell, in his discretion. Conv., § 1120.

MORTGAGES, POWER OF SALE IN MORTGAGES AND DEEDS OF TRUST—continued.

b. *Exercise and extension of power of sale.*

construction of directions to trustee to sell. Conv., § 672.

sale valid, though the marshal has also an execution for the debt. Conv., §§ 967, 941-944.

sale under decree is a judicial one, and not under the power. Conv., § 1119.

proceedings for foreclosure after defendant had been driven within Confederate lines, void. Conv., §§ 1121, 1124-1128.

otherwise if he voluntarily leaves to engage in hostilities against his country.

Conv., § 1134.

if trustee exceeds his power, equity will restrain and control him. Conv., §§ 1122, 1129.

sale enjoined as to purchaser who supposed the mortgage did not contain a power of sale. Conv., §§ 1128, 1180, 1181.

in Georgia the power of sale is a naked power, ceasing with mortgagor's death or bankruptcy. Conv., § 1132.

mortgagee's possession as a tenant at will not sufficient to give him an interest. Conv., § 1133.

sale not enjoined without good cause. Conv., § 1140.

one selling land without due authority must account to mortgagor for the proceeds. Conv., § 1148.

under prior mortgage, valid though subsequent mortgagee a bankrupt. Conv., §§ 1156, 1198.

the civil war did not exempt property of persons living in Confederate States from foreclosure proceedings. Conv., §§ 1133, 1136.

case where remedy was suspended during the war. Conv., §§ 1137-1139.

may be waived. Conv., § 1514.

c. *Notice of sale under power.*

sales not made according to general law, void. Conv., §§ 1141, 1146-1148.

must be published for the full time required by the trust deed. Conv., §§ 1142, 1148; p. 887.

pendency of civil war preventing publication, is immaterial. Conv., §§ 1142, 1149.

need be certain only to a common and reasonable intent. Conv., §§ 1143, 1153, 1154.

instances of good descriptions of land in. Conv., § 1154.

sale at site of door of burned court-house, valid; purchaser need not look beyond recitals. Conv., §§ 1145, 1155, 1156.

d. *Conduct of sale.*

trustee need not sell a part, but may sell the whole. Conv., §§ 1157, 1166.

acquiescence of mortgagor in, will cure irregular sale. Conv., §§ 1158, 1170.

when sale for cash or credit authorized, both may be combined. Conv., §§ 1159, 1171.

may sell wholly on credit; not liable for depreciation. Conv., §§ 1160, 1172.

trustee should adjourn, if no bidder but creditor or sham bidders. Conv., §§ 1161, 1173.

if creditor buy at his own price, collection of deficiency enjoined. Conv., § 1174.

sale may be adjourned more than once. Conv., §§ 1163, 1175-1179.

trustee need not be present in person. Conv., § 1168.

auctioneer may bid for beneficiary. Conv., §§ 1177, 1178.

error in stating amount of attorney's fee as in mortgage not fatal. Conv., § 1180.

statute requiring sale in parcels held directory. Conv., § 1181.

trustee may depute agent to attend sale. Conv., § 1182.

first mortgagee should have the right to bid, when. Conv., § 1249.

e. *Who may purchase.*

beneficiary under trust deed. Conv., §§ 1177, 1194.

auctioneer may bid for him. Conv., § 1178.

trustee coming into possession several years after sale is not necessarily fraudulent. Conv., §§ 1183, 1186-1189.

corporation may, though the trustee was its actuary. Conv., §§ 1184, 1190, 1191.

bidder not bound unless there was a memorandum of the sale signed by him or the auctioneer. Conv., §§ 1185, 1192.

mortgagee with power of sale cannot buy. Conv., § 1193.

f. *Liability of trustee.*

selling land without authority, must account to mortgagor for the proceeds. Conv., § 1148.

none for sale on credit and depreciation of security taken, when. Conv., §§ 1160, 1170-72.

g. *Rights of purchaser.*

may bring ejectment without giving notice to quit. Conv., § 1195.

83. SATISFACTION, EXTINGUISHMENT, ETC.

assignment to secure a note never delivered is not a. Conv., § 541.

presumption of payment does not arise from lapse of time, against mortgagee in possession. Conv., § 703.

MORTGAGES — continued.**34. SETTING ASIDE.**

deed misrepresenting transaction can only be sustained by satisfactory proof. Conv., § 542.

mortgage not set aside because it purports to secure bond having no existence. Conv., § 539.

35. CONSTRUCTION.

clause creating lien prevails as to interest conveyed. Conv., § 610.

36. RIGHTS OF MORTGAGEES AGAINST EACH OTHER. See *supra*, 13, 14.

receiver under junior mortgage not disturbed at suit of prior mortgagee, when. Conv., § 1041.

sale of one of two parcels not both covered by the same debt. Conv., § 1082.

accounting between different mortgagees; second may claim rents of first, when. Conv., §§ 844, 860.

second may have first mortgage set aside after statute run, when. Conv., § 892.

mortgagee making sale must have notice of incumbrances or he may apply surplus to known liens. Conv., § 1200.

37. COSTS AND FEES.

stipulation for attorney's fee in mortgage is not a penalty or forfeiture. Conv., § 1064.
reasonable, will be enforced. *Id.*

38. EVIDENCE.

in foreclosure of legal, it cannot be shown that the mortgage is equitable. Conv., § 1239.

MUNICIPAL CORPORATIONS.

must deal honestly. Conv., § 46.

1. ESTOPPEL OF.

to claim that land which it has contracted to convey, and to which it claims title, is taxable. Conv., §§ 44, 45.

2. RAILWAY AID BY.

statutory liens in favor of, on railroads, see *Railroad Mortgages*, 2.

N.**NATIONAL BANKS.**

may take mortgage, though prohibited. Conv., § 422.

NEBRASKA.

how deed executed in another state acknowledged. Conv., § 106.

NEGOTIABLE PAPER. See *Bills and Notes*.

contracts payable to bearer are not, necessarily; so of certificates in lieu of stock. Conv., § 1356.

NEW HAMPSHIRE.

statute prohibiting mortgages for future advances construed. Conv., §§ 546-548.

NEW TRIALS.

not granted for error when plaintiff in error could not prevail. Conv., § 697.

NEW YORK.

subscribing witnesses to deed need not be such at request of grantor. Conv., § 8.
acknowledgment of deeds in. Conv., § 109.

statute construed providing that no covenant is to be implied in a mortgage. Conv., § 1101.

requisites as to filing chattel mortgages in. Conv., §§ 1768-1771, 1773-1781, 1796.

must be refiled in one year as to creditors. Conv., § 1794.

chattel mortgage of goods, with power of sale in mortgagor, void. Conv., § 1837.

NORTH CAROLINA.

deed in, to deceased person, conveys the estate to his heirs. Conv., § 20.

acknowledgment of deeds in. Conv., §§ 107, 108.

general laborers' lien law does not apply to railroads. Conv., § 1575.

NOTICE. See *Chattel Mortgages*, 4, f; *Conveyances*, 5; *Mortgages*, 10, 11; *Purchaser for Value*.

what sufficient to put on inquiry. Conv., § 1845.

NOVATION.

none by issue of certificates of overdue interest on railroad bonds. Conv., § 1361.

arises only by agreement. Conv., § 1565.

O.

OBLIGATION OF CONTRACTS.

how far right of redemption controlled by the constitutional provision. Conv., §§ 804, 828.

OFFICERS. See *Corporations*.

acknowledging officers, see *Conveyances*, 4, d.

OHIO.

decree for conveyance operates as a conveyance. Conv., § 29.

acknowledgment of deeds in. Conv., §§ 110-112.

prior unrecorded deed is void as to purchaser in good faith. Conv., § 182.

mortgages must be recorded. Conv., § 605.

railroad mortgage lien confined to county in which recorded. Conv., § 1423.

railroad indivisible for purposes of sale. Conv., § 1422.

OREGON.

attestation of deed no part of execution in. Conv., § 9.

acknowledgment of deeds in. Conv., §§ 118-115.

mortgage creates only a lien. Conv., § 396.

rights of mortgagee in possession in. Conv., §§ 397-399, 666.

mortgage is a chose in action, and passes to an assignee subject to equities. Conv., §§ 641, 666.

suit to foreclose a mortgage barred in ten years. Conv., § 932.

such a suit is *quasi in rem*; absence of mortgagor from state immaterial. Conv., § 933.

chattel mortgage of goods, with possession and power of sale in mortgagor, is void. Conv., §§ 1828, 1829, 1830.

P.

PARTIES. See *Chattel Mortgages*; *Conveyances*; *Mortgages*, 25; *Railroad Mortgages*, 10.

generally, all entitled to litigate the same question are necessary. Conv., § 1449.

all the, to a written instrument, should join in suit on. Conv., § 1452.

PARTNERSHIP.

CHATTEL MORTGAGES BY.

may authorize an agent to make a chattel mortgage. Conv., §§ 1638, 1689-1696.

partner can bind copartner by deed; seal of one binds both. Conv., §§ 1690-1694.

firm may make, to secure individual partner's debt. Conv., § 1697.

one partner may make, of firm property for firm debt. Conv., § 1698.

and may sign and seal individually. Conv., § 1699.

PAYMENT. See *Chattel Mortgages*, 9; *Mortgages*, 18; *Railroad Mortgages*, 8.

the taking possession under a chattel mortgage is. Conv., §§ 1857, 1859.

PENALTY.

equity will not enforce the payment of a disproportionate. Conv., § 1515.

PENNSYLVANIA.

acknowledgment of deeds in. Conv., §§ 116-118.

necessity of recording deeds in. Conv., §§ 184, 185.

recording of mortgages in. Conv., § 606.

PLAT.

conveyance by, see *Conveyances*, 7, c.

PLEADING.

sham and frivolous defenses considered. Conv., § 664.

when answer asserts mortgage title to whole premises, title to moiety not set up. Conv., § 857.

reasonable presumptions are admitted by a demurrer. Conv., § 956.

waiver of oath of defendant amounts to nothing, unless accepted by defendant. Conv., § 957.

POWER OF ATTORNEY.

to sell land, cannot be used by attorney to acquire adverse title. Conv., § 911.

POWER OF SALE. See *Mortgages*, 32.

POWERS.

deeds under, see *Conveyances*, 2, b.

to sell, usually include mortgages. Conv., § 912.

PRACTICE.

rulings in case tried without a jury not reviewed, though excepted to, unless under the act of 1865. Conv., § 1264.

granting of time to produce further evidence is discretionary. Conv., § 1265.

PRE-EMPTION.

in Minnesota, one claiming cannot convey before he has obtained title. Conv., § 229. may be mortgaged. Conv., § 430.

PREFERENCE.

debtor may prefer creditor. Conv., § 1643.

PREFERRED STOCK. See *Corporations*.**PRIORITIES.** See *Chattel Mortgages*, 4; *Mortgages*, 10.

between railroad mortgages, see *Railroad Mortgages*, 13, 14.

PROBATE JUDGE.

in Mississippi, is a judge of a county court within the act of congress for taking depositions. Conv., § 1877.

PURCHASER FOR VALUE.

one under decree is a. Conv., § 29.

one under quitclaim deed is not a. Conv., § 265.

otherwise of bargain and sale or lease and release. Conv., §§ 264, 273.

bargainee of trustee may be a. Conv., § 275.

one whose right is under an executory contract, under which he has a right to a quitclaim deed only, is not a. Conv., § 455.

mortgagees and trustees are, when. Conv., §§ 587-589.

mistake not set up against. Conv., § 722.

director of railroad held to be, of a farm mortgage induced by false representations. Conv., § 743.

bona fide holder of coupons presumed to hold for full value. Conv., § 1853.

as collateral, is. Conv., § 1859.

mortgagees of future property are not, as they take only the title of the mortgagor therein. Conv., §§ 1547, 1551.

protected only as to *bona fide* payments before notice. Conv., § 1803.

Q.**QUITCLAIM DEED.**

passes only interest of grantor; grantee not a *bona fide* purchaser. Conv., §§ 263, 266, 455.

otherwise if it be by bargain and sale. Conv., § 264.

R.**RAILROAD COMPANIES.** See *Railroad Mortgages*.

power under charter to construct certain road. Conv., § 1309.

objections to plan of reorganization considered. Conv., § 1473.

in Missouri, the legislature may release debt due to state, but not the lien securing it. Conv., §§ 1231, 1233.

the state may sell the road or compromise the debt. Conv., § 1232.

net or gross earnings of a particular branch may be sufficiently ascertained by a *pro rata* estimate. Conv., § 1269.

eight per cent. of value not a reasonable rent of rolling stock, where the owner bears losses. Conv., § 1274.

RAILROAD MORTGAGES.**1. POWERS OF RAILROAD COMPANIES.**

cannot mortgage franchises without legislative authority. Conv., §§ 1201, 1203.

power to mortgage road, income and other property does not include franchise.

Conv., §§ 1201, 1204.

mortgage without such authority may be good on property. Conv., §§ 1201, 1203.

authority to mortgage road includes mortgage of part of it. Conv., §§ 1202, 1203.

power of sale includes power to mortgage. Conv., § 1212.

power to borrow money for corporate purposes implied. Conv., § 1213.

act of legislature recognizing validity of mortgage of franchises validates mortgage, when. Conv., § 1214.

power by estoppel. Conv., § 1216.

in Texas, to make mortgage of road-bed, franchise, etc. Conv., § 1297.

RAILROAD MORTGAGES — continued.

2. FORM AND CONSTRUCTION.

an equitable mortgage or charge in favor of a contractor who builds the road does not exist without a mortgage therefor. Conv., § 1217.
that mortgage of Texas road was made in New York is no defense to the bonds. Conv., § 1299.

language held to create a covenant to so expend moneys received from bonds as to add to the value of the security. Conv., § 1227.

such language held not to create a charge on such proceeds in favor of the contractor building the road. Conv., § 1228.

a *statutory lien* exists only when the intention to create it is expressed in positive terms. Conv., §§ 1218, 1229.

deed or writing unnecessary to. Conv., § 1256.

a railway aid law, providing for security to the municipality, does not create. Conv., §§ 1219, 1229, 1230.

construed like an ordinary mortgage. Conv., § 1237.

in Georgia, held an indemnity, and not as making the state a trustee. Conv., § 1251.

a legislature may provide, in favor of the state. Conv., § 1219.

a corporate seal does not make the mortgage that of the company unless rightfully affixed, except *prima facie*. Conv., §§ 1220, 1236, 1237.

restrictions of a statute authorizing bonds and mortgage are a part of the mortgage; provision that debt shall be due on failure to pay interest held void. Conv., §§ 1221, 1241, 1242.

foreclosure may be provided for on failure to pay interest. Conv., § 1242.

generally, the whole debt may be made due on any default. Conv., § 1259.

not a penalty, and discretionary with trustees. Conv., §§ 1260, 1261.

construction of "expenses" in provision allowing the company to sell lands and pay over proceeds, less the expenses of the trust. Conv., §§ 1222, 1243, 1244.

provision in a mortgage reserving the power of making a mortgage to the state prior to former mortgages construed; legislature may preserve the priority in favor of other parties. Conv., §§ 1223, 1245-1250.

how far the subsequent mortgage may vary in its terms from the power reserved.

Conv., §§ 1246-1249.

a provision that the company shall pay taxes held not to include an income tax imposed on the bond interest. Conv., § 1251.

a provision in bonds giving a lien is in effect an equitable mortgage. Conv., §§ 1252-1254.

a chattel mortgage by directors, at a meeting not properly noticed, is valid. Conv., § 1255.

distinction between ordinary mortgage and one including income. Conv., § 1506.

3. PROPERTY COVERED BY.

mortgage of tolls and income includes rolling stock. Conv., § 1206.

omission to specify a thing along with others enumerated does not exclude it, when. Conv., § 1207.

earnings not subject to, when. Conv., §§ 1263, 1264-1267.

mortgagor entitled to earnings until mortgagee takes possession. Conv., § 1276.

if future earnings and profits are expressly covered, the company may be held to account. Conv., §§ 1263, 1268-1274.

until demand made, mortgagee of tolls, etc., not entitled to have an account. Conv., § 1304.

lien confined to county in which recorded, in Ohio. Conv., § 1423.

4. AFTER-ACQUIRED PROPERTY.

an equitable mortgage contained in bonds includes, obtained from their proceeds. Conv., § 1254.

wood collected at stations for use passes by mortgage as. Conv., § 1275.

not limited to such as may be purchased with the mortgage money. Conv., §§ 1277, 1283.

after-acquired land does not pass by after-acquired mortgage unless used in connection with the road. Conv., §§ 1278, 1284.

land not so used must be indicated with reasonable certainty. Conv., §§ 1278, 1285, 1286.

municipal bonds not specifically described, do not pass as "property." Conv., §§ 1279, 1287.

a line of railroad subsequently purchased passes as. Conv., § 1288.

so of a lease of another line. Conv., § 1290.

after-acquired land grant does not pass so as to defeat equity of contractor as transferee of land certificates. Conv., § 1289.

after-acquired land is subject to the vendor's lien. Conv., § 1291.

mortgagee of future property not a purchaser, so as to take it freed from equities. Conv., §§ 1292, 1547, 1551.

rolling stock passes as. Conv., §§ 1293, 1305-1309.

may be mortgaged in borrowing the money to call it into existence. Conv., § 1302.

a contract by a mortgagor of, to devote funds to equipment of road, specifically enforced. Conv., § 1306.

RAILROAD MORTGAGES, AFTER-ACQUIRED PROPERTY—continued.

the mortgage attaches thereto in the condition in which it comes to the mortgagor.

Conv., § 1311.

and subject to a pre-existing mortgage thereon. Conv., § 1312.

and to a purchase money mortgage. Conv., § 1313.

but the general mortgage displaces it, when. Conv., § 1314.

5. LEGAL NATURE OF ROLLING STOCK.

passes as after-acquired property by a mortgage. Conv., §§ 1293, 1305-1309, 1322.

may be sold under execution in Texas. Conv., § 1298.

so in Illinois, by constitutional law. Conv., §§ 1325, 1326.

mortgage of, is subject to liens existing on it when acquired. Conv., §§ 294, 1310-1314.

of railroad operated in divisions may become fixtures and pass by mortgages of such divisions separately. Conv., §§ 1295, 1315-1319.

held otherwise as to a road of two divisions. Conv., § 1324.

mortgage of, need not be recorded as a chattel mortgage. Conv., §§ 1296, 1320.

is a part of the road itself. Conv., § 1321.

chattel mortgage statutes do not apply to. Conv., §§ 1323, 1393.

6. MORTGAGE BONDS AND COUPONS. See 7, *post*.

demand at place of payment unnecessary. Conv., §§ 1282, 1330.

that a mortgage of a Texas road was made in New York is not a defense to the bonds.

Conv., § 1299.

numbering of bonds generally gives no priority between them. Conv., §§ 1327, 1332-1336.

the holder is charged with matters appearing on their face. Conv., § 1332.

if they with the mortgage satisfy inquiry he need not look further. Conv., § 1333.

no presumption that lowest numbers sold first. Conv., § 1334.

in case of an overissue by unfaithfulness of trustees, all the holders have equal rights.

Conv., § 1336.

a first mortgage protects all bonds, though purporting to be second, issued at time of making second mortgage. Conv., §§ 1328, 1337-1340.

bonds held in pledge are protected. Conv., § 1338.

unless the first mortgage lien is expressly limited to bonds actually out at the time.

Conv., §§ 1329, 1340.

pledgee may sell, though the pledgor be bankrupt. Conv., § 1456.

payment of coupons at a bank upon their surrender implies a transfer of them, when.

Conv., §§ 1330, 1341, 1347.

possession of, is strong *prima facie* evidence of just title. Conv., §§ 1400, 1401.

railroad may guaranty municipal bonds taken by it. Conv., §§ 1331, 1348-1354.

whether certain coupons were bought or paid. Conv., § 1340.

coupons are not entitled to any priority over bonds or other coupons. Conv., § 1346.

bondholders are not affected by the fact that the mortgage was executed outside the state. Conv., §§ 1297-1304, 1357.

bona fide, are presumed to hold for full value. Conv., § 1358.

as collateral, are *bona fide* holders. Conv., §§ 1359, 1504.

subrogation of holders of state bonds issued to take up railroad bonds. Conv., §§ 1397-1401.

a defense that bonds were negotiated without consideration held not sustained. Conv., § 1464.

certificates for overdue interest not a novation; interest is still a lien. Conv., § 1361.

coupons are distinct contracts. Conv., § 1362.

personal claims of bondholders for income do not pass to subsequent holders. Conv., § 1363.

bondholders may foreclose. Conv., § 1370.

rights of bondholders not accepting new bonds and mortgage. Conv., §§ 1371, 1375-1378.

7. RIGHTS AND DUTIES OF MORTGAGE TRUSTEES.

personal claims of bondholders for income do not pass to subsequent holders. Conv., §§ 1363, 1365.

they represent the bondholders; they may bind them by their acts, except they be fraudulent or unfaithful. Conv., §§ 1364, 1366-1368.

are not the real parties in interest on foreclosure. Conv., § 1369.

bondholders may foreclose. Conv., § 1370.

when trustee should not foreclose without request of all the bondholders. Conv., § 1475.

are the only necessary and proper parties in foreclosure. Conv., § 1562.

8. PAYMENT AND REDEMPTION.

when new mortgage and bonds substituted for old, the bondholders mostly accepting.

those not accepting not entitled to payment in full. Conv., §§ 1371, 1375-1378.

they are not prejudiced by increase in number of bonds. *Id.*

a mortgage for a definite sum cannot be increased in any manner. Conv., §§ 1373, 1379-1381.

redemption statute of Illinois does not affect railroad mortgages, of which there is no redemption. Conv., §§ 1374, 1382-1393.

RAILROAD MORTGAGES, PAYMENT AND REDEMPTION—continued.

modification not an extinguishment. Conv., § 1375.
 mortgagor is entitled to notice of termination of indefinite extension of time to pay interest. Conv., § 1394.
 no redemption allowed. Conv., §§ 1395, 1616.
 relief had from payment of prior mortgage by mistake of fact only, and not of law. Conv., § 1396.
subrogation of holders of state bonds issued in lieu of railroad bonds. Conv., §§ 1397-1401.

9. REMEDIES AND JURISDICTION OF COURTS.

federal courts have jurisdiction of suit with its receiver. Conv., § 1315.
 purchaser at sale becomes, *quoad hoc*, as party to the suit. Conv., § 1317.
 when a railway exists under the law of two states, the courts of either have jurisdiction. Conv., §§ 1402, 1405-1409, 1417, 1432, 1460-1466, 1491.
 pendency of foreclosure in state court is no bar to suit in federal court on same subject-matter, when the parties are different. Conv., §§ 1403, 1410-1414.
 a plea that the acts done by trustee were directed by a state court will not prevent his removal, when. Conv., § 1411.
 decree may be entered though the bondholders are not parties. Conv., §§ 1381, 1405.
 sale for failure to pay interest, when. Conv., § 1406.
 when jurisdiction of the parties exists, the court may order sale of entire road, though much of it is beyond the jurisdiction. Conv., §§ 1409, 1417.
 no writ of possession issued, when. Conv., § 1418.
 state statutes and procedure are not adopted as to. *Id.*
 decision of state court as to validity of foreclosure followed. Conv., § 1418.
 power of sale in mortgage not exclusive; foreclosure in equity. Conv., § 1415.
 power under trust deed may be waived. Conv., § 1418.
 trustee may declare all due on any default when the mortgage so provides. Conv., §§ 1409, 1474-1477.

10. FORECLOSURE PROCEEDINGS.

unauthorized contract for foreclosure may be ratified. Conv., § 1352.
 trustees are not the real parties in interest; bondholders may foreclose. Conv., §§ 1369, 1370.
 bondholders are not necessary parties; they are represented by the trustees. Conv., §§ 1381, 1405, 1432, 1562, 1631. *See post.*
 subsequent mortgagees are not necessary parties. Conv., § 1414.
 trustee must report to tribunal in which commenced. Conv., § 1419.
 when the trustee refuses to foreclose, the bondholders may do so, and implead the trustee. Conv., §§ 1424, 1440-1446.
 a single bondholder may insist on, though mortgage provides for request of a majority. Conv., §§ 1425, 1447, 1448. *See* §§ 1433, 1474-1477.
 when all should request. Conv., § 1475.
 when the mortgage is directly to the bondholders by name, no one can proceed without the others. Conv., §§ 1426, 1449-1452.
 all bondholders should be parties when the fund is inadequate. Conv., § 1451.
 when foreclosure should not be ordered without written request of all the bondholders. Conv., § 1475.
 a single bondholder may sue for himself and all. Conv., §§ 1478, 1479.
 prior mortgagees are neither necessary nor proper parties. Conv., §§ 1427, 1458-1456. *See* § 1483.
 trustee may intervene in bondholders' suit. Conv., § 1491.
 on foreclosure as to a distinct portion of road, a mortgagee of another portion is not a necessary party. Conv., §§ 1428, 1457-1459.
 stockholders may be parties when they allege that the directors fraudulently refuse to attend to their interest. Conv., §§ 1429, 1460-1466. *See* § 1485.
 defense that suit was fraudulently and collusively brought, held not sustained. Conv., § 1472.
 a security may be enforced on a cross-bill. Conv., §§ 1433, 1467.
 decree need not follow the mortgage as to accepting bonds in lieu of money from the purchaser, but may do so. Conv., §§ 1434, 1463-1473.
 the court may fix the rate at which the bonds may be applied to the bid. *Id.*
 a decree requiring payment of a large sum within twenty days may be erroneous; the usual time is six months, but this may be shortened. Conv., §§ 1438, 1474-1477.
 decree *in personam* reversed if foreclosure decree be. Conv., §§ 1437, 1477.
 special restrictions on right to foreclose are strictly construed. Conv., § 1448.
 an objection that foreclosure of right to property in receiver's hands was filed without leave, made eighteen months afterwards, is too late. Conv., § 1454.
 a general creditor cannot intervene in. Conv., § 1458.
 subsequent judgments are cut off by the decree. Conv., § 1462.
 defense of collusive agreement to foreclose not sustained. Conv., § 1465.
 rule when the title to the real estate is in litigation. Conv., § 1471.
 bondholders entitled to equal distribution of fund. Conv., § 1480.
 when decree not made on mortgage of consolidated road, for default of interest on prior mortgage on one division. Conv., § 1484.
 question of title between defendant and third persons not litigated in. Conv., § 1487.

RAILROAD MORTGAGES, FORECLOSURE PROCEEDINGS—continued.

defenses are confined to those possible against the bonds. Conv., § 1499.
decree may be amended at a subsequent term, to make it subject to certain liens. Conv., § 1492.

what amendments may be made at a subsequent term. Conv., §§ 1612, 1618.

11. APPOINTMENT AND JURISDICTION OF RECEIVERS.

the power is discretionary, to be exercised with great caution. Conv., §§ 1211, 1500, 1514-1518, 1521.

in Illinois, a judge cannot appoint in vacation. Conv., § 1888.

after discharge of a receiver, causes of action against him are prosecuted *in rem*, the property being in court. Conv., §§ 1501, 1519, 1520.

notice of motion to appoint properly served on officer, good, though company not notified. Conv., §§ 1502, 1508.

moneys in hands of receiver do not belong to the company. Conv., § 1523.

exclusive right of second mortgagee to income of receivership asked by him. Conv., § 1581.

when appointed.

on petition of bondholders, when mortgagee is to receive the income. Conv., §§ 1495, 1502-1508.

when prompt action necessary to save land grant. Conv., §§ 1496, 1507.

there must usually be more than a default. Conv., §§ 1500, 1514-1518.

ultimate loss must be probable. *Id.*

inadequacy of security and insolvency good grounds for. Conv., § 1523.

where earnings are not applied to the mortgage, and the security is inadequate. *Id.*

when not appointed.

not against wish of majority of bondholders, so long as the management is honest and successful. Conv., §§ 1497, 1509-1511.

not on application of one bondholder on behalf of all, where mortgage gives the mortgagor possession till default, when. Conv., §§ 1498, 1512, 1518.

but an account was decreed in this case. Conv., §§ 1499, 1518.

a single and recent failure to pay semi-annual interest not sufficient, where the income had been used on the road. Conv., §§ 1500, 1514-1518.

but the company was required to pay part of its income into court. *Id.*

bona fide possessors not dispossessed by, unless on some equitable ground. Conv., § 1517.

not unless the best interests of all require it. Conv., § 1518.

12. RECEIVERS' DEBTS AND CERTIFICATES. See *post*, 18.

receivers' certificates should not be permitted, except in unusual cases. Conv., §§ 1867, 1524, 1526-1528.

neither the mortgagor nor his assignee can question priority of certificates. Conv., § 1455.

road completed on moneys advanced by creditors, to save land grant, and debentures afterwards issued. Conv., §§ 1524, 1526-1528.

claims may be created which take precedence of mortgage liens; certain debts are sometimes given precedence. Conv., §§ 1525, 1529-1534, 1535.

neither mortgagor nor his assignee can complain of such priority. Conv., § 1536.

funds in receiver's hands chargeable with retainer and services of attorney for trustees, though suit not prosecuted to effect, when. Conv., § 1537.

ten years' interest certificates ordered to be issued. Conv., § 1561.

certificates for overdue interest not a waiver of original lien. Conv., § 1566.

13. EQUITIES AFFECTING PRIORITIES.

a mortgage may reserve the power to make a second mortgage prior to it. Conv., § 1246.

purchasers of land certificates which are covered by a mortgage by estoppel only, and a prior equity. Conv., §§ 1250, 1239.

doctrine of after-acquired property does not affect. Conv., § 1283.

last creditor not entitled to priority because his money saved the property. Conv., § 1308.

a court of equity has full jurisdiction to enforce priorities. Conv., § 1810.

a common fund can be administered only for the benefit of all. Conv., § 1847.

a prior mortgage or judgment is superior, though second be enforced first. Conv., §§ 1430, 1460-1466.

prior bonds, negotiated, are to be paid in full as against junior mortgage bonds. Conv., § 1466.

second mortgage bonds for unpaid interest on first mortgage bonds not entitled to priority. Conv., § 1463.

priorities should be settled before the sale. Conv., § 1488.

sale of cars to company by one retaining title until paid for creates no equitable claim on fund in receiver's hands, or lien therefor, or for rent of cars; receiver may pay rent while he uses them. Conv., §§ 1538, 1547-1558.

prima facie, the fund in receiver's hands belongs to the creditors; a superior equity must be shown. Conv., §§ 1539, 1547, 1549.

when debts for labor, supplies, etc., may be preferred to creditors' rights. Conv., §§ 1540, 1547-1549, 1559-1567, 1579.

RAILROAD MORTGAGES, EQUITIES AFFECTING PRIORITIES—continued.

so of money advanced to pay back wages and prevent stoppage of business. Conv., §§ 1541, 1555, 1556.

overdue wages assigned to third persons have no priority. Conv., §§ 1545, 1559-1567. claims of connecting roads against insolvent road are unsecured. Conv., §§ 1542, 1555, 1556.

a contractor has no priority. Conv., §§ 1543, 1557, 1558.

so of a claim for advances to pay for construction. Conv., § 1569.

where it was agreed that a contractor might take possession until his claim was paid, it was held prior to an existing mortgage. Conv., § 1570.

it was presumed that the bondholders assented to the agreement. *Id.*

a judgment against a receiver for an injury on the road has no priority. Conv., §§ 1546, 1568.

priority not affected by the fact that part of the road was wholly built with moneys obtained from the junior mortgage. Conv., § 1571.

14. LIENS AFFECTING PRIORITY.

preferred stock creates a lien affecting a subsequent mortgagee with notice. Conv., § 1335. the liens of material-men, etc., must be perfected by state law in order to obtain preference. Conv., §§ 1555, 1573.

a local statute giving laborers for corporations a lien over mortgages does not apply to railroads. Conv., §§ 1572, 1574-1576.

the secretary of a railway is not a "servant or employee" within such a statute.

Conv., §§ 1573, 1577.

vendor's lien on the road is prior to claims of consolidated company taking the property. Conv., § 1580.

15. FORECLOSURE SALES.

unauthorized, not made valid by confirmation, when. Conv., § 1319.

the whole may be sold to pay interest when a sale in parcels is not practicable. Conv., § 1407, 1653, 1656.

a railroad is indivisible for the purposes of sale. Conv., §§ 1421, 1422.

sale in parcels allowed, if divisible for instalments; on second default further sale ordered. Conv., §§ 1581, 1593.

when sale ordered to be advertised in a certain paper, it may be advertised in a paper in which it has been merged. Conv., § 1680.

though strict foreclosure prayed for, an ordinary sale may be ordered. Conv., § 1676. not stayed to await more prosperous times, though the company's finances are improving. Conv., §§ 1583, 1602-1605.

deposit of \$50,000 may be required in sale of large property. Conv., §§ 1617, 1657, 1674-1680.

rule as to sales subject to contingent claims; when a committee, being agents to purchase, will not be compelled to disclose their principals. Conv., §§ 1618, 1619.

time of.

trustee may exercise his discretion as to; or as to selling at all, pending appeal.

Conv., §§ 1582, 1599-1601.

distribution of proceeds.

coupons matured before general default may be preferred, when. Conv., §§ 1584, 1606-1608.

interest first paid, and balance brought into court. Conv., § 1636.

balance after paying liens goes to mortgagor. Conv., § 1660.

when set aside; when not; on what terms.

not for mere inadequacy of price, unless it shows unfairness. Conv., §§ 1585, 1609-1620, 1634.

applicants to set aside for, must show that better bid will be made. Conv., §§ 1585, 1615.

proceedings to set aside must be commenced in reasonable time. Conv., §§ 1587, 1630, 1659.

bondholders cannot be made parties at term after confirmation, in order to impeach sale for fraud. They must bring an original bill. Conv., §§ 1588, 1631-1635.

for fraud of bondholder at suit of others. Conv., §§ 1589, 1636-1640.

for fraud of corporate officers in themselves buying. Conv., §§ 1590, 1636-1640.

for contract suppressing competition at sale. *Id.*

bondholders may combine and make the purchase. Conv., §§ 1591, 1641.

who have become purchasers, surrendered bonds, and formed new company, cannot except to the sale. Conv., §§ 1592, 1642.

purchasers conspiring with directors to make fraudulent sale, held as trustees. Conv., §§ 1593, 1643-1645.

set aside when notice grossly misstated the sum due. Conv., §§ 1594, 1646.

when set aside as to a creditor, is yet valid as to others. Conv., §§ 1595, 1647.

in Louisiana a fraudulent purchaser may be entitled to compensation for putting road in order, repairs, etc., but not for improvements consumed by use. Conv., §§ 1596, 1648-1654.

is entitled to interest on improvements, and liable for net earnings, and has lien thereon. Conv., §§ 1597, 1648-1654.

rule as to sales subject to contingent claims. Conv., § 1618.

organized bondholders may purchase. Conv., § 1635.

RAILROAD MORTGAGES — continued.

16. RIGHTS OF PURCHASERS AT FORECLOSURE SALES.
reorganization by, which contemplates an equitable distribution among creditors. Conv., §§ 1662, 1668.
bondholders purchasing may pay balance over costs, etc., in bonds, so far as to cover their proportion thereof. Conv., §§ 1663, 1669, 1670.
take only what was decreed to be sold, and not a fund not sold or ordered to be sold. Conv., §§ 1664, 1671, 1673.
have no right to earnings of road while in receiver's possession after sale, while they are indulged in making the required payments. Conv., §§ 1665, 1671-1673.
cannot retain sufficient, from his bid to pay taxes which have become a lien. Conv., §§ 1666, 1671-1673.
a provision in a mortgage that a majority of the bondholders may require the trustee to buy for their benefit, will be carried out by the court. Conv., §§ 1667, 1674-1680.
17. RIGHTS OF BENEFICIARIES. See *supra*, 6, 10.
creditors may waive a lien given for their benefit. Conv., § 1205.
18. RIGHTS OF MORTGAGEES AGAINST EACH OTHER.
sale on second mortgage bonds enjoined at suit of first mortgagee. Conv., § 1307.
holder of part of bonds cannot appropriate the security to his sole benefit. Conv., § 1308.
first mortgage protects all bonds issued at time second made, when. Conv., §§ 1323, 1337-1340.
exclusive right of second mortgagee to income of receivership asked by him. Conv., § 1531.
19. REMOVAL OF TRUSTEES.
a plea that the acts done were directed by state court, is bad. Conv., §§ 1404, 1411.
claims against, after removal, are prosecuted *in rem* against the property in court. Conv., §§ 1519, 1520.
20. RIGHTS AND DUTIES OF MORTGAGEES.
until they take possession, or commence foreclosure, they are not responsible for the conduct of the mortgagor. Conv., §§ 1431, 1460-1466.

RECEIVERS. See *Mortgages*, 27; *Railroad Mortgages*, 11, 12.

RECORDING. See *Chattel Mortgages*, 4; *Conveyances*, 5; *Mortgages*, 10.

REDEMPTION. See *Mortgages*, 19; *Railroad Mortgages*, 8.

REFORMING INSTRUMENTS.

- name of mortgage may be inserted. Conv., § 390.
- mortgage not reformed against prior judgment creditor. Conv., § 400.
- may be against assignee of mortgagor. Conv., § 401.
- not as against purchaser without notice. Conv., § 403.
- quere, whether cross-bill to reform mortgage to secure non-existent bond sustainable. Conv., § 543.
- mortgage reformed, when innocent purchasers not affected. Conv., § 623.
- as to chattel mortgages, see Conv., §§ 1653, 1654.

REGISTRATION. See *Chattel Mortgages*, 4; *Conveyances*, 5; *Mortgages*, 10.

REGULATION OF COMMERCE.

- act of congress as to recording mortgages of ships excludes state legislation. Conv., § 1882.

REHEARING.

- of case on appeal, no evidence outside the record received. Conv., § 509.

RELATION.

- delivery in escrow does not relate back, when. Conv., § 43.
- of confirmation to foreclosure sale, when. Conv., §§ 1067, 1073, 1074.

REPLEVIN.

- in Michigan, by chattel mortgagee against officer. Conv., § 1710.

RES ADJUDICATA.

- a non-resident corporation appearing and answering is bound by the decree. Conv., § 1408.
- decision of associate justice on removal followed by circuit judge. Conv., § 1609.

RHODE ISLAND.

- acknowledgment of deeds in. Conv., § 119.
- deeds must be recorded in. Conv., § 186.

ROLLING STOCK. See *Railroad Mortgages*, 5.

S.

SALE.

under mortgages and trust deeds, see *Chattel Mortgages*, 10; *Mortgages*, 32; *Railroad Mortgages*, 10.

as to seller remaining in possession, see *Chattel Mortgages*, 5.

SEAL. See *Conveyances*, 1, e.

essential to deed; but presumed, when. Conv., §§ 1-3.

and to power of attorney to convey land. Conv., § 33.

of acknowledging officer, may be on paper; certified copy. Conv., §§ 127-129.

not necessary to chattel mortgage, in Ohio. Conv., § 1724.

SEIZIN.

constructive, passes on conveyance of wild land. Conv., § 262.

SET-OFF.

equity follows the law, in respect to, except. Conv., § 858.

when subsequent mortgagee made a party in foreclosure cannot plead. Conv., § 1037.

SHERIFFS' DEEDS.

construed like other deeds. Conv., § 290.

SHIPS.

mortgages of, see *Chattel Mortgages*, 8.

SOLICITOR.

not improper to appear for company against a creditor, and afterwards for a trustee against the company. Conv., § 1280.

STAMP. See *Conveyances*, 1, g.**STATE DECISIONS.**

1. WHEN FOLLOWED BY FEDERAL COURTS.

construction of local recording acts. Conv., § 550.

redemption from mortgages. Conv., §§ 787, 1070-1072.

selling in inverse order of alienation by mortgagor, in foreclosure. Conv., § 1071.

as to foreclosure of railway mortgage. Conv., §§ 1418, 1621.

2. WHEN NOT FOLLOWED.

construing deeds. Conv., § 252.

admitting or excluding evidence. Conv., § 492.

redemption statutes, and procedure as to mortgages, not followed as to railway mortgages. Conv., §§ 1374, 1382-1393, 1413. See § 1418.

STATUTE OF FRAUDS.

deed absolute in form may be shown to be a mortgage. Conv., § 516.

STATUTE OF LIMITATIONS. See *Mortgages*, 21, 22; *Railroad Mortgages*, 15.

will not run in favor of grantee in deed intended as a mortgage. Conv., § 480.

does not run against bill to redeem by mortgagor who believes by mistake that he has no rights. Conv., § 504.

lapse of nineteen years eight months not a bar. Conv., § 507.

bill to foreclose a mortgage and reform it not on contract. Conv., § 626.

action to reform agreement for a mortgage is. Conv., § 626.

barred by limitation of fifteen years in Connecticut. Conv., § 892.

operates as a discharge, in effect. Conv., § 893.

how construed; affects the remedy only. Conv., § 915.

right to plead a special privilege. Conv., § 926.

of Massachusetts, considered. Conv., § 951.

courts of equity bound by, in certain cases. Conv., §§ 1627, 1628.

STATUTES.**SCOPE AND OPERATION OF.**

extraterritorial effect.

making decree for deed operate as deed confined to domestic decrees. Conv., § 30.

one state cannot prescribe how land shall be conveyed in another. Conv., § 32.

prospective; as to validity of acknowledgment before clerks in other states, are. Conv., § 187.

CONSTRUCTION.

in general.

act making deed executed under *lex loci* good by *lex rei* does not apply to deeds under decrees. Conv., § 139.

punctuation disregarded, when. Conv., § 1384.

ENACTMENT.

expressing subject in title; act respecting Pacific railroad, in Missouri, held good. Conv., § 1234.

STOCK. See *Corporations*.

STOCKHOLDERS. See *Corporations*.

SUBPOENA.

service of, unnecessary on supplemental bill, except as to new parties. Conv., § 1281.

SUBROGATION. See *Mortgages*, 17; *Railroad Mortgages*, 8.

SUPPLEMENTAL BILL.

service of subpoena unnecessary on. Conv., § 1281.

SURETY.

mortgage to, inures to principal, when. Conv., §§ 714, 968, 1852.

chattel mortgage assigned to, as indemnity, cannot be enforced, when. Conv., § 1872.

SURRENDER.

of deed to grantor, ineffectual. Conv., §§ 75-79.

T.

TAXATION.

county cannot tax lands contracted to be conveyed, while claiming title. Conv., §§ 44, 45.

TAX DEED.

one in possession, claiming title, cannot take. Conv., § 280.

TAXES.

purchaser at sale under railroad mortgage cannot retain from bid the amount of taxes which have become a lien. Conv., §§ 1671, 1672.

TENANTS IN COMMON. See *Joint Tenants*.

TENNESSEE.

acknowledgment of deeds in. Conv., §§ 120-122.

statutes as to record of deed of lands ceded to, construed. Conv., § 181.

deeds of lands in several counties, recorded in either. Conv., § 187.

registry necessary to pass estate. Conv., § 188.

deed executed in North Carolina held good. Conv., § 180.

TEXAS.

husband need not join in deed of wife's lands. Conv., § 282.

an execution is prior to unrecorded mortgage made first. Conv., § 607.

no forced sale of homestead in; nor can a mortgagee recover possession thereof by ejectment. Conv., § 708.

railroad may mortgage road, franchise, etc., which may be sold by execution. Conv., §§ 1297, 1298.

rolling stock subject to execution in. Conv., § 1298.

TIMBER. See *Growing Timber*.

TOWN.

authority of trustees to make deed must be affirmatively shown. Conv., § 12.

TREATIES.

under treaty of 1794 with England, British subjects could retain their lands without actual possession. Conv., § 921.

TRUSTEES. See *Mortgages*, 23; *Railroad Mortgages*, 7, 19.

TRUSTS.

conveyance by trustee; deed to trustee without expressing trust. Conv., §§ 275-277.

trustee takes legal title, though he gives no bond. Conv., § 1012.

U.

UNITED STATES.

how mortgage foreclosed, when they own the equity. Conv., § 1024.

USURY. See *Mortgages*, 12.

state statute does not bind foreign court of equity. Conv., § 787.

contract held void for. Conv., § 1622.

usurious contract cannot constitute a lien. Conv., § 1628.

V.

VENDOR AND PURCHASER.

deed not good as a conveyance may operate as a contract to convey. Conv., § 224.

VESSELS.

mortgages of, see *Chattel Mortgages*, 8.

VIRGINIA.

construction of act for registry of deeds. Conv., §§ 190, 191.

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W.

WASHINGTON.

acknowledgment of deeds in. Conv., § 123.

WASTE.

brick-making by mortgagor is, when. Conv., § 693.

WATERCOURSES.

boundaries on, see *Conveyances*, 7, c.

bed of stream may be conveyed separate from shores. Conv., § 301.

WISCONSIN.

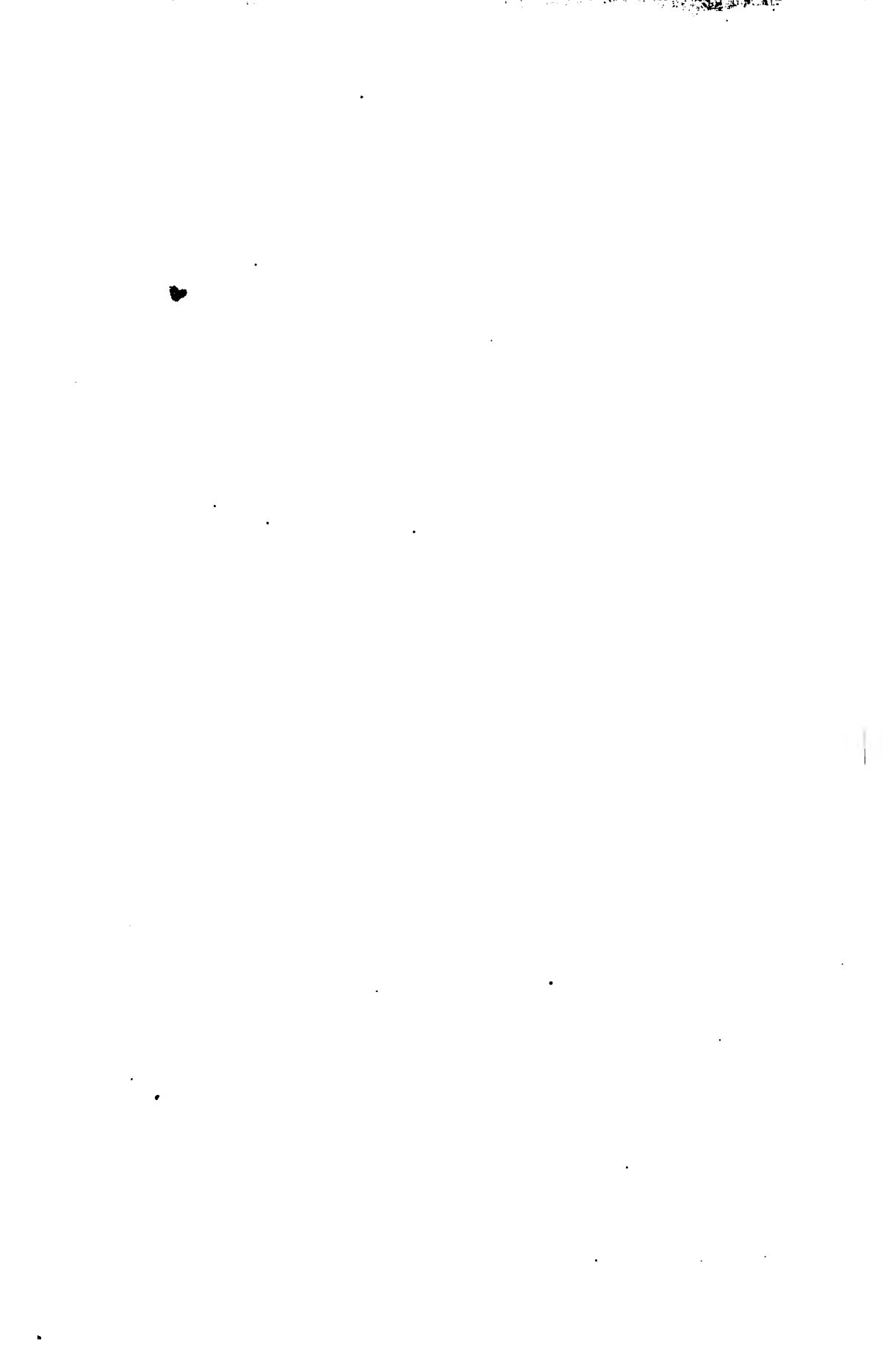
mortgages of future personal property are void. Conv., §§ 1731-33.

with power of sale in mortgagor, are void. Conv., §§ 1839, 1840.

WITNESSES. See *Conveyances*, 1, f.

credibility, how affected by interest. Conv., § 512.

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